

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on January 24, 2017

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

CASE 16-C-0288 - Petition of XO Holdings, XO Communications
Services, LLC, and Verizon Communications Inc.
for Approval of a Proposed Transaction Pursuant
to Section 100 of the Public Service Law.

ORDER GRANTING JOINT PETITION
SUBJECT TO CONDITIONS

(Issued and Effective January 25, 2017)

BY THE COMMISSION:

INTRODUCTION

By Joint Petition filed March 18, 2016 (Joint
Petition), XO Holdings, XO Communications Services, LLC (XO),
and Verizon Communications, Inc. (Verizon or the Company)
(collectively, the "Petitioners") request Commission
authorization to transfer XO Holdings' indirect 100% ownership
interest in XO to Verizon. Commission approval was initially
requested under Public Service Law (PSL) §100. However, on June
8, 2016, the Petitioners filed a supplement to their Joint
Petition seeking Commission approval under PSL §99(2) as well.
Under these applicable provisions of the PSL, the Commission
must determine whether the proposed transaction is in the public
interest.

In this Order, the Commission determines that the proposed transaction is expected to produce an incremental net benefit after mitigating certain risks. Accordingly, Commission approval is granted, subject to the conditions discussed below. Absent acceptance of these conditions, however, the public interest standard cannot be met and the Joint Petition is denied.

PETITION

XO Communications Services, LLC and XO Holdings

XO is a Delaware limited liability company certified by the Commission to provide resold and facilities-based telecommunications services in New York.¹ It is a wholly-owned direct subsidiary of XO Communications, LLC, which in turn is a wholly-owned direct subsidiary of XO Holdings, a Delaware general partnership headquartered in Herndon, Virginia. XO is the principal operating company for XO Communications' wireline voice, data and transport businesses. It controls and operates a nationwide Internet Protocol (IP) and Ethernet over Copper (EoC) network, including an inter-city network of approximately 20,000 fiber route miles and more than 5,600 metro fiber route miles.²

In New York, XO offers local and long distance voice, Internet access, cloud connectivity, security, private line, Ethernet, and other private data and network transport services for small and medium-sized business customers as well as other

¹ XO operates under a previously transferred Certificate of Public Convenience and Necessity (CPCN). See, Case 97-C-0993, Petition of NEXTLINK, L.L.C., Order Issuing Certificate of Public Convenience and Necessity (issued September 10, 1997).

² The Joint Petition states that these are not last-mile, fiber-to-the-home facilities and that a small portion of XO's network utilizes copper, which is typically connected to a nearby node that is in turn connected to fiber facilities.

carriers on a managed and wholesale basis. XO does not provide mass-market retail service.

Verizon Communications, Inc.

Verizon is a publicly traded holding company with subsidiaries providing communications services to consumers, businesses, government groups, and other carriers. The wireline voice, data and transport businesses include Verizon New York Inc., the state's largest Incumbent Local Exchange Carrier (ILEC) providing customers with voice, data, and video communications products and enhanced services, corporate networking solutions, data center and cloud services, security and managed network services, network transport services, and local and long distance voice services.

Proposed Transaction

Petitioners state that Verizon is proposing to purchase XO for approximately \$1.8 billion and thereby provide Verizon with access to XO's fiber-based IP and Ethernet networks. In addition, Verizon will lease available XO wireless spectrum, with an option to buy that spectrum by the end of 2018. Under the proposed transaction, XO Holdings will sell all of its interests in XO to Verizon, making XO a wholly owned indirect subsidiary of Verizon. As a result of this parent-level transaction, XO will, according to Petitioners, be transferred in full to Verizon and all entities currently regulated by the Commission will remain subject to the Commission's authority post-transaction. Appendix A illustrates the ownership structure both pre- and post-closing.

Public Interest Statement

According to the Petitioners, the proposed transaction is in the public interest. The Petitioners state that the transaction will benefit enterprise and wholesale business customers by increasing, expanding, and improving Verizon's fiber facilities. As businesses grow, Petitioners state, they are

increasingly relying on IP-based services, which require higher broadband speeds and more bandwidth to support increasing online activities. Petitioners represent that Verizon will utilize XO's fiber assets to meet these increasing demands and to advance its ability to make new and innovative offerings to both its and XO's enterprise and wholesale business customers.

