



## Summary

XO Communications, LLC (“XO”) hereby comments on the FCC’s above-captioned *Notice of Inquiry* regarding the development of a comprehensive national broadband plan for the United States (“*Broadband NOP*”). XO commends Congress and the FCC for initiating this effort to develop a much needed comprehensive national broadband plan. A well-crafted national broadband strategy will generate new investment, create jobs, benefit consumers, and contribute significantly to the nation’s economic recovery. XO looks forward to participating in the development of this national broadband plan.

In developing and implementing this comprehensive national broadband strategy, the FCC should focus on establishing optimal conditions for the emergence of vigorous competition among providers of high-speed data services. Robust competition among providers of high-speed services is essential to achieving high broadband penetration levels, promoting the efficient deployment of high-quality services, and ensuring affordable broadband rates. Historically, robust competition has led to extraordinary innovation in the communications industry as companies explore every avenue to attract customers and revenue. With competition driving innovation, black rotary telephones have been supplanted by cordless touchtone units with an array of features, first-generation brick cell phones have been replaced by a variety of mobile multimedia devices, and consumers have a range of communications packages and plans from which to choose. The FCC should design its strategic plan to generate the same vigorous competition and dramatic innovation in the broadband realm.

As the FCC implements this pro-competitive national broadband strategy – one consistent with the pro-competitive paradigm of the Telecommunications Act of 1996 – the FCC should establish a regulatory framework that promotes competition on an “end to end” basis. This pro-competitive framework should cover all segments of operators’ broadband networks, including last mile connections to residential and business customers and middle mile connections linking local networks to interstate backbone facilities. The FCC should also adhere to the fundamental principles of competitive and technological neutrality. Marketplace forces will promote efficient broadband growth and deployment only if fiber-based, copper-based, and other wireline technologies as well as fixed and mobile wireless technologies are permitted to compete on a level playing field. In addition, the FCC should do more to encourage intramodal competition in the provision of broadband services. The FCC should look to pro-competitive network unbundling policies implemented in other countries that have proven successful in promoting broadband deployment, and determine whether those policies can be adapted to the U.S. marketplace.

Efficient use of existing copper infrastructure is another critical element of the FCC’s pro-competitive broadband strategy. The nation’s legacy copper loop plant is a national asset that was constructed largely under the protection of a government-sanctioned monopoly and was paid for by American ratepayers. Given its near ubiquity and increasingly robust capabilities, the existing copper infrastructure represents a ready-made solution for expanding broadband access around the country.

The FCC’s national broadband plan should also target and eliminate a number of persistent impediments in the current telecommunications environment that continue to

delay and deter the broadband efforts of XO and other competitive carriers. With these actions, the FCC can provide competitive carriers with the complete set of tools necessary to compete fairly and effectively with incumbents. The FCC already has the legal authority to take these various actions, and no statutory changes are necessary.

First, the FCC's rules currently do little to prevent incumbent local exchange carriers' ("LECs") unnecessary and unilateral retirement of the nation's copper plant, a practice that prevents competitive carriers like XO from using that plant to offer broadband, video, high-speed data, and other advanced services. The FCC should reexamine its copper retirement rules and establish a new regulatory framework that stops incumbent LECs from wasting this important resource and deterring effective competition from new providers. Another obstacle to broadband competition is the FCC's exercise of its forbearance authority under Section 10 of the Telecommunications Act of 1996. Incumbents have taken advantage of the FCC's *ad hoc*, undefined forbearance procedures to gain relief prematurely from basic pro-competitive statutory and regulatory obligations. As part of its national broadband strategy, the FCC should promptly conclude its pending rulemaking proceeding to reform the procedures governing petitions for forbearance relief under Section 10.

The FCC's broadband plan must also address the longstanding inability of competitive broadband providers to obtain efficient access to the special access offerings of the Bell Operating Companies ("BOCs") and other incumbent LECs at reasonable prices. Incumbent LECs continue to command unjust and unreasonable rates for special access that far exceed their costs, making it more difficult for competitive LECs like XO to deploy competitive broadband alternatives to incumbent LEC services. More than four

years after initiating a rulemaking proceeding to examine special access issues, the FCC should finally remedy this problem with prompt, appropriate regulatory action. The FCC can also bring additional competitive pressure to bear on incumbent LEC special access offerings by revisiting its rules precluding carriers from obtaining access to unbundled network elements (“UNEs”) for the exclusive provision of mobile wireless services. Given its mandate to promote broadband development, the FCC should reexamine whether the payment of special access rates for wireless backhaul rather than UNE prices impairs these wireless carriers’ ability to provide broadband service and compete effectively against broadband operators utilizing other transmission media. Given the dramatic changes in the structure of the telecommunications industry, the FCC should also reconsider its current restrictions on access to unbundled loops and other UNEs for the exclusive provision of interexchange services.

Finally, the FCC’s comprehensive broadband plan should bar certain practices that AT&T has used to prevent or delay XO’s collocation of high-speed microwave facilities at AT&T central offices. In recent years, XO has attempted to install microwave facilities that are intended to augment and interconnect with the equipment that XO has previously deployed in incumbent LEC central offices. In contrast to other incumbent LECs, AT&T has impeded XO’s deployment efforts with a variety of unreasonable obstacles. To encourage XO’s pro-competitive efforts, the FCC should confirm that the collocation of microwave transmission facilities as proposed by XO was one of the arrangements contemplated by Section 251(c)(6) of the Communications Act.

The FCC should be open and transparent in crafting its comprehensive national broadband plan. Before presenting this plan to Congress, the FCC should place a draft of

its report on public notice to give consumers, the telecommunications industry, and other interested parties an opportunity to comment prior to its submission. In its report, the FCC should include a detailed timeline for a comprehensive rulemaking that will have an immediate, substantial, and positive impact on broadband expansion in the United States. The FCC should issue a notice of proposed rulemaking within 90 days of its report, and should issue an order adopting the initial, necessary rule changes within 180 days of the closing of the comment and reply cycle for that notice. The FCC should also undertake an inventory of its pending rulemaking proceedings with the greatest potential to promote broadband competition, and then move expeditiously to complete those proceedings or instead address the substantive broadband issues in its comprehensive broadband rulemaking.

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devices, and consumers have a range of communications packages and plans from which to choose. The FCC should design its strategic plan to generate the same vigorous competition and dramatic innovation in the broadband realm.

The FCC's national broadband plan should also address a number of persistent impediments in the current telecommunications environment that continue to delay and deter the broadband efforts of XO and other competitive carriers. To provide these carriers with the complete set of tools necessary to compete fairly and effectively with incumbents, the FCC must take a number of specific regulatory actions, including adopting new rules for retirement of copper plant, reforming the forbearance process, overhauling the special access pricing regime, permitting access to unbundled loops for the provision of broadband mobile wireless service and interexchange service, and resolving collocation issues that have impeded XO's deployment of microwave facilities. Finally, in its report to Congress on this plan, the FCC should include a detailed timeline for a comprehensive rulemaking that will have an immediate, substantial, and positive impact on broadband expansion in the United States.

