

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

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

**REPLY COMMENTS OF XO COMMUNICATIONS, LLC
AND
BROADVIEW NETWORKS, INC.**

Lisa R. Youngers
XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2258

Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW – Suite 400
Washington, DC 20007
Telephone: (202) 3342-8400
Facsimile: (202) 342-8451

Charles Hunter
Broadview Networks, Inc.
800 Westchester Avenue – Suite N-501
Rye Brook, NY 10573
Telephone: (914) 922-7589

Attorney for XO Communications, LLC and
Broadview Networks, Inc.

March 20, 2013

SUMMARY

The comments filed in response to the Public Notice make clear the widespread use of this nation's copper network facilities to provide innovative advanced broadband capability, not only by competitive local exchange carriers ("CLECs"), but incumbent local exchange carriers ("ILECs") as well. Even as ILECs and competitive providers on an increasing basis deploy fiber, copper continues to play an important role – and the evidence suggests a growing role – in making available broadband service to business and enterprises, both in areas where fiber is deployed and those where it is not. In brief, the existing copper facilities constitutes a valuable national asset which the Commission should explore how best to preserve, even after and ILEC determines that it will not use copper at a given location to support its own retail services.

The importance of copper to provide advanced communications capability was simply not fully comprehended by the Commission at the time of the *Triennial Review Order*, and the *Order* can no longer serve as a reliable guide. By the same token, the Commission plainly concluded in the *Triennial Review Order* that requesting carriers could obtain unbundled *copper* loops for broadband as well as narrowband services. The effective and innovative use of copper to support advanced broadband services by XO, Broadview, and others is not in tension with the *Triennial Review Order*, as AT&T implies, but fully in accord with it.

Now that the significance of copper to support advanced telecommunications capabilities is more in evidence, the Commission should suspend the current copper retirement rules before they allow further deterioration of this national resource. In their place, the Commission should adopt on an interim basis measures set forth in the January 25, 2013, Refresh Letter of US TelePacific Corp. and others, as discussed further in the initial comments of XO and Broadview.

At the same time, the Commission should request details from the ILECs regarding the location of copper facilities and infrastructure, as well as their plans and projections regarding the same. Until the Commission, using this information and the information submitted in this record regarding current the role of copper in meeting the needs of customers in the advance communications marketplace, is able to complete a rulemaking adopting new permanent copper retirement rules, the Commission should refrain from supplanting the foregoing interim measures. Such action will best preserve the nation's copper network resources with minimal or no further erosion – and no cognizable prejudice to ILECs – while the Commission deliberates.

In preserving copper infrastructure after an ILEC seeks to “retire” it, XO and Broadview are mindful that the Commission must, of course, ensure that the ILEC is adequately compensated for continuing to make the copper available. TELRIC-based pricing ensures that ILECs will continue to receive adequate compensatory payments. The case has not been satisfactorily made by the ILECs to abandon the use of TELRIC to price unbundled copper loops made available on a wholesale basis, especially as all ILECs still make heavy use of copper and the transition of ILECs away from copper to provide their retail services will not be brief.

AT&T's reliance on the Commission's lack of authority to require ILEC construction of new facilities to argue that the Commission also lacks authority to require maintenance of existing ILEC network facilities so that competitors can use them on an unbundled basis is misplaced. The Commission has authority under Sections 201(b), 251(c)(3), 251(d)(2), and 706 of the Communications Act to adopt rules requiring ILECs to make already-built network facilities available, provided they are adequately compensated.

XO and Broadview take issue with the suggestion that competitors have the same incentives to build out fiber as do incumbent local exchange carriers. While that may be true in

specific locations, it is hardly true as a general matter. Although as a general matter ILECs have a greater capacity to build out fiber networks in a given area, in most cases, only after a CLEC establishes a critical mass of customers in a location, *i.e.*, through the use of unbundled copper to provide EoC, can a CLEC realistically be expected to consider deploying fiber to that location.

The Commission should not give any credence to ILEC “promises” or “predictions” about future wholesale alternatives in deciding on what the appropriate regulatory framework should be at this time absent details and commitments. Without any details regarding these alternatives, neither the Commission nor competitors can evaluate whether meaningful and comparable alternatives will actually ever be made available. The Commission recognized in its *Phoenix Forbearance Order* the potential pitfalls when relying on the Commission’s predictive power in implementing significant regulatory changes.