Petitioners also state that the additional fiber capacity and expanded footprint will help Verizon to more effectively compete in the enterprise services market against leading national and regional high-capacity service providers, including cable and other traditional incumbent and competitive telephone companies and other non-traditional players. Petitioners submit that, to succeed in this market, Verizon must ensure it can meet growing demand for bandwidth and reliability – two increasingly important competitive factors in the global enterprise market. Thus, as part of Verizon's continuing investment in its networks, this transaction, Petitioners state, will help Verizon advance its competitive position to enterprise customers while at the same time driving other market participants to invest in their networks. In short, these additional assets will enable Verizon to be a better competitor, thereby spurring its competitors to do the same, all to the benefit of customers.

Petitioners further state that the proposed transaction will support Verizon's continuing goal of enhancing the capacity and reliability of its wireless networks to support the growing demand for mobile broadband. According to Petitioners, unlit or "dark" fiber is a key component to next generation mobile networks.³ The majority of XO's fiber is dark and with this

³ See, Joint Petition, fn. 5 (referencing Joey Jackson, Dark Fiber Key to Future of Small Cells, Backhaul, RCR Wireless News, Dec. 21, 2015).

transaction, Petitioners submit that Verizon will put that unlit fiber to use in expanding and modernizing its cellular network, making it more reliable, and meeting customer demands for more mobile broadband. Finally, Petitioners state that since XO emerged from bankruptcy in 2003 it, unlike Verizon, does not have the financial resources needed to continue to invest and support XO's fiber networks.

COMMENTS

Following the filing of the Joint Petition, a Notice Seeking Comments was issued on May 26, 2016.⁴ The initial comment period expired on June 6, 2016, but the reply comment deadline was extended until June 24, 2016. Two entities, Windstream Services, LLC (Windstream) and EarthLink, Inc. (EarthLink) filed comments opposing the proposed transaction. Verizon filed reply and surreply comments. All the comments and replies are summarized below.

On June 6, 2016, Windstream filed comments stating that, as both an ILEC and a Competitive LEC (CLEC) operating in New York, it is in a strong position to evaluate the competitive impacts of the proposed transaction, especially on business data service (BDS) market. Windstream submits that XO is a strong competitor, able to compete with Verizon in price through leased copper loops combined with its own electronics, allowing it to offer EoC at speeds up to 100 Megabits per second (Mbps). Using this unique strategy, XO, according to Windstream, is able to beat the Ethernet-based prices of Verizon and other ILECs in New York in a manner not likely to be replicated by any new

⁴ Department Staff also engaged in information gathering to better understand the implications of the proposed transaction. Those requests ranged from impacts on the business market to jobs and synergies and are discussed in more detail below.

competitors. According to Windstream, XO provides EoC in more than 565 local service offices and to approximately 935,000 buildings making it the eighth largest provider of Ethernet in the Nation.

As such, XO, Windstream submits, is an important alternative to Verizon's BDS services. According to Windstream, the market for BDS is already highly concentrated with nearly all census blocks having a Herfindahl-Hirschman Index (HHI) which exceeds a "highly concentrated" level.⁵ Verizon could, Windstream states, apply a price squeeze to eliminate other BDS providers of last-mile dedicated business service connections, which could include XO's terminating EoC services.

Windstream, therefore, urges the Commission to impose conditions on its approval to prevent Verizon from artificially raising costs and executing a price squeeze. Such conditions, according to Windstream, could include making Verizon address the reduction in competition caused by the acquisition of XO, requiring it to make unbundled Digital Subscriber (DS1) and DS3 capacity loops available over fiber and in IP, and ensuring that the Company commits to any additional requirements imposed on ILECs in the FCC's ongoing BDS proceeding.⁶

On June 13, 2016, EarthLink filed comments similarly stating that, the proposed transaction would eliminate XO as a competitor to Verizon in the provisioning of a number of retail

⁵ Federal Communications Commission's (FCC) data on BDS revenue, using the HHI. See, generally, WC Docket No. 05-25, In the Matter of Special Access for Price Cap Local Exchange Carriers.