**I. THE FCC'S NATIONAL BROADBAND STRATEGY SHOULD FOCUS ON ESTABLISHING OPTIMAL CONDITIONS FOR THE DEVELOPMENT OF VIGOROUS BROADBAND COMPETITION**

XO commends Congress and the FCC for initiating this effort to develop a much needed comprehensive national broadband plan.<sup>2</sup> A well-crafted national broadband strategy will generate new investment, create jobs, benefit consumers, and contribute

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<sup>2</sup> XO Communications, LLC ("XO") is a facilities-based provider of innovative telecommunications, broadband, and information services, such as Voice over Internet Protocol, data and Internet access, network transport, hosting, fixed wireless access, and managed services, to businesses, enterprise, and carrier customers nationwide. XO's network includes over an 18,000 route mile intercity network, more than 3,000 fiber-fed buildings, and wireless spectrum in 81 markets.

significantly to the nation's economic recovery. As the FCC has recognized, the wider availability of high-speed services can dramatically increase civic participation and improve citizens' access to health care services, educational opportunities, job training, public safety services, and other needed services.<sup>3</sup> Unfortunately, as studies repeatedly have shown, the United States currently trails other developed nations with respect to broadband penetration.<sup>4</sup> Given this reality, XO urges the FCC to take aggressive steps to promote the deployment of broadband services throughout the United States.

In developing and implementing this comprehensive national broadband strategy, the FCC should focus on establishing optimal conditions for the emergence of vigorous competition among providers of high-speed data services. XO launched local service in 1996 as a direct consequence of the Telecommunications Act of 1996's pro-competitive approach to the telecommunications marketplace,<sup>5</sup> and it hopes to sustain this competitive legacy in a new era of genuine broadband competition. Certainly, XO's use of fiber-based, copper-based, and fixed-wireless platforms for high-speed services underscores

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<sup>3</sup> See, e.g., *Bringing Broadband to Rural America: Report on a Rural Broadband to Rural America*, Michael J. Copps, Acting Chairman, Federal Communications Commission, ¶¶ 14-25 (May 22, 2009), available at: <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291012A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf)>.

<sup>4</sup> For instance, the Organisation for Economic Co-operation and Development's ("OECD's") rankings have placed the United States below the top ten countries for broadband penetration, and the United States currently ranks fifteenth in this category. See OECD Broadband Statistics, "Broadband Subscribers per 100 Inhabitants" (Dec. 2008), available at: <<http://www.oecd.org/dataoecd/21/35/39574709.xls>>. While some observers have challenged the accuracy of this OECD ranking, no one contends that the United States – the largest broadband market among the OECD nations – ranks among the top five countries in broadband penetration.

<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

the importance of a broadband policy that encourages the use of a variety of technologies to expand broadband availability throughout the country.

The preamble of the 1996 Act stated that its goal was “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>6</sup> With this legislation, Congress transformed the FCC’s statutory mandate from one based on the regulation of monopoly service providers to one based on promoting the emergence of competing providers of telecommunications and information services so that traditional price and other regulatory restrictions would no longer be needed to protect competition and consumers. The FCC should develop and execute a national broadband strategy that continues that same pro-competitive paradigm, one that fosters robust broadband competition within and between the various technologies that can deliver high-speed services.

As the FCC has recognized, vigorous competition among providers of high-speed services is essential to achieving high broadband penetration levels, promoting the efficient deployment of high-quality services, fostering innovation and an array of product choices, and ensuring affordable broadband rates.<sup>7</sup> To maximize these competitive benefits, the FCC should establish a regulatory framework that promotes

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<sup>6</sup> 1996 Act at Preamble, 110 Stat. 56.

<sup>7</sup> See *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540, 20548 (2004) (“Having multiple advanced networks will also promote competition in price, features, and quality-of-service among broadband-access providers. This price-and-service competition, in turn, will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices and incent the further deployment of new and next-generation networks and ever-more innovative services.”).

competition on an “end to end” basis. This framework should encompass all segments of operators’ broadband networks, including last mile connections to residential and business customers and middle mile connections linking local networks to interstate backbone facilities.<sup>8</sup> Once these pro-competitive policies are in place and competitors have the tools they need to deploy their offerings, marketplace forces should drive the expansion of broadband around the country. In addition, as it implements this pro-competitive national broadband strategy, the FCC should adhere to the fundamental principles of competitive and technological neutrality. The FCC has long recognized that advanced telecommunications, including broadband services, must be regulated in a manner that is technology-neutral.<sup>9</sup> Marketplace forces will promote efficient broadband growth and deployment only if fiber-based, copper-based, and other wireline technologies as well as fixed and mobile wireless technologies are permitted to compete on a level playing field.

XO urges the FCC not only to promote intermodal competition between providers utilizing different transmission media, but also to foster intramodal competition between entities relying on the same transmission media. Congress sought to encourage intramodal wireline competition in the 1996 Act, with its adoption of Sections 251 and 252 providing a framework for competition through interconnection, access to UNEs, and

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<sup>8</sup> “Middle mile” networks are those that provide the necessary broadband interoffice transport and backhaul within a community and then out to the internet backbone network. The middle mile network connects the community to the Internet, which is particularly important in remote locations.

<sup>9</sup> The FCC has expressly found that its broadband policies under Section 706 of the 1996 Act must be technology neutral. *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*, 14 FCC Rcd 2398, ¶ 74 & n.179 (1999).

resale.<sup>10</sup> The FCC's implementation of the 1996 Act has not achieved Congress' full objectives, however, and, as discussed below in Section IV of these comments, the FCC should now do more to encourage intramodal competition in the provision of broadband services.

In doing so, the FCC should look to pro-competitive network unbundling policies implemented in other countries that have proven successful in promoting broadband deployment, and determine whether those policies can be adapted to the U.S. marketplace. For example, the OECD reports that the Netherlands has augmented its robust facilities-based competition by encouraging the competitive entry of additional broadband providers utilizing UNEs. With this approach, the Netherlands has achieved the highest rate of deployment of competitive DSL equipment and the second highest level of overall broadband penetration among all OECD countries.<sup>11</sup> In addition, New Zealand over the past two plus years has implemented unbundling of the copper loop in an effort to stimulate broadband competition, and it enjoyed the third-highest growth rate

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<sup>10</sup> 47 U.S.C. §§ 251, 252.

<sup>11</sup> *Broadband Growth and Policies in OECD Countries*, Organisation for Economic Co-operation and Development, at 51 (2008) ("2008 OECD Broadband Report"), available at: <<http://www.oecd.org/dataoecd/32/57/40629067.pdf>>; OECD Broadband Statistics, available at: <<http://www.oecd.org/dataoecd/21/35/39574709.xls>>. Numerous foreign administrations have established rigorous unbundling rules which permit competitive providers to obtain access to UNEs from incumbents at reasonable prices. According to the OECD, 28 of the 30 member nations have adopted some form of unbundling requirements, including countries where facilities-based broadband competition between cable operators and incumbent telephone companies is vigorous. 2008 OECD Broadband Report at 53.

of growth in broadband penetration among OECD nations during the twelve month period between December 2007 and December 2008.<sup>12</sup>

Another key objective of the FCC's pro-competitive, pro-consumer broadband strategy should be broadband operators' ubiquitous provision of data speeds that permit consumers to access whatever Internet tools they need for education, business development, and other important activities. For guidance, the FCC should look to the broadband definitions and standards that it ultimately recommends in conjunction with the federal broadband grant programs. In its own proposed rules for the BTOP, for instance, XO proposed a current generation wireline/fixed wireless broadband speed of 5 Mbps downstream and 1 Mbps upstream, and advanced broadband wireline/fixed wireless speeds of 20 Mbps/5 Mbps for asymmetrical service and 10 Mbps for symmetrical services.<sup>13</sup> With these speeds, competitive operators will be able to deliver a full array of broadband benefits to their subscribers.