TABLE OF CONTENTS

	<u>Page</u>
A. The Copper Infrastructure Represents a Valuable National Asset Which the Commission Should Preserve through a Well-Balanced Regulatory Framework	2
B. A New Look at the Copper Retirement Rules under Present Circumstances Is Justified and Not Foreclosed by the <i>Triennial Review Order</i>	4
C. Until the Commission Acts Based on a Full Record, the Current Copper Retirement Rules Should Be Suspended and Replaced with Pro-Competitive Interim Measures	8
D. The Commission Must Take a Close Look at Copper Network Facilities and ILEC Plans before It Can Choose a Permanent Regulatory Framework That Advances the Public Interest.....	11
E. Absent Specific and Widespread Evidence, the Commission Should Give Little or No Credence in Its Deliberations That the ILECs Will Provide Wholesale Alternatives to Copper.....	14
F. Conclusion	17

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

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

**REPLY COMMENTS OF XO COMMUNICATIONS, LLC
AND
BROADVIEW NETWORKS, INC.**

XO Communications, LLC (“XO”), and Broadview Networks, Inc. (“Broadview”) by their attorneys, hereby file their reply to the comments responsive to the February 4, 2013, Public Notice released in the above-referenced proceedings.¹

¹ See Public Notice, Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission’s Copper Retirement Rules, WC Docket No. 12-353; RM-11358, DA 13-147 (rel. Feb. 4, 2013). In the Public Notice, the Wireline Competition Bureau sought comments on the request of Mpower Communications Corp., U.S. TelePacific Corp.; ACN Communications Services, Inc.; Level 3 Communications, LLC; TDS Metrocom, LLC and Telecommunications for the Deaf and Hard of Hearing, Inc. (collectively “TelePacific *et al.*”) that the Commission “refresh the record” developed in RM-11358 in which the Commission is considering certain petitions to update the copper retirement rules See Letter of US TelePacific Corp. *et al.* Requesting Commission to Refresh Record and Take Expedited Action to Update Copper Retirement Rules, WC Docket Nos. 10-188, 12-353; GN Docket Nos. 09-51, 13-5; RM-11358 (filed Jan. 25, 2013) (“Refresh Letter”).

A. The Copper Infrastructure Represents a Valuable National Asset Which the Commission Should Preserve through a Well-Balanced Regulatory Framework

As the Commission determines how to move forward following the refreshing of the record in response to the Public Notice, XO and Broadview urge the Commission suspend the current copper retirement rules and, on an interim basis, replace them with interim measures that, as a whole, shift the burden to ILECs wishing to retire copper.² In making that determination, the Commission should give primary weight to the invaluable resource represented by the copper facilities and the considerable public interest benefits that continue to flow from that resource.

The record in this case makes abundantly clear that the uses of this nation's copper network facilities by competitive local exchange carriers ("CLECs") as well as incumbent local exchange carriers ("ILECs") are widespread and innovative. These uses advance two principal objectives of the Commission: one, consumers benefit through the availability of competitive alternatives for broadband and other services and, two, competitors of the ILECs that cannot currently justify putting in their own fiber plant to serve a location are able, through access to copper facilities, to cost-effectively provide service, promoting a robust competitive marketplace. In short, the copper facilities constitute a national asset³ which the Commission should explore how best and equitably to preserve for use. Even as ILECs and competitive providers on an increasing basis deploy fiber facilities, the record demonstrates that copper

² See Comments of XO and Broadview at 13-15. Unless otherwise stated herein, references to comments of a party refer to March 5, 2013, initial comments filed in the above-captioned proceedings.

³ This resource has been paid for largely by the ILECs' residential, business, institutional, and wholesale customers during periods when the ILECs retained overwhelming market share and were, by any measure, the dominant providers in their markets.

continues to play an important role – and the evidence suggests a growing role – in making available broadband service to business and enterprises that do not yet have access to fiber and, even for those that do, a cost-effective competitive alternative to fiber-based broadband services.

ILECs contend that if the current copper retirement rules are modified in the way competitors advocate, they will be forced to maintain two distinct networks.⁴ This is clearly an overstatement because, in point of fact, there is really only one network. That single network, the public communications network, deploys on an integrated basis both copper and fiber facilities. In some cases, customers are served through a combination of both. For example, channel terminations, *i.e.*, loops, may be copper, but the interoffice network may be fiber. Or, in some cases, a single loop may be a combination of copper (distribution and drop) and fiber (feeder). In addition, even when an ILEC deploys fiber, it does not necessarily “flash cut” all its customers to that facility but rather permits many to continue to use copper plant. In other words, there is not an “either or” choice to be made, as networks are and for some time to come will include both fiber and copper. Recognizing that, and properly considering the valuable national asset that copper represents, the Commission must determine under what circumstances, and on what terms, the copper network facilities will continue to be made available for use by competitors – even as ILECs choose to move some retail service customers to fiber facilities – so as to promote robust broadband competition and consumer choice.