⁶ See, WC Docket No. 05-25, Letter from Kathleen Grillo, Senior Vice President, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, (filed August 9, 2016).

and wholesale wireline special access services in New York.⁷ It would, according to EarthLink, be more difficult to reach downstream customer locations with its own and resold network facilities. EarthLink purchases DS1, DS3, and Ethernet BDS from XO, along with central office collocations and transport services. According to Earthlink, eliminating XO would likely cause an increase in its costs, which would then have to be passed on to retail and wholesale customers.

EarthLink further states that the acquisition of XO by Verizon would leave only one BDS provider in some locations; however, even in those locations where two in-building BDS providers remain, EarthLink claims it is unlikely that one provider will be able to constrain the prices of the other. As the largest EoC provider, EarthLink states that XO provides a much-needed alternative to an ILEC's digital subscriber line (DSL) service and that Verizon is likely to cease offering XO's EoC service after the acquisition, as it has never offered a copper-based Ethernet product of its own. One illustration of this, according to EarthLink, is that XO has sought to increase EoC speeds at the time when Verizon is retiring its copper infrastructure in favor of fiber.

The proposed transaction would, according to EarthLink, also put an end to XO's multi-year network expansion plan, which would reduce access to anticipated competitive BDS fiber transport, and likely other competitive services at new locations. The proposed transaction would also, according to EarthLink, harm a competitor's ability to obtain voice

⁷ Verizon sought to strike EarthLink's comments as untimely because they were not submitted on or before the initial comment deadline of June 6, 2016. By the Notice Regarding Surreply Comments issued June 17, 2016, Verizon's request to strike was denied and additional time for surreply by June 24, 2016 was provided to allow for the fair, orderly and efficient conduct of the proceeding.

interconnection and to exchange Internet traffic on reasonable rates, terms, and conditions. EarthLink submits that Verizon could seek to eliminate XO's currently available flexible interconnection and Internet traffic policies and replace them with more restrictive interconnection policies. This, EarthLink argues, would be contrary to Sections 252(a)(1) and 252(i) of the Telecommunications Act of 1996 which requires ILECs to file interconnection agreements with state commissions and make them available for opt-in by requesting providers. In sum, EarthLink submits that the Commission should determine the proposed transaction poses a serious threat to competition and consumer welfare and deny the Joint Petition.⁸

On June 13 and 24, 2016, Verizon replied, stating that the proposed transaction should be approved, without conditions, and the Commission should reject Windstream's and EarthLink's assertions. Verizon states that the proposed transaction will create substantial public-interest. Verizon reiterates that the improvement and increased expansion of Verizon's fiber facilities will benefit enterprise and wholesale business customers. Moreover, the proposed transaction will support Verizon's goal of enhancing the capacity and reliability of its wireless networks, thus, providing more products and service offerings to current XO customers.

Verizon further argues that there will be multiple operational and economic efficiencies that will benefit end-users and all customers will gain access to better, more efficient economical services. Verizon states it will be less dependent on leased fiber and it will therefore be able to

⁸ As part of EarthLink's comments, it attached a copy of the Petition to Deny by INCOMPAS submitted to the FCC on May 3, 2016 in WC Docket No. 16-70. These comments reiterate many of the arguments opposing the proposed transaction raised by EarthLink herein.

better serve more locations and reach more enterprise customers. XO's fiber assets will, according to Verizon, facilitate the densification of its mobile broadband network by allowing better and more efficient fiber backhaul connectivity for wireless cell sites. This, Verizon states, will further government and industry efforts to meet mobile broadband demand and allow for the optimum use of existing spectrum resources.

Verizon states that Windstream's competitive concerns are speculative because there will be at least two, and often three or more competing providers in each of the 158 on-net XO buildings within Verizon's New York footprint. The Company thus concludes that there will continue to be ample competitive alternatives to business offerings and the proposed transaction will not threaten the continuance of EoC or create the incentive to implement price squeezes. Since the FCC plans to address price regulation in non-competitive BDS markets on an industry-wide basis, Verizon believes there is no need to place conditions here on alleged price squeezes or other vertical effects in the context of this proceeding.