Finally, in developing a pro-competitive broadband strategy, the FCC should seek input from state commissions and other appropriate state officials. The states have an important role to play in promoting broadband competition and making broadband services ubiquitously available throughout the country at affordable rates. In particular, XO appreciates and commends the work that its home state, the Commonwealth of Virginia, has undertaken on broadband issues. In June 2007, Virginia governor Tim

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<sup>12</sup> OECD Broadband Report at 54; *see also* OECD Broadband Portal – Press Release (Dec. 2008 data), *available at*: <[http://www.oecd.org/document/4/0,3343,en\\_2649\\_34225\\_42800196\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/4/0,3343,en_2649_34225_42800196_1_1_1_1,00.html)> (describing New Zealand as third among countries with strongest per-capita subscriber growth in 2008).

<sup>13</sup> *See* Comments of XO Communications, LLC and Nextlink Wireless, Inc. on the Commission's Consultative Role, GN Docket No. 09-40, at 5 (Apr. 13, 2009).

Kaine announced the formation of a “Broadband Roundtable,” a body intended to help the Governor meet his goal of affordable broadband connectivity at every business in the Commonwealth by 2010.<sup>14</sup> XO participated extensively in this Roundtable, and found the process to be productive and effective. Given the success of this and other state programs around the country, state officials in Virginia and elsewhere can make an important contribution to the development of a comprehensive, pro-competitive broadband strategy at the federal level.

## **II. EFFICIENT USE OF EXISTING COPPER INFRASTRUCTURE SHOULD BE A CRITICAL ELEMENT OF THE COMMISSION’S PRO-COMPETITIVE BROADBAND STRATEGY**

In developing a pro-competitive national broadband strategy, the FCC should accord an integral role to the United States’ existing copper infrastructure. The nation’s legacy copper loop plant is a national asset that was constructed largely under the protection of a government-sanctioned monopoly, paid for by American ratepayers, and deployed by large and small incumbent local exchange carriers during the twentieth century. This valuable ubiquitous nationwide infrastructure – including copper loops, copper subloops, and copper feeder plant – has played and continues to play an essential role in building businesses, improving the nation’s standard of living, and ensuring the availability of telecommunications services during public safety and homeland security crises. Legacy copper plant is the most widely deployed broadband infrastructure in use today, providing far greater reach than the fiber facilities installed to date. In contrast to

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<sup>14</sup> In September 2008, the Commonwealth’s Broadband Roundtable issued its final report on broadband issues and presented its online toolkit, designed to spur local and regional action to realize Governor Kaine’s goal. Final Report, Commonwealth’s Broadband Roundtable, Presented to Governor Timothy M. Kaine (Sep. 9, 2008), *available at*: <[http://www.otpba.vi.virginia.gov/roundtable\\_findings.shtml](http://www.otpba.vi.virginia.gov/roundtable_findings.shtml)>.

fiber's still limited footprint, most commercial buildings around the country today are served by copper plant.<sup>15</sup>

With the continued development and evolution of copper-based technologies, copper plant can deliver substantially more bandwidth than it could just five years ago. Copper loops now have the capability of delivering data speeds of more than 45 Mbps. Moreover, in the relatively near future, copper infrastructure may be capable of supporting transmission speeds of 100 Mbps or greater, data rates that can support a complete triple play of voice, data, and video services comparable to the offerings available over fiber loops. Competitive LECs have capitalized on these technological developments, and their broadband product offerings continue to expand, based on the extraordinary technical characteristics of this legacy copper plant. Given its near ubiquity and these robust capabilities, the existing copper infrastructure represents a ready-made solution for expanding broadband access in both the residential and business markets. Indeed, the enormous potential of existing copper plant is demonstrated by broadband providers' far greater reliance on this infrastructure in numerous countries around the world.<sup>16</sup>

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<sup>15</sup> As indicated *infra* at 10, fiber optic cables today extend to less than 20% of business locations in the United States. See *Leveraging Installed Copper to Reach Underserved and Unserved Community Anchor Institutions*, Hatteras Networks, at 6 (filed in GN Docket No. 09-51 on June 8, 2009) ("Hatteras Networks Report") (citing Vertical Systems Group, "Got Business Fiber? U.S. Fiber Penetration," *available at*: <<http://www.verticalsystems.com>>).

<sup>16</sup> Among the thirty OECD countries, *twenty* have higher levels of DSL broadband penetration than the United States. In particular, Iceland has a DSL penetration level nearly *triple* that found in the U.S., and nine other OECD nations have DSL penetration levels more than double the U.S. figure. See OECD Broadband Statistics, *available at*: <<http://www.oecd.org/dataoecd/21/35/39574709.xls>>. As in the United States, the existing copper plant in all of these OECD countries supports Ethernet-over-copper and

One copper-based technology that appears particularly promising for broadband development in the United States is copper-based Ethernet access, or “Ethernet-over-copper” (“EoC”). Whatever the medium, Ethernet applications are relatively easy to deploy and use, support ever-increasing data rates, and enable broadband access at a low “cost per bit.” Ethernet technology is widely used today to meet the telecommunications needs of businesses, governmental agencies, and other community “anchor tenants,” such as hospitals, schools, and libraries. These customers rely on Ethernet-based services for wide-area solutions that can connect their disparate locations and provide robust packet data network bandwidth.<sup>17</sup>

Some observers have suggested that fiber optics should be the preferred technology for Ethernet deployments, but fiber is not economically viable for the majority of anchor tenants. Fiber optic cables currently reach less than 20% of buildings in the United States, and fiber deployment is expanding very slowly, by only one percent per year on average for the past five years.<sup>18</sup> By utilizing EoC technology, carriers can greatly expand their broadband capacity and deliver business-grade Ethernet solutions while avoiding the millions of dollars in up-front capital costs that new fiber deployments may require. For the cost of extending fiber to a single anchor tenant, a carrier can provide EoC to ten of these tenants.<sup>19</sup> EoC can also reduce carriers’ operational expenses

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other copper-based technologies that can be used to provide increasingly robust high-speed data services.

<sup>17</sup> See Hatteras Networks Report at 3.

<sup>18</sup> *Id.* at 6 (citing Vertical Systems Group, “Got Business Fiber? U.S. Fiber Penetration,” available at: <<http://www.verticalsystems.com>>).

<sup>19</sup> *Id.* at 3. In areas beyond the reach of fiber, a carrier can also provide an anchor tenant with EoC service at least ten times more quickly than it can deploy and deliver a fiber-based Ethernet service to that customer. *Id.*

by almost 80% compared to operations utilizing time division multiplexing (“TDM”)-based technologies.<sup>20</sup> Given the ongoing advances in EoC technology, new fiber deployments may *never* be an economically superior alternative at most customer locations.

EoC promises particularly important benefits for rural areas of the United States. Continuing improvements in EoC technology should enable carriers to use existing copper facilities to deliver broadband services on a cost-effective basis to rural customer locations, including those that previously lacked affordable broadband access. Further, EoC broadband services can promote regional economic development by attracting small, medium, and large businesses that require high-speed transmission services to these rural areas.