In preserving copper network facilities once an ILEC seeks to “retire” it, the Commission must, of course, ensure that the ILEC is adequately compensated for continuing to make the copper available. In fashioning rules to maximize the benefit of the existing copper facilities, the Commission must get the pricing of copper channel terminations right, ensuring

⁴ See Comments of Verizon and Verizon Wireless (“Verizon”) at 10, 17.

that ILECs continue to receive compensatory payments while balancing that against the public interest in promoting competition and cost effective consumer choices. XO and Broadview are sensitive that, theoretically, ILECs would incur materially increased maintenance costs *if there was a flash cut* from today's network to an all-fiber network and ILECs were required to maintain the copper plant that exists today. At the same time, XO and Broadview are equally mindful that, in reality, there will *not* be a flash cut to an all-fiber network and, more importantly, copper will remain available in most places for some time to come.⁵ The current Total Element Long Run Incremental Cost-based ("TELRIC-based") pricing regime for these facilities adequately compensates the ILECs in the current circumstances.

B. A New Look at the Copper Retirement Rules under Present Circumstances Is Justified and Not Foreclosed by the *Triennial Review Order*

In its comments, AT&T tries to transmute the Commission's decision ten years ago in the *Triennial Review Order* into something it was not.⁶ There, based on the facts and circumstances before the Commission at the time, the Commission decided to require unbundling on a limited basis when an ILEC replaced a copper loop with a fiber-to-the-home ("FTTH") loop or a fiber-to-the-curb ("FTTC") loop. AT&T points to the fact that, in the *Triennial Review Order*, the Commission decided not to require the unbundling of the broadband portion of an ILEC's fiber network. AT&T suggests that this lends some support for the notion

⁵ See Comments of Verizon at 14 (recognizing that there will be copper in the network for the foreseeable future). Indeed, at the March 18, 2013, presentations to the Technology Transitions Policy Task Force, the Verizon witness, Tom McGuire, indicated that, in the past year, Verizon moved only 230,000 of its approximately 23 million customers to fiber-based services, a rate which confirms the slow pace at which the transition is occurring.

⁶ See *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

that, as a general matter, the Commission “refused to impose unbundling obligations for broadband-oriented facilities” as a general matter.⁷ In other words, AT&T appears to argue that the fact that competitors may seek to preserve copper to provide Ethernet over Copper (“EoC”) is not something the Commission should, or even can, take into account when reviewing its copper retirement rules.

AT&T seeks nothing less than for the Commission to narrow the import of the *Triennial Review Order* regarding unbundling of copper loops. While AT&T correctly summarizes in brief the Commission’s decision in that *Order* regarding FTTC and FTTH loops, the Commission plainly concluded that requesting carriers could obtain unbundled *copper* loops for broadband as well as narrowband services.⁸ For this reason alone, copper facilities are properly considered “broadband-oriented facilities.” In addition, the past decade since the *Triennial Review Order* has demonstrated how effectively copper may be used to provide businesses and enterprises with very high speed broadband services, far beyond what the Commission could have anticipated in 2003. Significantly, this development and the accompanying innovations are not in tension with the *Triennial Review Order*, as AT&T implies, but fully in accord with it.

Indeed, the role that copper has played and continues to play to support the competitive provision of cost-effective broadband services, even where the ILECs have built out fiber, argues for the suspension and reconsideration of the copper retirement rules.⁹ The

⁷ Comments of AT&T at 3.

⁸ See *Triennial Review Order*, ¶ 248.