Moreover, Verizon submits that it intends to honor XO's existing contractual obligations after the transaction's closing, and will continue to provide the same types of unbundled copper loops that XO uses today for EoC, to the extent required by federal law and rules. The providers in collocated facilities will, according to Verizon, therefore, be able to provide competitive service by having the ability to use these unbundled network elements.

Finally, Verizon states that EarthLink's comments should similarly be rejected. The sole purpose of EarthLink's filing, according to the Company, was to put before the Commission the Petition to Deny by INCOMPAS that was submitted to the FCC. In short, Verizon states that there will be ample

competitive alternatives to Verizon's and XO's services and EarthLink fails to offer any evidence that two in-building BDS providers or nearby fiber are insufficient to provide competitive constraint. Contentions, according to Verizon, which have been considered and squarely rejected by the FCC. Verizon submits that "[w]here service providers invest resources in network facilities, they have every incentive to use those facilities to provide services and collect revenues. Verizon competes today against the in-region ILECs and others in the BDS market outside Verizon's ILEC footprint, and it will have every incentive to continue to do so with XO's facilities."

DISCUSSION

XO currently operates under a duly authorized and approved CPCN as a provider of telecommunications services in New York. In approving a proposed telephone company acquisition under PSL §§99 and 100, the Commission must find that the transaction is in the public interest.

PSL §99(2) requires the consent of the Commission to any proposed transfer of its "works or system." As the Commission has noted in another merger case, "[a]lthough PSL §99(2) does not specify a standard of review, all such utility transfers have been interpreted as requiring an affirmative public interest determination by the Commission."⁹ PSL §§100(1) and (3) require the Commission's consent to the acquisition of the stock

⁹ Case 05-C-0237, Joint Petition of Verizon Communications et al., Order Asserting Jurisdiction and Approving Merger Subject to Conditions (issued November 22, 2005), n. 46.

of a telephone corporation.¹⁰ Unlike §99(2), however, these provisions expressly bar the Commission from giving its consent unless the applicant has shown, in the first instance, that the acquisition is in the public interest.¹¹

In this Order, the Commission determines that the proposed transaction is expected to produce an incremental net benefit, after mitigating certain risks associated with the proposed transaction. Therefore, the Commission will grant conditional approval of the transaction provided that Petitioners agree to the conditions discussed below. Absent Petitioners' acceptance of these conditions, however, the public interest standard cannot be met and the Joint Petition is denied. The Commission's conditional approval is granted based upon the particular set of facts presented herein. The

¹⁰ Consent is presumed after 90 days unless it is determined, as it has been here, that the public interest requires the Commission's review and written opinion. See, Case 16-C-0288, Letter from Karen A. Geduldig, Director, of the Office of Telecommunications dated May 23, 2016.

¹¹ Again, consent is presumed unless it is determined, as it has been here, that the public interest requires the Commission's review and written opinion.

Commission will continue to evaluate future petitions on a case-by-case basis.¹²

Benefits

The Commission will first consider whether the proposed transaction is likely to generate transaction-specific benefits that would not otherwise likely occur in the absence of the proposed transaction. The Commission finds that the proposed transaction will generate significant scale benefits that customers of both XO and Verizon will receive. Current XO and Verizon customers will benefit from a larger, more extensive network with greater reliability. Meanwhile, current XO customers will have access to additional products and services, including wireless, which Verizon is able to offer, but which are not currently available through XO or its affiliates. In contrast, XO is a company that has historically struggled financially and could not otherwise make these investments

¹² See, e.g., Case 15-M-0388, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016), p. 14; Case 14-C-0308, Petition of Brick Skirt Holdings, Inc. DFT Telephone Holding Company, LLC, et al. for Authority to Transfer and Acquire Shares of Capital Stock and Other Transactions, Order Approving Transfer of Control with Conditions (issued December 12, 2014), p. 8; Case 16-C-0118, Joint Petition of Middleburgh Telephone Company; Newport Telephone Company, Inc.; NTCNet Long Distance, Inc.; NTCNet Telecom, Inc.; and Joseph A. Tomaino for Authority to Transfer and Purchase Capital Stock, and to Issue Long Term Debt, Order Approving Transfer of Control and Issuance of Securities With Conditions (issued August 1, 2016), p. 17.

