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

In the Matter of	)	
	)	
Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable To Retirement of Copper Loops and Copper Subloops	)	RM-11358
	)	
AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition	)	GN Dkt. No. 12-353
	)	
Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution	)	

COMMENTS OF EARTHLINK, INTEGRA, AND TW TELECOM

Pursuant to the Commission's *Public Notice* in the above-captioned proceedings,[1] EarthLink, Inc. ("EarthLink"), Integra Telecom, Inc. ("Integra"), and tw telecom inc. ("tw telecom") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these comments on the January 25, 2013 request filed by TelePacific, ACN, Level 3, TDS Metrocom, and TDI (collectively, "TelePacific *et al*.") to refresh the record and make certain changes to the Commission's copper retirement rules.[2]

[1] *See* Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission's Copper Retirement Rules, Public Notice, DA 13-147 (rel. Feb. 4, 2013) ("*Public Notice*").

[2] *See* Letter from Eric J. Branfman, Counsel for TelePacific *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-188, GN Dkt. Nos. 09-51, 12-353 & 13-5, RM-11358 (filed Jan. 25, 2013) ("Request").

I. INTRODUCTION

In their Request, TelePacific *et al*. urge the Commission to "update its copper retirement rules to preserve and promote affordable broadband over copper."[3] The Joint Commenters support this goal. As discussed below, competitive access to incumbent LEC copper loop facilities has yielded a number of significant benefits for competition and consumer welfare in the business broadband market. Accordingly, the Commission should, consistent with TelePacific *et al.*'s proposal, reform its copper retirement policies to safeguard competitors' access to this key input.

It is important, however, that the Commission consider the preservation of copper loops as part of a comprehensive reform of its policies governing wholesale access to last-mile connections to business customers. This is because reform of the Commission's copper retirement rules, while important, is insufficient by itself to ensure competition in the provision of business broadband services. In particular, as the Joint Commenters have previously explained, the Commission should adopt rules requiring incumbent LECs to provide competitors with access—on reasonable rates, terms, and conditions—to (1) conditioned copper and dark fiber loops, or alternatively, (2) packet-mode loops (*i.e.*, fiber loops and the packet-mode capabilities of hybrid fiber-copper and copper loops).[4] It is critical that competitors have regulated access to fiber and hybrid fiber-copper loops because, among other things, (1) there are technical limitations to providing broadband over copper (*e.g.*, speed limitations based on

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[3] *Id.* at 1.

[4] *See* Comments of Cbeyond, EarthLink, Integra, Level 3, and tw telecom, GN Dkt. No. 12-353, at 14-15 (filed Jan. 28, 2013); Letter from Thomas Jones, Counsel for Cbeyond, EarthLink, Integra, and tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 *et al.*, at 5 (filed Dec. 4, 2012).

distance from the central office),[5] (2) copper is unavailable in many suburban areas because incumbent LECs have replaced it with fiber or failed to maintain it,[6] and (3) there are substantial economic and operational barriers to competitive deployment of fiber.[7] A holistic policy approach to last-mile access (of which copper retirement policy reform is one part) will not only ensure that competitors can continue serving existing customers in a packet-mode environment, but will also enable competitors to expand the availability and improve the quality of the broadband services they offer to businesses of all sizes throughout the United States.[8]

II. COPPER REMAINS A VITAL INPUT FOR THE PROVISION OF BROADBAND SERVICES TO SMALL AND MEDIUM-SIZED BUSINESSES.

While incumbent LECs are replacing copper with fiber and competitive LECs have been self-deploying fiber wherever possible, incumbent LEC copper facilities remain a vital input for

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[5] *See, e.g.*, Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Dkt. No. 09-223, at 18-19 (filed Nov. 16, 2009) ("Cbeyond Petition"); XO Communications, "Carrier Ethernet Services," *available at* http://www.xo.com/SiteCollectionDocuments/carrier-services/transport-services/PS_Ethernet_Services.pdf.

[6] *See, e.g.*, Cbeyond Petition at 18-19.

[7] The Commission has repeatedly made this finding. *See, e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶¶ 84, 90 (2010) ("*Phoenix Order*"); *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, ¶¶ 86-91 (2003) ("*TRO*"); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶¶ 149-154 (2005).

[8] *See, e.g.*, Comments of Cbeyond, Inc., Integra Telecom, Inc., MegaPath, Inc., Covad Communications Company and tw telecom inc., WC Dkt. No. 10-188, at 16-36 (filed Oct. 15, 2010) ("Cbeyond *et al*. Business Broadband Comments"); Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51, at 1-8 (filed Dec. 22, 2009).

the provision of broadband services to small and medium-sized businesses ("SMBs"). As TelePacific *et al.* observe, "providers that intend or desire to migrate to fiber will continue to make substantial use of copper for the foreseeable future."[9] Indeed, competitors are utilizing copper infrastructure to bring numerous benefits to American businesses.