⁹ XO and Broadview do not in these replies make the argument for expanded unbundling obligations for ILEC fiber networks *per se*. However, the Commission should, as part of the regulatory framework that will guide the industry as it moves toward an all-IP public communications network, consider the need for appropriate unbundling obligations of

Commission should consider ways in which the valuable asset of the copper facilities can be preserved without cognizable injury to incumbent LECs *or their competitors*. The Commission could not have anticipated that EoC would develop as it has, and indeed even ILECs are making use of this innovation to provide broadband services.¹⁰ In the *Triennial Review Order*, the Commission appeared to have only foreseen the use of copper loops for simpler 2-wire xDSL services.¹¹ Today's EoC services are far more advanced than those services, and the record developed in response to the *Refresh Letter* suggests that additional innovations based on use of copper network facilities are still being developed.¹² Further, the growth of EoC has been nothing short of explosive, and new EoC additions are markedly outstripping new fiber deployments and are likely to continue to do so for the next several years, according to a study performed by Infonetics Research.¹³ The importance of copper to provide advanced communications capability was simply not fully comprehended by either the Commission or even the industry in the period leading up to the *Triennial Review Order*.

channel terminations (*i.e.*, loops and subloops) not only of copper facilities but also fiber facilities. *See, e.g.*, Comments of XO in GN Docket No. 12-353 (Jan. 28, 2013).

¹⁰ As EarthLink Inc., Integra and tw telecom observed in their initial comments, CenturyLink is “now responding to competitors’ Ethernet-over-copper services with their own such offerings.” Comments of EarthLink, Inc., Integra Telecom, Inc., and tw telecom inc. (“EarthLink *et al.*”) at 5. *See also* Comments of Overture Networks at 4 (discussing other ILECs’ use of EoC); Comments of TEXALTEL at 3 (same).

¹¹ *See Triennial Review Order*, ¶ 276 (“... copper loops enable carriers to deliver xDSL-based broadband services ...”).

¹² *See* Comments of XO and Broadview at 5-7; *see also, e.g.*, Comments of ADTRAN, Inc. at 2-5 (discussing VDSL, bonding, vectoring, and other innovations delivering speeds of up to 100 Mbps and more “focused on copper distribution where the economics for fiber optics and other technologies are the most challenging.”); Comments of EarthLink *et al.* at 4-6.

¹³ *See* Comments of Overture Networks at 4-5 (discussing Infonetics Research results).

Now that the continued relevance of copper in the emerging broadband world is better understood, the significance of EoC and other copper-based innovations squarely supports a fresh look at the copper retirement rules and, more generally, how to preserve the important asset existing copper facilities constitute. Without a doubt, copper is established as one of the industry's primary tools to bring businesses and enterprises advanced communications capabilities.¹⁴ Even if copper's role in supporting competitive provision of high-speed broadband and other advanced communications capabilities is a transitional one, that transition is not likely to be brief. The Commission needs to regulate *today* in acknowledgement of that reality, which is not what was apparently before it in 2003 when the Commission likely held different views about the transition.

Just as the Commission recognized in its more recent forbearance cases involving Qwest's petition for relief from unbundling obligations in the Phoenix Metropolitan Statistical Area, in which it pulled back from its earlier *Omaha Forbearance Order* in light of changed circumstances, the Commission should approach the copper retirement rules in a way reflecting current realities.¹⁵ The present role that copper plays in supporting the availability of

¹⁴ While AT&T and other ILECs ostensibly argue that advanced communications capabilities cannot refer to copper-based services, the statute's definition of the term, "advanced communications capability" is expressly technology neutral. 47 U.S.C. § 1302(c)(1) ("using any technology").

¹⁵ In the *Phoenix Forbearance Order*, the Commission emphasized the dangers of making predictions without a sufficient factual basis, especially one that incumbent ILECs "even if not required to offer UNEs, would have an incentive 'to make attractive wholesale offerings,'" as it had in its *Omaha Forbearance Order*. *Petitions 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, ¶ 33 (2010) ("*Phoenix Forbearance Order*") (citing *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19,415 (2005) ("*Omaha Forbearance Order*") *aff'd sub nom Qwest Corporation v. FCC*, 689 F.3d 1214 (10th Cir. 2012)). The Commission explained how, in hindsight, its

competitive broadband services is sufficient for the Commission to reach different conclusions than it did in 2003. Indeed, there is not as great an obstacle to the Commission changing direction in light of current circumstances as AT&T and other ILECs argue exists as a result of the findings in the *Triennial Review Order*. As the U.S. Court of Appeals for the District of Columbia Circuit recently explained in affirming the Commission's 2011 pole attachment order, the Commission, in view of current circumstances, faces a relatively modest hurdle in refashioning an earlier regulatory framework.¹⁶

C. Until the Commission Acts Based on a Full Record, the Current Copper Retirement Rules Should Be Suspended and Replaced with Pro-Competitive Interim Measures

As explained above, the current importance of copper in advancing, at this time, the Commission's broadband objectives is beyond question. Based on the significance of these

predictions regarding competition in the Omaha, Nebraska, market had proven to have been without factual basis, and there is "little evidence, either in the record or of which we are aware, that the BOCs or incumbent LECs have voluntarily offered wholesale service at competitive prices once regulatory requirements regarding wholesale services were eliminated." *Phoenix Forbearance Order*, ¶ 34. In short, the Commission recognized the perils of regulating based on predictions of the future rather than present facts, an approach it abandoned in the *Phoenix Forbearance Order* and subsequent decisions regarding ILEC requests for forbearance from unbundling requirements.