without having access to extensive capital resources such as Verizon's.¹³

The Commission also finds that business customers in particular will stand to benefit from the proposed transaction. Through this transaction Verizon will be able to leverage XO's assets to serve more customer locations, which, in turn, will make it a stronger competitor in the multi-location enterprise market. Similarly, Verizon's wireless customers will benefit from the proposed transaction. In the first instance, Verizon will be able to leverage XO assets to better serve its wireless customers by improving the efficiency and capacity of the Company's networks. As Petitioners noted, there has been an increase in demand for mobile broadband. One of the key elements to meeting that demand is dark fiber. The majority of XO's fiber is dark and this transaction will afford Verizon the opportunity to put that dark, unused fiber to good use, i.e., to better connect its expanding cellular network and respond to consumer demand for more mobile bandwidth and increased network reliability.

The Commission also notes that expanded wireless backhaul capability and network densification, which are supported by the proposed transaction through Verizon's acquisition of XO's dark fiber, are key elements to successfully deploying a next generation 5G network. Another is spectrum. Through this transaction, Verizon will be afforded the

¹³ See, e.g., Verizon To Buy XO Communications' Fiber Business For \$1.8B From Billionaire Carl Icahn, Forbes, <http://www.forbes.com/sites/antoinegara/2016/02/22/verizon-to-buy-xo-communications-fiber-business-for-1-8b-from-billionaire-carl-icahn/#48d7a70649f0> (February 22, 2016) (discussing XO's history of bankruptcy and financial struggles).

opportunity to purchase the type of wireless spectrum that is foundational to the successful deployment of 5G. Together, these fiber and spectrum assets would support a more comprehensive rollout of 5G and other future mobile technologies. Indeed, the FCC noted this as a benefit of the proposed transaction in its review and approval, stating in relevant part that "Verizon's acquisition of XO Communications Services' fiber assets, that might otherwise be unused, should help Verizon facilitate implementation of its 5G network plans."¹⁴ In sum, combining XO's business with Verizon's will provide the financial resources to support and promote better and more intensive use of XO's fiber network.

Potential Harms

The Petitioners state that "[t]he market for mass-market services to consumers will be unaffected by the transaction because XO Communications Services does not serve any residential customers. And the transition poses no risks to XO Communications Services' business, government, and wholesale customers..."¹⁵ Department Staff analyzed the impact the proposed transaction would have on the competitiveness of the market for business services. Using confidential data collected from the Petitioners, an analysis was performed on a wire center-by-wire center basis within Verizon's New York service territory employing the HHI discussed above. This index is similarly utilized by the Department of Justice (DoJ) in its Merger Guidelines to evaluate proposed transactions. The HHI is an indicator of market concentration. As market concentration increases, firms operating within that market gain market power, and the market overall tends to become less competitive.

The HHI is calculated by summing the square of each

¹⁴ FCC Order, n. 12, supra, ¶ 57.

¹⁵ Joint Petition, p. 7.

firm's market share, and ranges from 0 (perfect competition) to 10,000 (monopoly). The DoJ's Merger Guidelines note that it is important to consider both the overall level of concentration in the market as well as the change in concentration as the result of a merger. Markets with an HHI of 0 to 1,499 are considered to be un-concentrated, Markets with an HHI of 1,500 to 2,500 are considered moderately concentrated, and markets with an HHI in excess of 2,500 are considered highly concentrated. For purposes of the Commission's analysis, each wire center is considered as being a distinct, geographically differentiated market.

Our analysis shows that Verizon's New York service territory, at the wire center level, is already considered moderately or highly concentrated according to the current DoJ Merger Guidelines, with 68% of those wire centers having an HHI greater than 5,000.¹⁶ Currently, the statewide HHI average within Verizon's service territory is 5,783. Verizon's acquisition of XO will cause a slight increase in the number of wire centers in Verizon's service territory that are considered moderately concentrated and have an HHI between 1,501 and 2,500. The acquisition would slightly increase the statewide HHI average within Verizon's service territory from 5,783 to 5,816. In sum, the proposed transaction will have some limited impact on this already concentrated market.