Importantly, EoC offers consumers benefits and functionality that are comparable to fiber-based Ethernet service. EoC service providers are able to provide multiple services, such as VoIP, private line, and Internet access, over one physical connection. EoC also supports a variety of applications, including business access, in-building access, cellular and WiFi backhaul, and backhaul for Digital Subscriber Line Access Multiplexers. EoC providers can offer data speeds over 10 Mbps to virtually all of their anchor tenant customers, and can offer some customers data speeds as high as 50 Mbps.<sup>21</sup> This technology also gives carriers substantial operational flexibility, allowing them to expand capacity through a “pay as you grow” installation of additional software. Carriers

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<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 4. Carriers using EoC technology can offer data rates of 10 Mbps up to about 15,000 feet, extendable to 120,000 feet with repeaters. Data rates of 20 Mbps are possible up to about 10,000 feet, extendable to 80,000 feet with repeaters, and rates of 45 Mbps are possible up to about 5,000 feet, extendable to 40,000 feet with repeaters. *Id.* at 5.

using EoC can expand bandwidth in 1 Mbps increments without investing in new network infrastructure or having to “roll a truck” to a customer location.<sup>22</sup>

XO and numerous other competitive LECs are utilizing EoC technology to extend the reach of their metro and wide area Ethernet networks to business customer locations outside today’s fiber footprint. Competitive and incumbent carriers now have large EoC deployments in major markets all over the United States, with plans to roll out additional markets in 2009 and 2010.<sup>23</sup> Accordingly, as the FCC moves forward with its national broadband strategy, the FCC should account for the substantial contribution that this copper-based technology can make to the increasing penetration of broadband in the United States.

### **III. THE FCC SHOULD ELIMINATE IMPEDIMENTS TO THE DEVELOPMENT OF COMPETITIVE, END-TO-END BROADBAND SERVICES**

To expedite the growth of broadband throughout the United States, the FCC should take the steps necessary to achieve robust, end-to-end competition in the provision of broadband services. An effective national broadband plan will give carriers utilizing a range of technologies and business plans the tools they need to develop these competitive offerings. This pro-competitive approach should apply to all segments of existing

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<sup>22</sup> Hatteras Networks Report at 8. EoC development can provide substantial benefits to the wireless industry. With the growth of mobile voice and data services, as well as fixed wireless services based on WiFi and WiMAX, wireless carriers are facing increasing capacity requirements for connections between their base stations to the nearest switching POP. Significantly, less than five percent of cell sites are currently served by fiber, and TDM access (such as low speed T1/E1 connections) does not meet the bandwidth and resiliency needs of today’s mobile wireless backhaul. For the wireless industry, EoC represents an attractive alternative to the cost and complexity of deploying fiber to carriers’ tower locations. *Id.* at 9-10.

<sup>23</sup> *Id.* at 7.

broadband telecommunications networks, including last mile connections to residential and business customers and middle mile connections linking local telecommunications networks to interstate backbone facilities.

Certain elements of this “toolbox” are fundamental to the development of vigorous nationwide broadband competition and must remain a regulatory priority for the FCC. Incumbent LECs today remain dominant in the provision of access to last mile broadband connections. As a result, the FCC must ensure that all competitive providers, like XO, have a reasonable opportunity to gain efficient access to these unbundled network elements on an economic, non-discriminatory basis in areas where competing alternatives are not available. The FCC should also ensure that competitive broadband providers are able to enter into interconnection agreements with incumbent LEC networks on just, reasonable, and non-discriminatory terms. Interconnection is a cornerstone of the 1996 Act and a key to ensuring a nationwide, ubiquitous, seamless communications system, regardless of technology.

A variety of impediments in today’s telecommunications environment continue to delay and deter the efforts of competitive carriers seeking to compete with the incumbent LECs in the provision of broadband services. In order to give these carriers the full set of tools necessary to compete fairly and effectively in the provision of broadband, the FCC must design and implement a broadband strategy that eliminates these obstacles. The FCC’s *Broadband NOI* provides competitive carriers such as XO an opportunity to begin this process. In these comments, XO identifies several persistent impediments to its widespread roll-out of a fully competitive, end-to-end broadband alternative. Each of these impediments can slow or frustrate the entry of competitive

carriers and can be removed by targeted regulatory initiatives. Significantly, the FCC already has the legal authority to take these various actions, and no statutory changes are necessary.

As described below, XO urges the FCC to include the following, specific regulatory actions in its national broadband plan: (1) adopt a new procedural framework to govern the retirement of the existing copper infrastructure by incumbent LECs; (2) reform the Section 10 forbearance process; (3) reform the Phase II pricing flexibility regime for special access services and ensure that special access prices and practices are just and reasonable; (4) permit access to unbundled loops and other UNEs for the provision of broadband mobile wireless service and interexchange service; and (5) ensure collocation of rooftop microwave facilities at incumbent LEC central offices.

**A. The FCC Should Adopt a New Procedural Framework That Prevents Incumbent LECs from Unilaterally Retiring the Nation's Legacy Copper Infrastructure**

As described above, the nation's near ubiquitous and still robust copper infrastructure is well-suited to serve as a primary medium for the efficient growth of broadband in the United States. XO and other competitive carriers are moving forward with the deployment of EoC and other copper-based technologies, with the goal of providing an end-to-end competitive alternative to incumbent LECs' broadband and other service offerings. These efforts, however, are threatened by a growing and troubling incumbent LEC practice: the unnecessary and unilateral retirement of copper plant. Currently, the FCC's rules do little to prevent this practice or protect the copper infrastructure. As a key part of its national broadband strategy, the FCC should reexamine its copper retirement rules and establish a new regulatory framework that stops

incumbent LECs – based on their unilateral action and without any regulatory oversight – from wasting this important resource and deterring effective competition from new providers.

Incumbent LEC retirement of copper facilities, along with other types of network changes, is governed by Part 51 of the FCC’s rules.<sup>24</sup> In the 2003 *Triennial Review Order*, the FCC effectively left copper retirement to the unilateral discretion of incumbent LECs. To remove their copper plant or otherwise eliminate competitive access to these facilities, incumbent LECs need only provide public notice of this planned action, without any substantive justification.<sup>25</sup> Only those parties using the copper facilities at issue are eligible to object, and those objections are limited to timing issues.<sup>26</sup> Potential competitors considering the use of that copper plant have no opportunity to raise public interest considerations, and the FCC does not assess the competitive or public interest impact of this action. In effect, the existing rules leave outside parties with no way to stop incumbent LECs from removing existing copper infrastructure – along with its potential to offer a competitive alternative for consumers and businesses.

As noted, the FCC’s current rules do not require incumbent LECs to justify their retirement of copper plant, and these carriers have in fact not provided a legitimate justification for this ongoing practice. The continuing presence of copper loops only rarely physically precludes construction of fiber loop overbuilds and in most cases there is no need to remove existing copper facilities to deploy fiber-to-the-home or fiber-to-the-curb loops to customers. Nor is copper retirement economically efficient. The FCC’s

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<sup>24</sup> 47 C.F.R. §§ 51.325-51.335.

<sup>25</sup> 47 C.F.R. § 51.333.

<sup>26</sup> *Id.*

rules do not impose on incumbent LECs any obligation to maintain existing copper loops and copper subloops in serviceable condition, except to the extent that such facilities are requested by competitive LECs as UNEs, pursuant to Section 251(c)(3) of the Act. When facilities are unbundled, incumbent LECs are appropriately compensated at rates established by state commissions pursuant to Section 252(d) of the Act.<sup>27</sup>

The retirement of copper plant can prevent providers, like XO, from using that plant to offer broadband, video, high-speed data, and other advanced services. In the wake of the FCC's decision in the *Triennial Review Order* to exclude newly constructed fiber loops from Section 251 unbundling requirements,<sup>28</sup> the only realistic option for almost all new entrants seeking to compete with incumbent LECs in providing last-mile broadband and other high-speed services is to use legacy copper plant. The widespread retirement of essential copper plant within the incumbent LEC fiber footprints plainly will limit competitive LECs' ability to serve as alternative providers of last-mile network connections, and will prevent them from providing competitive, bundled services to millions of customers.<sup>29</sup>

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<sup>27</sup> Section 51.319(a)(3)(iii)(B) of the FCC's rules expressly states that incumbent LECs "need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access," pursuant to Section 251(c)(3) of the Act. 47 C.F.R. § 51.319(a)(3)(iii)(B); 47 U.S.C. § 251(c)(3).