¹⁶ See *American Electric Power Service Corporation, et al. v. FCC*, No. 11-1146, at 14 (D.C. Cir. Feb. 26, 2013) (in promulgating amended rules, Commission faces "modest demands for changing its policy") ("*American Electric Power Service Corporation*") aff'g *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011). In *American Electric Power Service Corporation*, the Commission applied certain portions of Section 224 of the Act to ILECs for the first time after more than a decade after applying the statute differently, and materially modified the telecommunications carrier pole attachment rate formula implementing applicable portions of Section 224. The Court relied heavily on *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), which underscored that where the FCC modifies its regulations, the Commission "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better [under the circumstances]."

advanced communications capabilities, TelePacific *et al.* in the *Refresh Letter*, XO and Broadview in their comments, and others urge the Commission to suspend the current copper retirement rules and replace them with interim measures that, as a whole, shift the burden to ILECs wishing to retire copper.¹⁷

AT&T contends that the Commission lacks authority to maintain existing copper network facilities so that competitors can use them in the form of unbundled network elements (“UNEs”).¹⁸ AT&T bases this position in significant part on its observation that the Eighth Circuit found that the Commission lacks authority to require ILECs to construct network elements for the purposes of offering them on an unbundled basis.¹⁹ However, AT&T’s conclusion regarding maintenance of *existing* network elements does not follow from this premise. This is especially the case because of the value of the copper resource already built, and largely paid for by ratepayers, which is hardly the case with facilities that have not yet been and may never be constructed. Indeed, XO and Broadview submit that a primary effect of the local competition provisions of the Telecommunications Act of 1996 is that local network facilities represent something of a national asset to be made available (with adequate compensation to the ILECs) to foster competition for the benefit, ultimately, of the public at large. That is no less true today than in 1996, and the lack of authority to require ILEC construction of new or superior facilities does not translate into a lack of authority to preserve

¹⁷ See, e.g., *Refresh Letter* at 20-22; Comments of XO and Broadview at 13-15, Comments of EarthLink *et al.* at 8. As XO and Broadview explained, the interim retirement rules must extend to the replacement of copper feeder with fiber because, once the feeder is replaced, even if the distribution and drop remain copper, the entire loop becomes unusable for EoC, depriving competitors of an important input to offer competitive, cost-effective broadband services.

¹⁸ See Comments of AT&T at 12-14.

¹⁹ See *id.* at 13-14.

and make available already-constructed facilities on an unbundled basis. Rather, the Commission has authority under Sections 201(b), 251(c)(3), 251(d)(2), and 706 of the Communications Act to adopt rules requiring ILECs to make existing copper facilities available on an unbundled basis and to preserve existing copper facilities for that purpose.²⁰

XO and Broadview recognize that ILECs must be compensated for making network facilities available to competitors on an unbundled basis, whether copper or otherwise. As noted above, XO and Broadview submit that adequate compensation continues to be available through the TELRIC pricing regime. There is no need to upend the current pricing regime for UNEs, especially as the ILECs continue to make expansive use of copper facilities to provide retail as well as wholesale services. The ILECs should continue to be compensated through rates conforming to the Commission's current pricing regulations. If the ILECs believe that copper retirement necessitates the adjustment of the loop costs based on TELRIC rules, they are free to seek approval of new prices for unbundled loops from the State commissions in light of changes in demand, changes in maintenance costs, and current utilization levels.²¹ Because copper will

²⁰ See 47 U.S.C. §§ 201(b) (the Commission's general rulemaking authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"), 251(c)(3) (the unbundling obligations of ILECs), 251(d)(2) (Commission authority to implement unbundling obligations), and 1302 (Commission authority to take regulatory action to promote deployment of advanced telecommunications capabilities). See also 47 U.S.C. § 271 (unbundling obligations of Regional Bell operating Companies independent of Section 251(c)(3)).