Windstream and Earthlink argue that the exit of XO from the Ethernet market will result in less competition and increased costs for both businesses and that the Commission should impose conditions to ensure that the transaction is in the public

¹⁶ See, U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, <http://ftc.gov/os/2010/08/100819hmg.pdf> (issued August 19, 2010).

interest. Those conditions range from making Verizon address the reduction in competition caused by the acquisition of XO to continuing to make unbundled DS1 and DS3 capacity available over fiber and in IP to requiring Verizon to commit to comply with any additional requirements imposed on other price cap ILECs in the FCC's ongoing BDS proceeding. The Commission notes that these parties made the similar arguments to the FCC and that the FCC opted not to impose any conditions on its approval of the proposed transaction.¹⁷

The FCC concluded that XO-served buildings that have overlapping fiber facilities with Verizon within its incumbent LEC region have either (1) one or more alternative competitive fiber providers already in the building, or (2) one or more alternative competitive fiber providers within 0.1 miles of the building. The FCC also concluded that demand in these building is currently for at least 100 Mbps and that, together, this serves to sufficiently constrain Verizon from seeking to increase prices post-Transaction.¹⁸ The Commission's record does not indicate how many of the 159 buildings with one or more competitors involve only a single additional competitor to Verizon/XO.

The Commission acknowledges, as stated above, that this transaction will modestly increase the concentration of

¹⁷ WC Docket No. 16-70, In the Matter of Applications of XO Holdings and Verizon Communications Inc. For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order (issued November 16, 2016). In that Order, the FCC stated, in part, that "the relatively modest benefits of the Transaction resulting from certain credited operational and economic synergies, along with the 5G and wireless backhaul enhancements, increased multi-location customer competition, and minimal benefit to current XO customers gaining first-time access to Verizon services, outweigh any public interest harms."

¹⁸ Id., ¶ 26.

this particular market and that Verizon's acquisition of XO will result in a duopoly in some XO-served buildings. With increased market concentration there is a risk that market participants will not have sufficient incentive to actively compete, which can lead to increased pricing and diminishing service quality. One driver of competition is the willingness of one competitor to increase its investment and improve its service quality notwithstanding a lack of competitive pressure. Petitioners assert that Verizon's access to XO's assets will allow it to act as this type of market competitor, mitigating any potential risk.

Rather than simply accept Verizon's statement that it will be strong competitor following the transaction, the Commission must ensure that Verizon continues to provide XO's existing enterprise customers and other carriers with much needed services. Further, as with all transactions, there is a risk that post-close, as Verizon seeks to realize synergies, there will be a loss of critical jobs that support customer service in New York. An increase in market concentration makes it easier for a competitor, in the pursuit of synergies and other potential increases to profit, to allow customer service to decline. In order to protect customers and mitigate the potential for customer facing XO job losses following the close of the transaction, the Commission will condition its approval of the transaction on Petitioners agreeing that, for the four years from the date of the issuance of this Order, they shall be prohibited from laying off, or taking any action effecting an involuntary reduction in workforce (excluding retirement incentives and attrition), of customer-facing jobs within XO Communications in New York State. Retaining XO's workforce will help ensure that its current customers continue to receive high quality service while the two companies are integrated.

Petitioners shall be required to report to the Secretary to the Commission, within 14 days of the date of the issuance of this Order, the number of customer-facing employees XO Communications Services employs on the date of the issuance of this Order. This filing shall include the locations and job titles of all such employees. For each of the four years following the issuance of this Order, on the anniversary date of the closing of the transaction, the Petitioners shall file with the Secretary to the Commission a report demonstrating their compliance with this condition that includes the same details as their 14-day filing.

In addition to general concerns over Verizon's ability to exercise market power, Windstream also asserts that, because XO offers EoC, its exit from the market as a standalone entity reduces competition for this valuable service. Our record does not indicate how many of the 159 buildings with one or more competitors involve only a single additional competitor to Verizon/XO. However, to the extent XO has been serving specific buildings with EoC, the Commission finds that there is no long-term transaction-specific harm from the loss of XO independent provider of that service.