<sup>28</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

<sup>29</sup> The unnecessary retirement of the legacy copper infrastructure also eliminates redundant network facilities that could prove critical to ensuring communications in homeland security crisis and natural disaster situations.

Incumbent LECs' retirement of copper plant in recent years has continued to serve as a real threat to competitive carriers' broadband deployment efforts. The incumbent LECs' premature retirement of copper *feeder plant* has been especially harmful to competitive LECs, consumers, and businesses. Copper feeder plant connects a competitive LEC's central office collocation (where broadband equipment is deployed) and individual customer premises. Consequently, retiring copper feeder plant effectively strands all of the subloop connections using that plant and has a much more significant adverse impact on competitive entry than removing individual subloops.

Retiring any segment of existing copper infrastructure is an irrevocable action that permanently deprives competitive LECs, consumers, and businesses of the ability to use that plant for broadband services. Significantly, as XO has itself experienced, an incumbent LEC's retirement of copper in even one small portion of a market can cause a competitive LEC to abandon its broadband plans throughout that market. Based on copper retirement notices in the Memphis, Tennessee market, XO in 2006 decided not to deploy EoC equipment or offer its Ethernet products in that market.

As part of its national broadband strategy, it is imperative that the FCC reverse the incumbent LECs' continuing premature retirement of the nation's copper infrastructure. Given its broadband potential, preserving legacy copper plant must now be a fundamental goal. To that end, XO and a group of other carriers in 2007 filed petitions requesting that the FCC amend its Part 51 rules governing copper retirement (the "Copper Retirement Petition").<sup>30</sup> Under the proposed rules, the FCC would conduct

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<sup>30</sup> Petition for Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops, XO Communications, LLC; Covad

a formal, case-by-case review of incumbent LEC requests to retire copper loop, subloop, and feeder facilities. To approve a request, the FCC would have to find that the network change furthered the public interest. Given the likely harm to broadband competition, proposed copper retirements would be subject to a presumption that they do *not* serve the public interest.<sup>31</sup> In addition, all interested parties would be permitted to participate in the approval process and object to a proposed copper retirement on public interest grounds.

XO urges that the FCC either move promptly to adopt the Copper Retirement Petition's proposed rules in its pending rulemaking proceeding, or include the proposed revisions as part of a comprehensive broadband rulemaking proceeding following its report to Congress. Preserving the legacy copper infrastructure will promote last-mile broadband competition, and is one of the best means available to the FCC to achieve its goal of ubiquitous broadband deployment. Competitive LECs and their equipment suppliers have worked hard to develop innovative copper-based technologies and applications. As a result, competitive carriers can now deliver greater bandwidth over copper than was possible when the FCC adopted the current copper retirement framework in 2003. With this new approach to copper retirement, the FCC can negate incumbent LECs' anti-competitive efforts and secure a bright future for broadband technology.

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Communications Group, Inc.; NuVox Communications; and Eschelon Telecom, Inc., RM-11358 (Jan. 18, 2007) ("Copper Retirement Petition").

<sup>31</sup> An incumbent LEC could rebut this presumption only if it showed that (i) the deployment of fiber to the customer premises would be impossible if the copper facilities at issue were maintained, and (ii) that this retirement is otherwise in the public interest. Copper Retirement Petition at 22.

## **B. The FCC Should Reform the Section 10 Forbearance Process**

Another obstacle to the efforts of XO and other competitive LECs to provide competitive, end-to-end broadband service has been the misuse of the forbearance provisions under Section 10 of the Telecommunications Act of 1996.<sup>32</sup> Section 10 grants the FCC authority to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service” if a petitioner demonstrates that enforcement of the rule at issue (1) is not necessary to ensure that the charges, practices, and classifications are just and reasonable and are not unjustly or unreasonably discriminatory; (2) is not necessary for the protection of consumers; and (3) is consistent with the public interest.<sup>33</sup> Under the statute, a forbearance request is deemed granted if the FCC fails to act within a one year period, meaning that these petitions can lead to substantial changes in regulatory requirements without any FCC action.<sup>34</sup>

Unfortunately, the text of Section 10 does not mandate the procedural framework that XO believes is necessary for full and careful consideration of forbearance requests. In this vacuum, forbearance proceedings have often been procedural free-for-alls. Petitioners routinely file incomplete petitions that they amend later, sometimes well after initial comments and reply comments have been submitted, and critical empirical information is often not filed until well into the statutory review period. These manipulations can effectively turn an already abbreviated twelve-to-fifteen month process into a two-to-three month process while holding the FCC’s agenda and resources

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<sup>32</sup> 47 U.S.C. § 160.

<sup>33</sup> *Id.* § 160(a).

<sup>34</sup> *Id.* § 160(c). This deadline can be extended by up to 90 days.

hostage.<sup>35</sup> Overall, this lack of procedural structure has the potential to produce regulatory outcomes that depart from sound and systematic decision-making.

In recent years, incumbent LECs have taken advantage of the existing *ad hoc*, undefined forbearance procedures to gain relief prematurely from basic pro-competitive statutory and regulatory obligations, including those related to such core provisions of the Act as Sections 201, 202, 251, and 271.<sup>36</sup> In fact, the forbearance process has effectively become the incumbent LECs' vehicle of choice for addressing fundamental competition policy issues and attempting to refashion or eliminate their regulatory obligations, thereby circumventing the rulemaking process. These unbounded forbearance petitions have not only caused competitive harm, they have needlessly diverted the FCC's resources and cost the companies required to review those filings countless hours and dollars. These are resources that might have been better spent developing and implementing broadband services.

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<sup>35</sup> For instance, in the recent *Verizon 6-MSA Proceeding*, Verizon failed to submit market specific empirical data to support its request for forbearance from Section 251 (c)(3) unbundling requirements in six major Metropolitan Statistical Areas ("MSAs") until the last day of the formal pleading cycle, when more than two-thirds of the statutory twelve-month clock had already run. See *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Verizon 6-MSA Order*"), appeal pending, *Verizon v. FCC*, No. 08-1012 (D.C. Cir. Filed Jan. 14, 2008).

<sup>36</sup> See, e.g., *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (Sep. 6, 2006) (requesting that the FCC forbear from applying loop and transport unbundling regulation pursuant to Section 251(c) of the Act); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Phoenix, Arizona, and Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97 (Apr. 27, 2007) (asking that the FCC forbear from applying loop and transport unbundling regulation under Sections 251(c) and 271(c) of the Act).

As part of its national broadband strategy, the FCC should promptly conclude its pending rulemaking proceeding to reform the procedures governing petitions for forbearance relief under Section 10. In September 2007, XO and a number of other carriers filed a joint petition proposing a variety of unambiguous, rigorous procedures for filing and reviewing such requests,<sup>37</sup> and the FCC in November 2007 issued a rulemaking proposal that largely tracked this petition.<sup>38</sup> The FCC should act now to adopt all the rules on which it sought comment,<sup>39</sup> including notice and comment procedures, a complete-as-filed requirement for forbearance proceedings, and a standard timetable for all filings.<sup>40</sup> With the appropriate procedural roadmap, the FCC can reduce the uncertainty arising out of the current process and foster a fair regulatory framework for all carriers, an outcome that in turn will promote more vigorous broadband competition and increased broadband availability.