²¹ The preservation of copper facilities will not deprive ILECs of the flexibility to provide their customers with broadband services using the medium they see fit, contrary to the repeated assertions, for example, of Verizon, in its comments. See Comments of Verizon at 9-11. An ILEC making existing copper facilities available to competitors as UNEs will be free to offer fiber-based services in competition with them.

remain in the network for a long time to come, as Verizon acknowledges, TELRIC-based pricing for unbundled copper loops should remain the standard.²²

D. The Commission Must Take a Close Look at Copper Network Facilities and ILEC Plans before It Can Choose a Permanent Regulatory Framework That Advances the Public Interest

The success of technologies like EoC and other innovations as reflected in the record serve as justification for the Commission to suspend the current copper retirement rules and adopt other interim measures. But these facts do not provide a complete basis for the Commission to take *permanent* action. Before the Commission can adopt the correct long-term path in the current circumstances, beyond the interim measures XO and Broadview and others advocate, the Commission needs to know much more about where copper is in the ILEC networks today, what the ILECs' expectations are in the near- and medium-term regarding their continued use of copper as more fiber facilities are introduced by ILECs, and what the various ILECs actually do to the copper facilities when they "retire" them.²³ This is information that is squarely within the possession of the ILECs. By contrast, competitive carriers have only an indirect view as wholesale purchasers.

To date, the rhetoric of the ILECs regarding copper retirement has been at a high level. Much more granularity of detail is needed to understand what regulatory options are reasonably available, can be implemented, and what would serve the public interest. The

²² COMPTTEL observes that use of TELRIC may actually overcompensate ILECs as ILECs come to rely less and less on copper facilities and infrastructure over time. *See* Comments of XO at 10 (citing Declaration of Joseph Gillan, Attachment A to Letter of Karen Reidy to Marlene Dortch, RM-11358 et al, ¶ 17, filed Dec. 7, 2009 ("[T]he existing UNE price would overprice recycled copper facilities because they are designed to reflect the cost to rebuild the network, not merely extend its useful life.")).

²³ As XO and Broadview noted in their initial comments, what constitutes copper "retirement" is not defined in the rules or the Commission's orders and needs to be better articulated. *See* Comments of XO and Broadview at 9, n. 27.

information, of course, may differ considerably from one ILEC to the next. For example, when copper is retired, what physically happens to it? Is it removed or left in place? Do the answers differ for entire copper loops versus copper feeder? If the copper is left in place, is other equipment related to the copper plant removed or decommissioned? If the copper is not removed, what maintenance, if any, is conducted after it is no longer in use? What activities must be undertaken to bring back copper into serviceable condition when it is retired but not removed? How exactly has the presence of legacy copper frustrated investment in fiber facilities, if indeed it has? How do the answers differ for entire copper loops versus copper feeder? How do the answers to the foregoing questions differ in the network facilities used to support mass market services versus business and enterprise customers? These questions merely scratch the surface of the information the Commission will require to prudently regulate continued access to the copper resource in the face of ILEC retirement.

The Commission should not make wholesale policy regarding copper based only on anecdotal evidence received from the ILECs. In the current situation, the competitive industry is completely at the mercy of the ILECs on this matter. The ILECs' discretion under the current retirement rules is largely unbounded. Competitors, as a result, can take little comfort in the statements of Verizon, for example, that copper will remain available in most places.²⁴ The current copper retirement rules, as explained in XO's and Broadview's initial comments, provide scant if any protection to competitors. While competitive providers, such as XO and Broadview,

²⁴ See Comments of Verizon and Verizon Wireless at 14. This is especially true where Verizon has, on other occasions, noted its intentions to "kill the copper." See Transcript, Verizon at Guggenheim Securities Symposium, at p. 8 (June 21, 2012) ("every place we have FiOS, we are going to kill the copper"). See also AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition (filed Nov. 7, 2012) ("AT&T IP Transition Petition") (seeking the freedom to no longer maintain the "legacy network").

are searching for and considering other alternatives, the fact remains that copper at this time remains an extremely important input to their services.

