

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Broadband Study Conducted by the) GN Docket Nos. 09-47, 09-51, 09-137
Berkman Center for Internet and Society)

COMMENTS OF XO COMMUNICATIONS, LLC – NBP PUBLIC NOTICE #13

XO Communications, LLC (“XO Communications”) hereby comments on the Federal Communications Commission’s (“FCC’s” or “Commission’s”) Public Notice #13 regarding the broadband study conducted by the Berkman Center for Internet and Society (“Berkman Center Study”). XO commends the FCC and the Berkman Center for undertaking this review of the existing literature regarding broadband deployment and usage throughout the world, and believes that the Berkman Center Study should help guide the Commission’s national broadband strategy. In particular, the Berkman Center Study substantiates a point that XO emphasized in comments on the Commission’s *Notice of Inquiry* regarding its comprehensive national broadband plan: a rigorous unbundling policy for incumbent local exchange carriers (“LECs”) is integral to promoting broadband competition and advancing broadband deployment and availability in the United States.¹

¹ See Comments of XO Communications, GN Docket No. 09-51, at 28-30 (June 8, 2009) (“XO Broadband NOI Comments”); Reply Comments of XO Communications, GN Docket No. 09-51, at 6-8 (July 21, 2009).

RESPONSE TO QUESTIONS

1. Does the study accomplish its intended purposes?

The FCC directed the Berkman Center to “revie[w] the current plans and practices pursued by other countries in the transition to the next generation of connectivity, as well as their past experience.”² According to the Berkman Center, “[b]y observing the experiences of a range of market-oriented democracies that pursued a similar goal over a similar time period, we hope to learn from the successes and failures of others about what practices and policies best promote that goal. By reviewing current plans or policy efforts, we hope to learn what others see as challenges in the next generation transition, and to learn about the range of possible solutions to these challenges.”³

The Berkman Center Study makes an invaluable contribution to the record of this proceeding by identifying practices and policies that have promoted broadband development outside the United States. Specifically, consistent with XO’s position in this and other proceedings, the Berkman Center underscores the vital role that imposing network unbundling on incumbent LECs plays in promoting broadband penetration, capacity, and affordability in other countries.⁴ In fact, the Berkman Center states that its “most surprising and significant

² The Berkman Center for Internet and Society at Harvard University, *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, at 9 (Draft; Oct. 2009, available at: <http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf> (“Berkman Center Study”); see also Public Notice, *Comment Sought on Broadband Study Conducted by the Berkman Center for Internet and Society – NBP Public Notice # 13*, GN Docket Nos. 09-47, 09-51, and 09-137, DA 09-2217 (rel. Oct. 14, 2009). On November 4, 2009, the Berkman Center’s Principal Investigator, Yochai Benkler, addressed a number of points that have been raised informally since the October 14 release of the Public Notice. See Yochai Benkler, Berkman Center, *Commenting on the Berkman Center’s Broadband Study for the FCC* (Nov. 4, 2009), available at: <<http://cyber.law.harvard.edu/node/5751>>.

³ Berkman Center Study at 9.

⁴ *Id.* at 11-12, 75-80.

finding” is that imposing and enforcing unbundling requirements on incumbent LECs, *inter alia*, “played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition.”⁵ According to the study, “[t]he lowest prices and highest speeds [for broadband service] are almost all offered by firms in markets where, in addition to an incumbent telephone company and a cable company, there are also competitors who entered the market, and built their presence, through use of open access facilities.”⁶

The Berkman Center Study points to “extensive evidence” regarding the beneficial impact of pro-competition policies, including two recent econometric analyses that measured the effect of incumbent LEC unbundling on broadband penetration. The Berkman Center Study confirms that these econometric analyses support the proposition that incumbent LEC unbundling contributed to broadband penetration in OECD countries.⁷ In fact, the Berkman Center concludes that “the effect [of network unbundling on penetration] is larger and the result more significant and more robust than prior studies based on the same data found.”⁸ According to the Berkman Center Study, in countries where a regulatory agency enforced incumbent LEC network unbundling obligations, new entrants using unbundled facilities “provided an important catalyst for the development of robust competition which, in most cases, contributed to strong broadband performance across a range of metrics.”⁹

⁵ *Id.* at 11.

⁶ *Id.* at 12.

⁷ *Id.* at 75.

⁸ *Id.* at 12.