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<sup>37</sup> Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings, Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeodUSA Telecommunications Services, Inc. WC Docket No. 07-267 (Sep. 19, 2007). This joint proposal was widely supported by commenters as well as Members of Congress.

<sup>38</sup> *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 22 FCC Rcd 21212 (2007).

<sup>39</sup> On May 27, 2009, the FCC indicated that an order in its pending forbearance proceeding has been circulated and is pending action by the full Commission. See Items on Circulation, available at: <[http://www.fcc.gov/fcc-bin/circ\\_items.cgi](http://www.fcc.gov/fcc-bin/circ_items.cgi)>. XO appreciates the FCC's recent attention to these forbearance issues and urges the Commission to issue this order as expeditiously as possible.

<sup>40</sup> XO also urges the FCC to require the issuance of a written order on all forbearance petitions, including those petitions that previously have been "deemed granted."

**C. The FCC Should Reform the Phase II Pricing Flexibility Regime for Special Access Services and End Incumbent LECs' Unjust and Unreasonable Special Access Prices and Practices**

The FCC's national broadband plan must also address the longstanding inability of competitive broadband providers to obtain efficient access to the special access offerings of the Bell Operating Companies ("BOCs") and other incumbent LECs at reasonable prices. More than four years ago, the FCC initiated a rulemaking proceeding to examine special access pricing and the regulatory framework for these services.<sup>41</sup> Despite overwhelming evidence of market failure, the FCC has yet to take meaningful action to curb the incumbent LECs' dominance in the provision of special access services. Incumbent LECs continue to command unjust and unreasonable rates for special access that far exceed their costs. These excessive prices stifle competition and make it more difficult for competitive LECs like XO to deploy reasonably priced competitive broadband alternatives to incumbent LEC services. The FCC should finally remedy this problem with prompt, appropriate regulatory action.

The FCC adopted its Phase II pricing rules in 1999, based on a prediction that special access competition would develop and impose discipline on incumbent LEC pricing and other practices.<sup>42</sup> This predicted competition has not materialized. With very few exceptions, competing broadband providers like XO have no alternative to the

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<sup>41</sup> *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).

<sup>42</sup> *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999).

special access offerings of incumbent LECs for the transmission circuits needed to link their end user customers and local network facilities to their nationwide networks.<sup>43</sup>

Moreover, in recent years, actual and potential competition among providers of last-mile and middle-mile transmission links has been significantly diminished by a number of high-profile mergers. In November 2005, the two leading providers of alternatives to special access services, legacy AT&T and MCI, were absorbed by SBC and Verizon.<sup>44</sup> Following the FCC's December 2006 approval of the merger of the "new" AT&T and BellSouth, the provision of special access services is now dominated by two BOCs, AT&T and Verizon, each of which provides service within more than twenty states.<sup>45</sup>

Other recent regulatory developments have further limited the options available to special access customers. During the past four years, the implementation of the FCC's *Triennial Review Order* and *Triennial Review Remand Order* has significantly constrained competitive LECs' access to UNEs priced at forward-looking costs. Lacking virtually any competitive alternatives, XO and other competitive LECs have had to convert nearly every high-capacity UNE loop (DS-1 and above) lost to a non-impairment

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<sup>43</sup> See Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, Revised Edition, at 38-47 (First Issued Jan. 21, 2009), available at: <[http://nrri.org/pubs/telecommunications/NRRI\\_spcl\\_access\\_mkts\\_jan09-02.pdf](http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf)>.

<sup>44</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005).

<sup>45</sup> *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007).

decision to unreasonably priced incumbent LEC-provided special access, much to the detriment of these competitors' customers and their businesses.

In addition, continuing barriers to entry – some intrinsic to the provision of dedicated transmission links and others created by incumbents – make it difficult for competitors to provide viable alternatives to AT&T and Verizon. The provision of DS-1 and higher speed dedicated transmission services involves significant economies of scale and significant sunk costs, and must overcome such operational impediments as obtaining access to rights-of-way and privately owned buildings.<sup>46</sup> Due to these factors, competitive market entry has generally been possible only for the highest capacity services along the highest volume routes in densely populated metropolitan areas.

The incumbent LECs' unreasonable exclusionary practices have also hindered the development of alternatives to special access services. These exclusionary practices include: (i) excessive charges for terminating incumbent LEC service, (ii) commitments to purchase some minimum amount from the incumbent, with substantial penalties for non-compliance, and (iii) volume or loyalty discounts and other provisions under which a special access consumer must pay the incumbent LEC more for another service if it uses a competing provider's service.<sup>47</sup> These practices lock in customers so they are unable to

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<sup>46</sup> See Declaration of Ajay Govil (Redacted Version), ¶¶ 13-16, attached to Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, WC Docket No. 05-25 (Aug. 8, 2007) (cost of high-capacity loop facilities includes deployment of MF Rings, construction of building laterals, negotiation of municipal franchises and private rights-of-way licenses, and obtaining permits for trenching).

<sup>47</sup> See Comments of XO Communications, LLC, Covad Communications Group, Inc., and NuVox Communications (Redacted Version), WC Docket No. 05-25, at 26-27 (Aug. 8, 2007) ("XO Group Comments").

switch to an alternative provider, even if one exists. Regulatory intervention is needed to end these exclusionary tactics.

Without competitive alternatives to impose price discipline, the BOCs and other incumbent LECs have aggressively exercised their dominance in pricing their special access services. Taking full advantage of the FCC's Phase II pricing flexibility regime, incumbent LECs have increased their special access rates to unjust and unreasonable levels.<sup>48</sup> While the FCC has previously expressed hope that special access charges would move toward cost-based rates, the analysis of the U.S. Government Accountability Office confirms that incumbent LECs' special access charges are generally well in excess of the state commission approved cost-based rates for corresponding UNEs.<sup>49</sup> In addition, with special access rates far exceeding costs, the BOCs' rates of return have risen dramatically in the years since Phase II pricing flexibility was permitted, with two of these carriers recently enjoying rates of return near or above 100%.<sup>50</sup> This market failure under Phase

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<sup>48</sup> See United States Government Accounting Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO Report No. GAO-07-80 (Nov. 2006), available at: <<http://www.gao.gov/new.items/d0780.pdf>> ("*GAO Report*"). The ability of competitors to discipline LEC pricing tactics for metro dedicated transport special access (channel mileage) is exceptionally limited, especially for DS-1 circuits. Meanwhile, competitors' ability to discipline incumbent LEC pricing tactics in the markets for various special access channel terminations is virtually nonexistent. Indeed, competitive LECs are unable economically to self-supply or to obtain competitively provisioned alternatives to sub-OCn-level incumbent LEC special access circuits.

<sup>49</sup> See *GAO Report* at 8.