EoC providers obtain bare unbundled network element copper loops, bundle them together and add off-the-shelf electronics to offer lower-speed Ethernet services, with capacities ranging typically from 1-20 Mbps. As the FCC concluded, XO has no unique ability or special expertise in the provision of EoC service that other competitors are unable to replicate. The copper unbundled network elements and other inputs, including collocation and off-the shelf electronics, used by XO to provide EoC service are readily available to other providers today and should continue to be available to other

competitors in the future.¹⁹ Accordingly, we disagree with Windstream and Earthlink. Monopolistic or duopolistic behavior for typically less than 50 Mbps EoC service is not a concern given the contestability of this service. Other competitors already providing this service could readily offer it to satisfy additional demand.²⁰ Further, as Windstream notes, the FCC is considering the competitiveness of the BDS market and the need for associated controls. To the extent pricing controls are imposed on Verizon as a result of that proceeding, it will have to comply and, thus, a condition in this regard is not warranted here.

EarthLink also argues that Verizon will seek to eliminate the flexible interconnection practices and policies that XO uses in offering voice interconnection and Internet traffic exchange. The Commission, however, agrees with Verizon that this is not the appropriate proceeding to determine provider obligations with respect to filing voice-over-IP interconnection and Internet traffic exchange agreements under Section 252 of the Telecommunications Act of 1996. That issue should be considered and determined for all market participants, not just those involved with this particular transaction. The Commission is addressing these types of comprehensive industry developments, and associated regulatory needs, in the context of its ongoing proceeding to study the state of telecommunications in New York.²¹ Notwithstanding the foregoing, the Commission also recognizes Verizon's representation, in its response to

¹⁹ Id., ¶¶ 29-30.

²⁰ Id., ¶ 31.

²¹ See, generally, Case 14-C-0370, In the Matter of a Study on the State of Telecommunications in New York State.

Windstream's comments, that it will "honor XO's existing contractual obligations to its customers after closing."²²

While a modest increase in market concentration is an identified harm associated with the proposed transaction, the other harms put forward by Windstream and Earthlink are either speculative or unrelated to the proposed transaction and are better addressed in ongoing FCC or Commission proceedings.²³ In sum, after mitigating the potential harms associated with an increasingly concentrated market, the Commission determines that the net benefits of the proposed transaction outweigh the modest harms and it is in the public interest and is, therefore, approved.

Most Favored State Clause

For the reasons stated herein, it is our judgment that the condition we are establishing is necessary to satisfy the public interest with regard to this transaction. At the same time, however, the Commission is aware that the Petitioners continue to pursue approval in other state jurisdictions, and that these jurisdictions may require commitments that would also be beneficial to New York.

In order to ensure that New York gains the benefits of these commitments, we will require Petitioners to agree to a

²² Joint Petition p. 7.

²³ The FCC reached the same conclusion in its Order, stating that "[i]n spite of commenters' claims that XO has some price-constraining effect in the market for wholesale BDS services, the record reflects that the overwhelming majority of XO's services are provided over the same incumbent LEC-leased wholesale inputs that are available to other competitive LECs. To the extent commenters' concerns are focused more on Verizon's non-transaction specific practices with respect to wholesale BDS offerings industry wide, the Commission has a separate rulemaking proceeding concerning BDS generally." See, f.n. 17, supra, ¶ 16.

most favored state clause. If, in obtaining approval of the transaction in other jurisdictions, the Petitioners commit to any condition, they will within 30 days following such commitment, notify the Commission of its intent to provide those same benefits in New York at terms that are reasonably comparable to the other state or federal commitments.

Enforcement

The conditions adopted in this Order shall be binding and enforceable by the Commission upon unconditional acceptance by Petitioners within seven (7) business days of the issuance of this Order. If the Petitioners' unconditional acceptance is not received within seven (7) business days of the issuance of this Order, the Petitioners will have failed to satisfy their burden under the Public Service Law as described herein, and this Order shall constitute a denial of the Petition.