First, competitors continue to combine copper loop inputs with investments in their own network equipment to deploy innovative and affordable business broadband services. In the 1990s, competitive LECs were at the forefront of bringing DSL technology to businesses.[10] Likewise, today, as the incumbent LECs themselves have recognized, competitive LECs are leading the deployment of Ethernet-over-copper services to businesses.[11] For example, competitors such as Integra are now offering businesses Ethernet-over-copper services at speeds above 50 Mbps.[12]

Moreover, the Ethernet-over-copper services that Integra, EarthLink, and numerous other competitive LECs offer SMBs allow those businesses to realize many of the same efficiencies of

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[9] Request at 8.

[10] *See id.* (explaining how "the nascent competitive industry brought to market advanced xDSL technologies that had gathered dust on the ILECs' shelves for years").

[11] *See* CenturyLink Comments, WC Dkt. No. 05-25, at 29-32 (filed Feb. 11, 2013); *see also* Sean Buckley, "Competitive carriers hone their Ethernet over Copper skills," *FierceTelecom*, May 3, 2011, *available at* http://www.fiercetelecom.com/special-reports/competitive-carriers-hone-their-ethernet-over-copper-skills (describing how "a growing group of competitive service providers . . . have [sic] been driving the EoC market with ongoing deployments in their network footprints").

[12] *See* Press Release, Integra Telecom, "Integra Boosts Network Bandwidth with Symmetrical 60-Mbps Ethernet Over Copper Access," Nov. 6, 2012, *available at* http://www.integratelecom.com/about/news/Pages/Integra-Boosts-Network-Bandwidth-with-Symmetrical-60-Mbps-Ethernet-Over-Copper-Access.aspx; *see also* Sean Buckley, "XO ups EOC ante with new 100 Mbps speeds," *FierceTelecom*, Nov. 7, 2012, *available at* http://www.fiercetelecom.com/story/xo-ups-eoc-ante-new-100-mbps-speeds/2012-11-07 ("*XO ups EOC ante*").

Ethernet technology as enterprise customers.[13] These efficiencies include, among others, (1) the delivery of higher bandwidth at significantly lower cost per bit than T1 services; (2) scalability to easily increase bandwidth without the need to deploy new equipment; and (3) the ability to converge voice, data, and cloud services over a single connection that is simpler and less costly to manage.[14]

Second, this investment and innovation by competitors continues to spur competition. Just as incumbent LECs eventually responded to competitive LECs' DSL offerings with their own DSL offerings,[15] incumbent LECs such as CenturyLink are now responding to competitors' Ethernet-over-copper services with their own such offerings.[16]

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[13] *See, e.g.*, "Integra Telecom covers its retail, wholesale bases with EoC and EoFiber," *FierceTelecom*, May 3, 2011, *available at* http://www.fiercetelecom.com/special-reports/competitive-carriers-hone-their-ethernet-over-copper-skills/integra-telecom-covers-i (explaining how Integra leverages Ethernet-over-copper "to provide the same level of service that we're providing to enterprise customers at attractive price points and similar functionality to the SMB marketplace as well") (internal quotations omitted).

[14] *See, e.g.*, Press Release, Integra Telecom, "Integra Telecom Expands Ethernet Over Copper Network to Deliver Enterprise-Grade Services," May 30, 2012, *available at* http://www.integratelecom.com/about/news/Pages/Integra-Telecom-Expands-Ethernet-Over-Copper-Network-to-Deliver.aspx ("Integra May 30, 2012 Press Release"); MegaPath, "The Advantages of Business Ethernet for Business Customers," *available at* http://www.megapath.com/megapath/assets/File/PDF/WhitePapers/WP_BusinessEthernet.pdf; Comments of XO Communications, LLC, WC Dkt. No. 10-188, at 3-4 (filed Oct. 15, 2010).

[15] *See, e.g.*, Robert W. Willig, "Investment is Appropriately Stimulated by TELRIC," at 6 (Dec. 2003), *attached to* Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03-173 (filed Dec. 5, 2003) ("With the advent of competitive cable modem technology in the late '90s and the ability of CLECs to use UNEs to provision their own competitive DSL services, ILEC investment in DSL technology exploded in response.").

[16] *See, e.g.*, "For CenturyLink, EoC breeds business opportunities," *FierceTelecom*, Feb. 7, 2012, *available at* http://www.fiercetelecom.com/special-reports/stepping-eoc-plate-incumbent-telcos-take-swing/centurylink-eoc-breeds-business-oppor ("To better target small to medium business (SMB) clients with lower speed Ethernet services, the ILEC has expanded its Ethernet over Copper (EoC) rollout to about 334 new COs in the Qwest markets."); *id.* ("As CenturyLink looks to strengthen its presence in its legacy Qwest markets where it has to contend with growing

Third, competitors have leveraged copper infrastructure to undertake faster and wider deployment of business broadband services than would otherwise be possible given (1) the substantial economic and operational barriers to competitive deployment of fiber,[17] and (2) the lack of access to incumbent LEC packet-mode loops on reasonable rates, terms, and conditions.[18] For instance, while copper is unavailable in many suburban areas as a result of incumbent LECs' copper retirement or failure to maintain copper, and Ethernet-over-copper technology is subject to distance limitations,[19] Integra and other competitors have invested in central office upgrades to bring Ethernet services to as many businesses as possible that are not within reach of their fiber networks.[20]

In addition, the ubiquity of copper has allowed competitors to deploy broadband services to SMBs in rural areas that they could not otherwise serve. As the Small Business Administration has explained, "[m]any small carriers rely exclusively on legacy copper networks

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competition from aggressive CLECs like Integra Telecom and cable operators like Cox Business, the service provider will likely use EoC as a [sic] option to upsell existing customers or new customers that want higher speed data services.").