Once the agency better understands the current network and market realities, only then should it make sound regulatory decisions regarding copper preservation and retirement and replace the interim measures advocated by the *Refresh Letter* and competitors in their comments. Indeed, given that missteps in this context promise to have extremely long term consequences – once the copper becomes unavailable to competitors and customers, it likely will remain unavailable permanently in the absence of appropriate regulatory oversight and controls – the Commission cannot afford to delay.²⁵ Otherwise, a nationwide asset that the FCC oversees will be irretrievably reduced in value and utility where it is not simply lost. Any minor delay in the ILEC’s decommissioning plans, however, will have minimal impact on incumbent carriers, but the potential pro-competitive benefits resulting from a more deliberate consideration of policies and regulations surrounding copper retirement will justify whatever marginal effect, if any, occurs. Indeed, given the massive investments that AT&T, Verizon, and other incumbents have made in fiber roll-outs in recent years, far greater in magnitude than the scale of any copper retirement that has taken place, it is difficult to credit that retention of copper facilities acts as any greater deterrent on investment.²⁶

²⁵ XO and Broadview concur with those commenters that ask the Commission to reject the request of USTelecom in its pending forbearance petition that the time period for notices relating to copper loop retirement should begin when ILECs notify interconnecting carriers rather than when the Bureau issues the public notice. *See, e.g.*, Comments of EarthLink *et al.* at 8-9.

²⁶ Indeed, Verizon, for one, has apparently leveraged copper infrastructure to support its roll out of FiOS making its deployment of fiber more cost effective. *See* Comments of COMPTTEL at 9 and n. 31 (California testimony of Verizon explaining that placement of fiber has taken advantage of the existing infrastructure, for example the placement of fiber cables alongside existing copper cables or overlashing fiber on copper

E. Absent Specific and Widespread Evidence, the Commission Should Give Little or No Credence in Its Deliberations That the ILECs Will Provide Wholesale Alternatives to Copper

The ILECs contend that, even as copper goes away, consumers will still have competitive options for Ethernet and other advanced broadband services. Verizon, for example, contends that where copper is no longer available, consumers will still have a range of competitively-provided alternatives for such services.²⁷ By way of further explanation, Verizon contends that incentives will exist for it and other ILECs to offer wholesale solutions to competitors²⁸ While it is at least superficially encouraging for XO and Broadview to hear that these ILECs will consider offering wholesale solutions to competitors absent any detail about what those alternatives would be, it is difficult to gauge how sincere the ILECs are. At a minimum, such alternatives must allow competitors to provide advanced communications capability to their customers comparable to that which they have been providing using copper. To date the experience of XO and Broadview, among others, has been that where UNEs are not available, a competitor cannot economically offer broadband retail or wholesale products using

cables.) (citing Panel Declaration of Richard L. Fowler, John C. Mannix, Louis D. Minion, and Warren E. Thomas on Behalf of Verizon-California, Before the Public Utilities Commission of California, Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Retirement by Incumbent Local Exchange Carriers of Copper Loops and Related Facilities Used to Provide Telecommunications Services, 08-01-005 at ¶ 29, March 14, 2008).

²⁷ See Comments of Verizon at 13. Among the measures that the Commission should adopt is a prohibition against retiring copper that is currently in use by competitors. An ILEC is being adequately compensated for the use of any such copper and, in such circumstances, retirement seems to serve no other purpose than to undermine a competitor and disrupt the services of its customer to the probable benefit of the ILEC. This is especially the case because the retirement of copper should not be confused with the retirement of TDM services, as copper can be used effectively to provide IP-based services as well, such as EoC.

²⁸ *Id.* at 19. Accord Comments of AT&T at 5 (stating that “AT&T is now carefully studying alternatives for providing access to retired copper facilities”).

ILEC-provided fiber facilities.²⁹ In short, the competitor is foreclosed from the market in that location unless and until it can economically justify building its own fiber facilities.

Significantly, the Commission should be aware that carriers such as XO and Broadview are not standing still and putting all of their advanced services eggs in the EoC basket. While continuing to utilize copper where it is available to provide broadband capability, as explained in their initial comments, XO and Broadview are exploring other alternatives, both wholesale and retail. As Verizon correctly notes, EoC is not always available due to the distance of customers from ILEC central offices or the unavailability of sufficient copper loops of the right quality to reach the speeds demanded by the customers.³⁰ The Commission should not take away the wrong impression that competitors such as XO and Broadview refuse to consider other options, including installing or extending their own fiber where economically feasible. But the reality is that such other options often are simply not sufficiently cost-effective to support a business case for competitive services in the absence of UNEs. As TelePacific *et al.* observed in the *Refresh Letter*, “providers that intend or desire to migrate to fiber will continue to make substantial use of copper for the foreseeable future.”³¹

Accordingly, XO and Broadview take issue with the suggestion that competitors have the same incentives to build out fiber as do incumbent local exchange carriers.³² While that may be true in specific locations, it is hardly true as a general matter. As a rule, competitors need to be more selective than the incumbent LECs who remain, on the whole, more entrenched

²⁹ See Comments of XO and Broadview at 10-11; QSI Consulting Inc.: “Viability of Broadband Competition in Business Markets” pp. 3-7 (dated Jan. 21, 2010) (“QSI Report”), Exhibit A attached to Comments of MegaPath.