<sup>50</sup> AT&T's (based on combined legacy SBC and BellSouth data) rate of return increased from 40% in 2000 to 100% in 2006, Verizon's increased from 15% in 2000 to 52% in 2006, and Qwest's increased from 38% in 2000 to 132% in 2006. FCC Report 43-01, Table I Cost and Revenue, Column(s) Special Access, Row 1915 Net Return divided by Row 1910 Average Net Investment. See also S. Derek Turner, *Dismantling Digital Deregulation: Toward a National Broadband Strategy*, at 57-58 (May 2009) ("*Free Press Report*"), available at: <[http://www.freepress.net/files/Dismantling\\_Digital\\_](http://www.freepress.net/files/Dismantling_Digital_)

II pricing flexibility and the resulting supra-competitive special access prices and rates of return have been well documented in the FCC's pending rulemaking.<sup>51</sup>

The Commission's comprehensive broadband strategy should include a plan for reforming the Phase II pricing flexibility regime. Competitive LECs like XO are captive special access customers and must simply accept these excessive rates and attempt to pass these costs along to their own customers. Where competitive LECs are competing with their special access suppliers in the retail marketplace, an incumbent LEC can use this control over a vital input to their rivals' downstream products to gain a competitive advantage in the provision of broadband and other retail services.

In their 2007 comments in the FCC's special access proceeding, XO and other carriers outlined a series of steps that would reduce prices in Phase II pricing flexibility areas to reasonable levels, including reinitializing the rates and adopting an interim X-factor of 5.3%.<sup>52</sup> XO and others also recommended that once those reforms were implemented, the FCC grant downward pricing flexibility across all access markets. Downward pricing flexibility would permit incumbent LECs to lower their prices in response to competition. As part of its national broadband strategy, the Commission should now take these steps or adopt other appropriate reforms of the Phase II pricing flexibility regime in order to reduce rates to more reasonable levels.

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Deregulation.pdf> (noting that the average return across all BOCs surpassed 100 percent in 2007, and that Verizon that year earned a 700 percent rate of return in one study area).

<sup>51</sup> See, e.g., XO Group Comments at 11-22; Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 8-21 (Aug. 8, 2007); Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 9-14 (Aug. 8, 2007); Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, at 10-14 (Aug. 8, 2007).

<sup>52</sup> XO Group Comments at 43-45.

The FCC should also proscribe the exclusionary practices described above that are designed to reinforce the BOCs' special access dominance and deter competitive entry. Specifically, the FCC should prohibit the following arrangements and conditions as part of its comprehensive reform of special access pricing regulations: (1) tying of discounted prices to very high term and volume commitments, with excessive termination penalties; (2) requiring customers to convert all or some existing UNEs to special access services to guarantee a certain percentage of "spend" on special access services; (3) requiring customers to purchase only special access services (in lieu of lower priced UNEs) going forward;<sup>53</sup> (4) requiring customers to refrain from taking positions contrary to the incumbent LECs in FCC proceedings; and (5) precluding customers from porting individual channel terminations as necessary to satisfy volume commitments.<sup>54</sup> These prohibitions would help ensure an open and fair marketplace for special access services, thereby promoting broadband competition and enhancing consumer welfare.<sup>55</sup>

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<sup>53</sup> In its order approving the AT&T and BellSouth merger, the FCC conditioned its grant on the merged entity's "not includ[ing] in any pricing flexibility contract or tariff filed with the Commission after the Merger Closing Date access service ratio terms which limit the extent to which customers may obtain transmission services as UNEs, rather than special access services." *See AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, Appendix F, Special Access, ¶ 8 (2007). To promote broadband competition, the FCC should now apply this requirement to all incumbent LECs.

<sup>54</sup> *See* XO Group Comments at 46; Letter from Brad E. Mutschelknaus, Counsel for XO, *et al.*, to Marlene H. Dortch, FCC Secretary, WC Docket No. 06-74, at 2 (Dec. 29, 2006).

<sup>55</sup> The Commission should also adopt a "fresh look" policy for all special access agreements currently in force. *See* XO Group Comments at 46-47. A fresh look policy would give special access customers an opportunity to terminate current arrangements for a set period after the effective date of a Commission order in this proceeding. During this time, the terms of these contracts could be renegotiated to comply with the new rules governing the maximum permissible charge by the incumbent LEC and to remove any illegal terms or conditions.

**D. The FCC Should Permit Access to Unbundled Loops and Other UNEs for the Provision of Broadband Mobile Wireless Service**

The FCC can bring some additional competitive pressure to bear on incumbent LEC special access offerings by permitting access to the use of unbundled elements for the provision of high-speed transmission services that mobile wireless services will find useful, especially in connection with the emerging third and fourth generation broadband services. As described above, the rapid growth of mobile voice and data services, as well as fixed wireless services based on WiFi and WiMAX, has created a growing need for high-speed connections between Commercial Mobile Radio Service (“CMRS”) carrier base stations and their local networks, usually through intermediate points located on the incumbent LECs’ networks. Today, however, less than five percent of cell sites are served by fiber, and TDM access (such as low speed T1/E1 connections) does not meet the bandwidth and resiliency needs of today’s mobile wireless backhaul.<sup>56</sup> As discussed above, XO’s EoC products have the capability of providing the high-speed dedicated transmission links that are needed to serve mobile wireless cell sites.

The Commission’s rules, however, currently preclude carriers from obtaining access to UNEs for the exclusive provision of mobile wireless services.<sup>57</sup> The restriction not only forces CMRS and other carriers to use over-priced special access services to reach base stations, but also eliminates a potentially effective constraint on an incumbent LEC’s exercise of Phase II pricing flexibility to increase prices.

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<sup>56</sup> Hatteras Network Report at 9.

<sup>57</sup> See *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 575-577 (D.C. Cir. 2004) (*USTA II*); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 34-37 (2005) (“*Triennial Review Remand Order*”).

The development of the FCC's national broadband plan provides a timely opportunity to revisit this restriction on access to UNEs. The Commission and the D.C. Circuit initially analyzed whether a CMRS carrier would be impaired in its ability to "provide the services that it seeks to offer" without access to UNEs in 2004 and 2005 when wireless broadband services were nascent; CMRS offerings (like wireline products) at that time were overwhelmingly narrowband services. Consequently, neither the D.C. Circuit nor the FCC explicitly considered the impact of this UNE restriction on the ability of mobile wireless providers to compete in the provision of broadband services. Further, although the court and the FCC both justified this prohibition by pointing to the robust intramodal competition among CMRS carriers that had developed without the benefit of UNE access, neither examined the effect of this restriction on wireless carriers' ability to compete with incumbent LECs and cable modem providers in the provision of broadband service.<sup>58</sup>

Now, four and a half years after the *Triennial Review Remand Order*, mobile wireless carriers are providing third-generation data offerings and are moving forward with plans to deploy fourth-generation wireless broadband services.<sup>59</sup> These wireless

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<sup>58</sup> *USTA II* at 577; *Triennial Review Remand Order* at ¶ 36.

<sup>59</sup> See, e.g., Yu-Ting Wang, "AT&T Chief Stresses Broadband, Wireless, Sees No Sign of Turnaround Yet," *Communications Daily* (May 29, 2009) ("AT&T is investing as much as it can in its broadband infrastructure . . . [and] is working as fast as it can on broadband deployment and expansion, . . . plan[ning] to upgrade its 3G network to double wireless broadband speed and to expand its spectrum footprint"); Yu-Ting Wang, "Sprint Eyes Becoming Mobile Data Leader With 4G," *Communications Daily* (May 21, 2009) ("Sprint Nextel is set for 4G market expansion this year and beyond"); see also *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, Thirteenth Report, DA 09-54 at 9 (rel. Jan. 16, 2009) ("*Thirteenth CMRS Competition Report*") ("As of December 31,

carriers are likely to compete not only with each other, but also with incumbent LEC wireline broadband offerings and cable modem services.<sup>60</sup> Given this new reality and the FCC's mandate to promote the development of broadband, it is clearly time to reexamine whether the payment of special access rates for wireless backhaul rather than UNE prices (either directly to the incumbent LEC or indirectly through XO or other competitive LECs) impairs these wireless carriers' ability to provide broadband service to consumers and compete effectively against broadband operators utilizing other transmission media.