Section 25 of the PSL requires that Verizon "comply with ... every order ... adopted" pursuant to the PSL, and that any failure to comply with this Order may result in the Company being required to "forfeit to the people of the State of New York a sum not exceeding one hundred thousand dollars constituting a civil penalty for each and every offense and, in the case of a continuing violation, each day shall be deemed a separate and distinct offense." In the event that the Company fails to comply with the conditions contained herein, pursuant to PSL §26, "the [C]ommission may direct counsel to the [C]ommission to commence an action or special proceeding in the supreme court in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented."

Through this Order, Petitioners will be required to fully and completely comply with the conditions detailed herein and any failure to comply with those conditions as described

above may result in the commencement of a penalty and enforcement action under PSL §§25 and 26.

CONCLUSION

Based on the foregoing, the Commission determines that approval of the transaction, subject to Petitioners' acceptance of the conditions described herein, is in the public interest.

The Commission orders:

1. The Joint Petition to transfer XO Holdings' indirect 100% ownership interest in XO Communications Services, Inc. to Verizon Communications, Inc., is granted pursuant to Public Service Law §§99 and 100 subject to the conditions discussed in this Order.

2. For the four years from the issuance of this Order, Verizon Communications, Inc. or its subsidiaries, shall be prohibited from laying off, or taking any action effecting an involuntary reduction in workforce (excluding retirement incentives and attrition), of customer-facing jobs within XO Communications in New York State.

3. Petitioners shall be required to report to the Secretary to the Commission, within 14 days of the date of the issuance of this Order, the number of customer-facing employees XO Communications Services employs on the date of the issuance of this Order. This filing shall include the locations and job titles of all such employees.

4. For each of the four years following the issuance of this Order, on the anniversary date of the closing of the transaction, the Petitioners shall file with the Secretary to the Commission a report demonstrating their compliance with Ordering Clause 2. This filing shall include the same

information as the filing made in compliance with Ordering Clause 3.

5. Petitioners, and their successors in interest, shall certify that they unconditionally accept and agree to comply with the commitments set forth in the body of this Order by submitting a certification to the Commission within seven (7) business days of the issuance of this Order. If the Petitioners do not unconditionally accept within seven (7) business days of the issuance of this Order, this Order shall constitute a denial of the Joint Petition.

6. Petitioners shall agree to a most favored state clause. If, in obtaining approval of the transaction in other state jurisdiction, Petitioners commit to any conditions, they shall, within 30 days following such commitment, notify the Commission of their intent to agree to be bound by those same conditions in New York at terms that are reasonably comparable to the other state commitments.

7. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

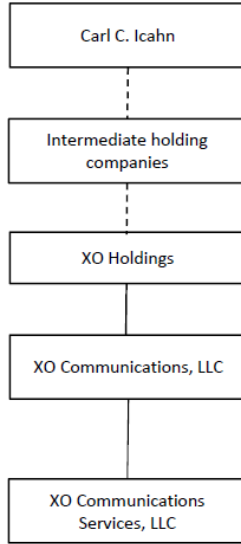
8. This proceeding is continued for compliance purposes.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

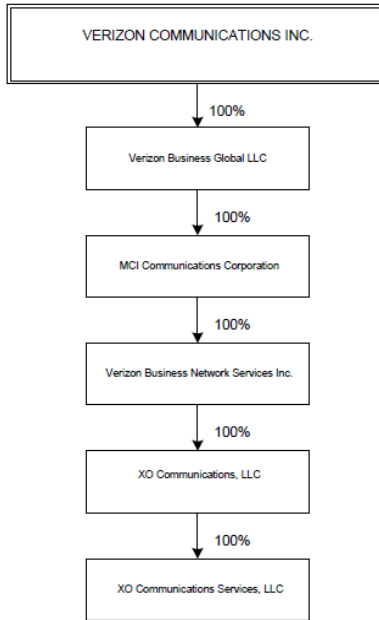
XO Communications
Pre-closing ownership structure



*All ownership interests are 100% unless otherwise noted. Unaffected entities are not included.



Post-Closing Ownership Structure



Unaffected entities are not included