[17] *See supra* note 7.

[18] *See, e.g.*, Cbeyond Petition at 6-10 (describing the FCC's decisions deregulating packet-mode last-mile facilities); Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Dkt. No. 05-25, at 9-18 (filed Nov. 2, 2012) (same).

[19] *See supra* note 5.

[20] *See* Integra May 30, 2012 Press Release at 1 (discussing expansion of Integra's Ethernet-over-copper network to more than 120 central offices in its 11-state footprint); Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51 *et al.*, Attachment at 3 (filed Feb. 25, 2013) (stating that MegaPath has "700 CO's [sic] enabled for Ethernet [over copper] access"); *XO ups EOC ante* at 1 ("When it completes this latest network expansion, XO will have EoC enabled in over 799 LSOs.").

to offer a variety of affordable services to small business broadband customers that would not otherwise be available to them, particularly in non-urban areas."[21]

Fourth, access to copper infrastructure has allowed competitors to enter new markets and provide SMBs with an alternative to the incumbent LEC-cable operator duopoly. Historically, most SMBs have not found incumbent LECs' and cable operators' offerings to meet their needs and competitive LECs have filled the gap with their own service offerings.[22] That trend continues today. For instance, competitors' Ethernet-over-copper offerings can meet the demands of SMBs that seek more reliable services than DSL and cable modem offerings but cannot afford the broadband services marketed to enterprise customers.[23] Moreover, the availability of competitive alternatives can yield additional benefits for these SMB customers. In particular, as the Commission has recognized, supracompetitive pricing is less likely in markets that have more than two firms.[24]

III. THE COMMISSION SHOULD UPDATE ITS COPPER RETIREMENT POLICIES TO PROMOTE THE CONTINUED AVAILABILITY OF INNOVATIVE AND AFFORDABLE COMPETITIVE BROADBAND SERVICES TO SMBs.

The Commission's existing copper retirement policies threaten competitors' ability to widely deploy innovative and affordable broadband services to SMBs. This is because the Commission's current rules permit incumbent LECs to remove copper loops even where they are

[21] Comments of the Office of Advocacy, Small Business Administration, GN Dkt. No. 10-188, at 5 (filed Oct. 15, 2010).

[22] *See* Cbeyond *et al*. Business Broadband Comments at 7, 10-12.

[23] *See id.* at 11-12.

[24] *See Phoenix Order* ¶¶ 29-30.

being used or could be used by a competitive LEC to provide service.[25] In other words, these policies give incumbent LECs uneconomic and anti-competitive incentives to retire copper before the end of its useful life. The Commission should therefore update its copper retirement rules to preserve competitors' access to this valuable input. There is no question that the Commission has the authority to do so.[26] In fact, as demonstrated above, updated rules will advance the goals of Section 706 of the 1996 Act.[27]

In their Request, TelePacific *et al.* propose a number of appropriate reforms toward this end. The Joint Commenters support these proposed changes, especially those (1) permitting removal or disabling of copper only upon an affirmative Commission finding that such action is in the public interest; (2) "clarify[ing] that retirement does not refer to the physical removal of copper, and that any action short of that does not terminate the obligation to provide unbundled access to loop elements over copper"; (3) separately defining "removal" and "permit[ing] removal only in a very narrow range of circumstances"; and (4) applying the copper retirement rules to the feeder portion of the loop.[28] As TelePacific *et al.* state, the Commission should suspend its current copper retirement rules while it adopts these rule changes.[29]

Finally, the Joint Commenters agree that the Commission should reject USTelecom's request in its pending forbearance petition that the notice time period for retiring copper loops begin when incumbent LECs notify interconnecting carriers rather than when the Bureau issues a

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[25] *See TRO* n.847.

[26] *See* Request at 15-20.

[27] *See* 47 U.S.C. § 1302(a) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans").

[28] Request at 21-22.

[29] *See id.* at 20.

public notice.[30] Given the numerous public interest benefits yielded by competitive access to incumbent LEC copper facilities, the last thing the Commission should do is give competitors even less time to respond to incumbent LEC network changes.

IV. CONCLUSION

For the foregoing reasons, the Commission should adopt TelePacific *et al.*'s copper retirement proposal as part of a comprehensive reform of its policies governing last-mile access to business customers.

Respectfully submitted,

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[30] *See* Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations, WC Dkt. No. 12-61, at 56-59 (filed Feb. 16, 2012).