In a related vein, the Commission should also reconsider its current restrictions on access to unbundled loops and other UNEs for the exclusive provision of interexchange services.<sup>61</sup> The structure of the telecommunications industry has undergone dramatic changes since the Commission's restrictions initially were adopted, including several "mega-mergers" that produced the current AT&T and Verizon. The Commission, therefore, should reexamine whether providers of retail wireline broadband services are impaired without access to unbundled loops and other UNEs in their ability to compete effectively with AT&T, Verizon, and other incumbent LECs that control those network elements.

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2006, 21.9 million mobile wireless devices capable of accessing the Internet at broadband speeds were in use in the United States, versus 3.1 million at the end of 2005.”).

<sup>60</sup> See, e.g., Yu-Ting Wang, “3GPP Finalizes LTE Standards; 4G for Public Safety Expected,” *Communications Daily* (May 13, 2009) (“the growth of wireless broadband has changed carriers’ business model, collapsing boundaries among telco, IP service providers and device makers”).

<sup>61</sup> See *USTA II* at 592; *Triennial Review Remand Order* at ¶ 36.

**E. The FCC Should Protect Against Collocation Issues that Impede the Deployment of Microwave Facilities**

The FCC's comprehensive national broadband plan can and should foster broadband competition by barring certain practices that AT&T has used to prevent or delay XO's collocation of high-speed microwave facilities at incumbent LEC central offices. Pursuant to Section 251(c)(6) of the Act,<sup>62</sup> XO has established physical collocations for telecommunications equipment in approximately 980 incumbent LEC central office buildings in the United States. At these central offices, XO deploys its equipment in order to access UNEs and obtain interconnection with the incumbent LECs, including AT&T, Qwest, and Verizon. The terms and conditions governing microwave collocation arrangements are set forth in interconnection agreements with the incumbent LECs as well as in incumbent LEC tariffs.

XO in recent years has sought to upgrade its local network by deploying rooftop microwave antennas at incumbent LEC central offices. The microwave facilities are intended to augment and interconnect with the equipment that XO already has deployed in the central office and thereby provide a high-speed wireless link between XO's local network and the UNEs and incumbent LEC services that XO obtains in the office. XO's ultimate goal is to use these microwave links to replace leased circuits that it currently uses to interconnect the central office with its local network.

XO has encountered little difficulty with most incumbent LECs in deploying these rooftop microwave facilities. Most incumbent LECs have processed XO's requests for microwave collocation space promptly and efficiently. These carriers have properly regarded these requests as expansions of XO's existing collocation arrangements at the

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<sup>62</sup> 47 U.S.C. § 251(c)(6).

central offices and, consequently, as covered either by their existing interconnection agreements with XO or by their tariffs. As a result of their straightforward approach to XO's microwave collocation requests, XO has been able to deploy transmission equipment at eleven incumbent LEC central offices over the past three years.

AT&T, in contrast, has consistently delayed or prevented XO's efforts to expand its collocation facilities in AT&T central offices to include microwave transmission equipment. For instance, rather than following existing, well-established procedures for processing collocation requests, AT&T has often insisted that XO submit a "Bona Fide Request," a process that imposes significant additional costs and delays in completing the deployment of microwave facilities. AT&T has also barred XO from using its preferred contractors to perform the necessary roof work, insisting instead that its own, more expensive vendors perform this work. In some cases, AT&T has demanded that XO underwrite the cost of certain new construction activity that made the microwave collocation project economically infeasible.<sup>63</sup>

The efficient collocation of microwave transmission facilities at incumbent LEC central offices around the country is a key part of XO's overall plan for delivering robust high-speed transmission services to its customers. To encourage such pro-competitive efforts to expand the reach and performance of high-speed services, the FCC's comprehensive plan should confirm that the collocation of microwave transmission

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<sup>63</sup> In some instances, AT&T's tactics have made obtaining microwave access prohibitively costly, preventing XO from *ever* been able to deploy its planned facilities. For example, XO in 2007 abandoned its effort to deploy microwave entrance facilities at certain locations in Missouri, and it has experienced particularly tortured building access disputes with AT&T in California. In fact, due both to AT&T's conduct and to certain municipal requirements, XO to date has not obtained access to any microwave facilities at AT&T central offices in the Los Angeles area.

facilities as proposed by XO was one of the arrangements contemplated by Section 251(c)(6) of the Act. Such an unambiguous ruling would undermine AT&T's efforts to thwart XO's network upgrades and assist state commissions in resolving such collocation disputes through their oversight of interconnection agreements.

#### **IV. THE FCC'S REPORT TO CONGRESS SHOULD INCLUDE A TIMELINE FOR REGULATORY ACTION THAT IMPLEMENTS ITS NATIONAL BROADBAND STRATEGY**

The Commission should be open and transparent in crafting its national broadband strategic plan. To that end, the FCC's plan should include a detailed blueprint for achieving its policy objectives and a timeline for regulatory actions. Before presenting this strategic plan to Congress, the FCC should place a draft of its report on public notice to give consumers, the telecommunications industry, and other interested parties an opportunity to comment on the report prior to its submission. The final report undoubtedly would benefit from the focused comments of carriers and customers who will be affected substantially by the FCC's strategic plan.

Within 90 days after submitting its report to Congress, the FCC should issue a notice of proposed rulemaking that sets forth specific proposed rule changes that will have an immediate, substantial, and positive impact on broadband expansion in the United States, including the regulatory actions proposed by XO above. Within 180 days of the closing of the comment and reply cycle established by the notice, the FCC should issue an order adopting the initial, necessary rule changes. In addition, within 90 days after submitting its report to Congress, the FCC should compile an inventory of its pending rulemaking proceedings and publicly identify those pending proceedings that have the greatest potential to promote broadband competition in the United States.

Within one year of publishing this list, the FCC should complete these proceedings (including those that XO identified above in Section III). If appropriate, the FCC should terminate these pending proceedings and instead address the substantive broadband issues in the comprehensive broadband rulemaking that follows its report to Congress.

## V. CONCLUSION

For the aforementioned reasons, XO urges the FCC to adopt a comprehensive national broadband plan, including a working timeline for action as outlined above, that focuses on the establishment of optimal conditions for the development of vigorous broadband competition and eliminates a number of persistent impediments to the broadband deployment efforts of XO and other competitive carriers.

Respectfully submitted,

/s/ Heather Burnett Gold  
Heather Burnett Gold  
Senior Vice President  
heather.b.gold@xo.com

Lisa R. Youngers  
Vice President, Federal Affairs  
lisa.r.youngers@xo.com

XO Communications, LLC  
13865 Sunrise Valley Drive  
Herndon, VA 20171  
703-547-2000

Regina M. Keeney  
Stephen J. Berman  
Lawler, Metzger, Milkman & Keeney, LLC  
2001 K Street, NW, Suite 802  
Washington, DC 20006  
(202) 777-7700  
Counsel for XO Communications, LLC

June 8, 2009

**Certificate of Service**

I hereby certify that on this 8th day of June, 2009, I caused true and correct copies of the foregoing Comments of XO Communications, LLC, to be mailed by electronic mail to:

Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
cpdcopies@fcc.gov

and

Best Copy and Printing, Inc.  
fcc@bcpweb.com

/s/ Ruth E. Holder  
Ruth E. Holder