

STATEMENT OF  
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BEFORE THE  
ENERGY AND COMMERCE COMMITTEE  
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET  
UNITED STATES HOUSE OF REPRESENTATIVES  
ISSUES IN TELECOMMUNICATIONS COMPETITION

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Chairman Markey, Ranking Member Stearns, and Members of the Subcommittee; thank you for the opportunity to appear before the Subcommittee today regarding Issues in Telecommunications Competition and HR 3914, the “Protecting Consumers through Proper Forbearance Procedures Act”. My name is Carl Grivner, and I am CEO of XO Communications, one of the Nation’s largest facilities-based telecommunications providers offering a comprehensive array of industry leading voice, data, and next generation IP services to small, medium, and large business customers in 75 metro area markets in 26 states.

As this Subcommittee knows all too well, there is no shortage of issues, regulatory or otherwise, when it comes to the telecommunications industry. However, if one steps back for a broader view of where the United States and its telecommunications industry should be heading in the 21<sup>st</sup> Century, the predominant issue here is broadband access and the variety of choices and services available to consumers. What is lacking is the freedom and opportunity for consumers and businesses to choose their particular broadband provider based on what their needs are – not what a particular company deems them to be. And with consumer demand for bandwidth accelerating and total Internet traffic expected to quadruple by 2011, the public is not in a waiting mood.<sup>1</sup>

Since the passage of the 1996 Act, the competitive industry has been the source of billions of dollars of investment in broadband deployment and innovation. Companies like XO have always been first to market with new products and services. Before, it was

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<sup>1</sup> Source: Cisco, Global IP Traffic Forecast and Methodology, 2006-2011

DSL and bundled services; now its bandwidth based pricing, IP-VPN, Ethernet-over-Copper, and 10 Gbps wavelengths. And we will continue to invest in and deploy cutting-edge technologies that increase bandwidth capacity and deliver more of the advanced products and services that the market is demanding.

Since 1996, XO has invested heavily in building its own facilities, spending over \$7 billion in constructing an advanced nationwide fiber network, with nearly \$400 million invested in new services and increased network capacity since 2006. We now have multi-terabit capable IP and transport networks to meet growing demand. In addition to our advanced fiber network, we are also maximizing the potential of the existing legacy network by investing in soft switches, optical switches, and the most efficient multiplexing technology.

In building our networks, we have overcome obstacles city block by city block and office building by office building. However, there is one obstacle that remains as a significant barrier to entry for a competitive carrier like XO – the “last mile”. Let me be clear, when I am talking about the “last mile” I am referring to the ratepayer financed legacy incumbent local exchange carrier (ILEC) network that is already in the ground and connecting buildings to the ILEC serving wire center. Everyone concedes loop facilities require such enormous amounts of capital to build that it is not cost-effective to duplicate existing facilities to the vast majority of customers. If XO were to attempt to build to the estimated 2.3 million buildings within reach of our network – the cost would be over \$50 billion. And that is assuming building owners will negotiate for access and local

governments do not impose construction bans or onerous fees. In over 90% of the business market, the ILEC loop facilities are the only route into the building and constitute an absolute bottleneck facility. XO pays hundreds of millions of dollars each year to lease portions of this legacy network under the provisions of the 1996 Act, and we have invested heavily in maximizing its use for broadband.

One integral part of this strategy for better utilization of the legacy network is the copper loop that currently serves almost all businesses and connects to over 100 million U.S. households. About 75% of all telephone access lines are provided from the local switch entirely by copper infrastructure; also known as “home run copper”. The copper loop facilities are nearly ubiquitous and, although the wire itself has not changed, advancements in electronics have made it possible to deliver broadband over copper at speeds that were not thought possible just a few years ago. Innovative electronics and competitive industry investment have turned the legacy copper loop infrastructure into one of the most capable and economically efficient broadband resources available today. It is important to note that other countries who are leading the U.S. in broadband do so by leveraging their legacy copper facilities. This fact was highlighted at a previous Subcommittee hearing examining “broadband lessons from abroad”.

## **Increasing Consumer Choice and Access to Broadband**

### Unlocking the Broadband Future of Copper

In the past few years, copper has far exceeded previous expectations in terms of the bandwidth it can deliver. Not too many years ago, copper was supposedly only good for

analog voice and dial-up. Yet, new innovations continue at an incredible pace and it is expected that the bandwidth copper can deliver will exceed 100 Mbps in the not-so-distant future. In particular, XO currently deploys a 10 mbps Ethernet over Copper (EoC) service (with the ability to scale to 45mbps) for businesses that do not have access to a fiber network at a lower cost than a traditional T-1. So, as you can see, the power of copper is truly amazing.

It is important to note that the 1996 Act, and subsequent FCC decisions, provide competitive carriers the ability to access the copper loop at cost-based rates, which comprises the majority of so-called “last mile” facilities. Access to copper pairs is a critical component to the future growth of the competitive industry and is vital to consumers who seek advanced services and competitively priced broadband offerings. This is significant as it has been the competitive carriers that have pushed technological advancements to maximize use of the copper infrastructure. And this is a recurring story; just as our industry embraced and deployed DSL and bundled services long before the Bell Companies sought to do so, we are now embracing and deploying high-bandwidth Ethernet-over-Copper and other next generation copper technologies ahead of the ILECs. Furthermore, our customers are extremely satisfied with the speed, reliability, and lower cost of these services.

As copper technology is continually evolving, we have not seen the limit of what this legacy resource can accomplish in terms of increased speed and overall broadband availability. The problem, and this issue was discussed at a previous hearing, is that this

legacy broadband resource is in danger of either being prematurely “retired” by the ILEC or the access to this resource being denied through the use of forbearance petitions.