³⁰ See Comments of Verizon at 16.

³¹ *Refresh Letter* at 8.

³² See, e.g., Comments of AT&T at 9-11; Comments of Verizon at 16-17.

with the end user customers. As MegaPath observed in its comments, “ILECs are able to deploy their broadband fiber networks on a market-by-market basis, in advance of customer demand.”³³ Moreover, the continued availability of copper loops on an unbundled basis may ultimately permit a competitor to achieve a sufficient concentration of customers in a local geographic area to reach a point where it can economically justify deployment of fiber and no longer depend upon an ILEC’s UNEs.³⁴ Absent the availability of the unbundled loops, the competitor is far less likely to reach that juncture and deploy fiber.

In the final analysis, XO and Broadview submit that the Commission should not take into account ILEC “promises” or “predictions” about future wholesale alternatives in deciding on what appropriate regulatory framework should be adopted at this time. Without any details of these alternatives, neither the Commission nor competitors can evaluate whether meaningful alternatives will actually ever exist. As noted earlier, the Commission recognized in its *Phoenix Forbearance Order* the seriousness of the potential pitfalls when relying on the Commission’s predictive power in implementing significant regulatory change.³⁵ And even were the ILECs to provide better descriptions of what wholesale solutions would be made available,

³³ Comments of MegaPath at 3; *QSI Report* at p. 22. The Commission previously has observed that “competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs.” *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 et al, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978, ¶ 237 (2003). While CLECs, as a whole, are not new entrants to the same extent as they were when this statement was made, the principle still holds as ILECs continue, without question, to possess a far greater geographic reach with facilities they have installed than any competitor and their combined retail and wholesale customer base can be expected to have substantially the same effect on network investment decisions as was the case a decade ago.

³⁴ *Accord* Comments of MegaPath at 4.

³⁵ *See* footnote 15, *supra*.

the Commission should examine them carefully to see if they are genuine and comparable offers or whether they being offered with strategic intentions to secure regulatory relief and with strings attached that would result in a net loss to the public interest. Specifically, the Commission should examine if there are strings attached to these alternatives, and do they serve to reduce rather than increase provider flexibility over the *status quo*? The proven valuable nationwide asset represented by existing copper facilities and their utility for bringing competitive broadband services to all sectors of the economy today should not be traded away without concrete assurances that consumers and competition will not be adversely affected.

F. Conclusion

For the foregoing reasons, the ILECs in their comments filed in response to the *Refresh Letter* fail to make the case for declining reconsideration of the current copper retirement rules in light of the tremendous national resource represented by copper and the importance of current leveraging of copper assets by CLECs and ILECs alike. Moreover, the record makes clear the absence of true alternatives where the case to self-provision fiber cannot be justified. As set forth in the initial comments of XO and Broadview, the Commission should suspend the current copper retirement rules to curtail the potential damage to consumers, competition, and the public interest.

At the same time, the Commission should request details from the ILECs regarding copper facilities and infrastructure, as well as their plans and projections regarding the same. Until the Commission, using this information, is able to complete a rulemaking adopting new copper retirement rules in light of current market realities, the Commission should implement the interim measures set forth in the *Refresh Letter* as presented by XO and Broadview in their initial comments. Such action will best preserve the nation's copper facilities assets with minimal or no further erosion while the Commission deliberates.

Respectfully submitted,

XO COMMUNICATIONS, LLC and
BROADVIEW NETWORKS, INC.

A handwritten signature in black ink, appearing to read 'E. Yorkgitis, Jr.', written over a horizontal line.

Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW – Suite 400
Washington, DC 20007
Telephone: (202) 3342-8400
Facsimile: (202) 342-8451

Lisa R. Youngers
XO Communications, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2258

Charles Hunter
Broadview Networks, Inc.
800 Westchester Avenue – Suite N-501
Rye Brook, NY 10573
Telephone: (914) 922-7589

Attorney for XO Communications, LLC and
Broadview Networks, Inc.

March 20, 2013