⁹ *Id.*

The Berkman Center Study identifies numerous countries that have achieved high levels of broadband service at least in part through requiring incumbent LECs to make their local facilities available to competing providers. For example, in Japan, access to incumbent LEC network elements at regulated rates was found to be a critical factor in the early introduction of broadband, and is considered to have played a major role in driving transmission speed and price competition there.¹⁰ For example, copper unbundling that supported the delivery of Digital Subscriber Line service enabled new entrants to roll out services in areas where they did not have fiber coverage.¹¹

In France, following the creation of an effective regulatory framework requiring France Telecom, the incumbent LEC, to open its network to competitors, new entrants aggressively began offering broadband services in competition with the incumbent. According to the study, these new entrants quickly built their customer bases, and rolled out innovative marketing packages.¹² In New Zealand, between 2001 and 2006, before the legislature imposed network unbundling requirements on the incumbent LEC, New Zealand ranked only twenty-first or twenty-second in international broadband penetration.¹³ As the Berkman Center Study points out, after the legislature acted in 2006, New Zealand rose quickly in the Organisation for Economic Co-operation and Development (“OECD”) rankings for broadband penetration and data speeds offered by an incumbent.¹⁴

¹⁰ *Id.* at 87.

¹¹ *Id.*

¹² *Id.* at 101.

¹³ *Id.* at 108.

¹⁴ *Id.* at 109.

Given the success of incumbent LEC unbundling requirements in fostering broadband growth in other countries, the Berkman Center Study states that there is a wide consensus outside the United States that these unbundling policies play an integral role in promoting the emergence of competitive broadband industries.¹⁵ As described below, it is time for the FCC to learn from the experiences of these countries and revisit the application of network unbundling policies to encourage broadband growth and competition in the United States.

4. How much weight should the Commission give to this study as it develops a National Broadband Plan?

As the FCC moves forward with its national broadband strategy, the Commission, at a minimum, should give substantial weight to the Berkman Center Study's findings regarding the benefits of enforcing unbundling requirements on incumbent LECs. A new policy approach for broadband is needed in the United States given that, as the Berkman Center Study points out, the United States is a "middle-of-the-pack performer" for broadband.¹⁶

As the study indicates, "[o]n those few measures where we have reasonably relevant historical data, it appears that the United States opened the first decade of the 21st centuries [sic] in the top quintile in penetration and prices, and has been surpassed by other countries over the course of the decade."¹⁷ For fixed broadband wireline penetration, the United States is in the third quintile among those countries in the OECD, and the United States is only in the fourth quintile for mobile broadband penetration.¹⁸ The United States is also only in the third quintile with respect to pricing for medium, high, and very high broadband data speed services.¹⁹ As the

¹⁵ *Id.* at 77, 79.

¹⁶ *Id.* at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Berkman Center Study finds, “[t]he highest prices for the lowest speeds are overwhelmingly offered by firms in the United States and Canada, all of which inhabit markets structured around ‘inter-modal’ competition.”²⁰

As XO described in its Broadband NOI Comments, Congress enacted the Telecommunications Act of 1996 (the “1996 Act”) to encourage intermodal, intramodal and resale wireline competition.²¹ The addition of sections 251 and 252 to the Communications Act of 1934, as amended, provided a framework for promoting that competition through interconnection obligations, access to unbundled network elements (“UNEs”) offered by incumbent LECs, and resale of retail service offerings.²² As the Berkman Center Study points out, however, the Commission subsequently elected to “abandon this mode of regulation for broadband in a series of decisions in 2001 and 2002.”²³ With incumbent LECs’ network unbundling obligations substantially reduced, “[o]pen access has been largely treated as a closed issue in U.S. policy debates.”²⁴

As the FCC develops its National Broadband Plan, it is imperative that the FCC revisit its assessment of the importance of access to unbundled incumbent LEC network elements in achieving its overriding objectives of accelerating nationwide broadband deployment. Incumbent LECs in the United States plainly remain dominant in the provision of access to last-mile wireline broadband connections. To address this bottleneck, XO urges the FCC to ensure that all competitive providers have a reasonable opportunity to obtain efficient access to these

²⁰ *Id.* at 12.

²¹ XO Broadband NOI Comments at 5-6.

²² 47 U.S.C. §§ 251, 252.

²³ Berkman Center Study at 11.

²⁴ *Id.*

UNEs on a non-discriminatory basis in areas where competing alternatives are not available. Given the Berkman Center Study findings, the FCC should recommit to implementing a rigorous policy requiring incumbent LECs to provide access to unbundled network elements that competitors need to offer their own broadband services, and should work to ensure that those incumbent LECs do not escape their unbundling obligations through forbearance proceedings or other regulatory mechanisms. This approach is consistent with the pro-competitive goals of the 1996 Act as well as the newer statutory objectives of promoting broadband penetration, fostering the deployment of innovative, high-quality broadband services at affordable rates, and restoring the United States' leadership position in global broadband deployment and adoption.

Respectfully submitted,

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