### The Threat of the Copper Cartel

An ongoing threat to the legacy copper loop infrastructure is what is known as “Copper Retirement”. As the ILECs deploy fiber they are disabling the copper loop. In some instances they disconnect the copper at the customer premise; in other instances they remove the copper connection from the street to the home for “aesthetic purposes”.<sup>2</sup> And in some cases, they retire copper loop facilities permanently. What the ILEC is actually doing is denying a vital broadband resource that other industry participants can use to bring broadband services to the customers that either the ILEC chooses not to serve or chooses to serve with products that may not meet the needs of the customer. The ILECs are behaving like a “Copper Cartel”; controlling the supply and pricing of a vital resource. Current FCC rules require only limited notice of the ILEC’s intention to retire a copper loop. There is no opportunity for consumers or affected companies to seek review to ensure the proposed copper retirement is in the public interest. As a result, critical network infrastructure which can be used to provide alternative broadband services to consumers and businesses will be lost.

It is also important to emphasize that the copper loops are unique in that they are “line-powered”. In other words, copper conducts electricity, including electricity sent from

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<sup>2</sup> Answering questions from Chairman Markey at an October 2, 2007 hearing, Verizon Executive Vice President, Tom Tauke, stated that Verizon does “in some cases” remove the aerial copper to the home for “aesthetic” reasons.

central office and mobile generators. That is why your basic phones continue to work even if homes or businesses lose electric power. This vital public safety feature is not available for fiber (optical) transmissions, though a limited back-up battery is available for some services. Copper is also a redundant facility, which can serve the crucial need for government and businesses to maintain continuity of operations in the event of a public safety emergency. As you know, Congress instructed the General Services Administration (GSA) to require owned and leased federal buildings to have diverse network facilities.<sup>3</sup>

At the very time when federal policymakers are calling for greater investment in broadband technologies and availability, along with increased network redundancy (and, of course, greater broadband competition), it is unconscionable that a handful of companies can proceed unchecked in the destruction of an economic and national security asset. For once legacy copper facilities are removed, destroyed or permanently disabled, competitive entrepreneurs, consumers and business, who are willing to explore purchasing and maintaining these facilities, are deprived of the ability to use this valuable resource. In particular, the Office of Advocacy of the U.S. Small Business Administration has voiced concern on this issue: *“We believe the heightened pace of copper retirement warrants further economic analysis. Such an analysis may show that allowing companies to continue to develop and utilize the copper network will further the Administration’s broadband policy goals”*.<sup>4</sup>

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<sup>3</sup> P.L. 108-447; §414 - General Provisions—General Services Administration.

<sup>4</sup> Office of Advocacy of the U.S. Small Business Administration’s letter, go to [http://www.sba.gov/advo/laws/comments/fcc07\\_0510.pdf](http://www.sba.gov/advo/laws/comments/fcc07_0510.pdf).

Currently, there is a petition before the FCC asking the Commission to amend its rules to preserve access to copper facilities by subjecting all retirement proposals to a formal review process and a presumption that such retirements are not in the public interest. Congress should encourage the FCC to act on this petition immediately to prevent any further squandering of this valuable broadband asset.

### **Protect Copper Facilities and Consumer Access To Broadband**

As previously mentioned, the 1996 Act, and subsequent FCC decisions, provide competitive carriers the ability to access the copper loop and other portions of the ILEC “last mile” legacy network. It is imperative to point out that our success in unlocking the broadband capabilities of the copper facilities in the legacy network, in addition to the billions invested in our own facilities, can be wiped away with a single petition to the FCC under a provision of the 1996 Act that was intended for a much different purpose. In order to encourage further broadband innovation, deployment, and consumer access to broadband choices; the Forbearance Process must be reformed.

As part of the 1996 Act, Congress included a provision that was intended to be a tool to enable companies to obtain waiver of antiquated, legacy regulations that were no longer necessary as the industry moved away from rate-of-return regulation. And, in the early days this provision was used according to its purpose with a positive effect on the marketplace. However, in recent years we have seen the use of the forbearance provision

morph into an attempt by incumbent companies to legislate, filing petition after petition, in order to game the system using the strict timelines and the "deemed granted" threat of Section 10 to rewrite central pro-competitive requirements of the Act.

This Committee has rightly stepped forward to amend the forbearance statute with the introduction of HR 3914, the “Protecting Consumers through Proper Forbearance Procedures Act.” I commend Chairmen Dingell and Markey for introducing this bill as it removes one of the most troubling portions of Section 10 – permitting a forbearance petition to be “deemed granted”. Their leadership and effort to highlight these problems are extremely helpful and timely. Building upon their efforts, I would like to note that there are a number of additional issues and concerns regarding the implementation of the forbearance statute that also require the attention of Congress and, thus, really appreciate the opportunity this hearing provides to illuminate the full range of issues at hand.

#### I. Introduction and Background of Section 10 Forbearance

Enacted as part of the Telecommunications Act of 1996, the forbearance provision<sup>5</sup> was intended to facilitate the elimination of dated and unnecessary regulations

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<sup>5</sup> The law, 47 U.S.C. 160, requires the FCC to forbear from “applying any regulation or provision” of the Act to a telecommunications carrier or service if it determines: (1) enforcement is not necessary to ensure rates are just and reasonable and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is in the public interest. The Commission may grant a petition seeking forbearance in whole or in part and must explain its decision in writing. It is required to reach a decision within one year from filing, a period which can be extended by 90 days.

without legislative intervention. However, the statute essentially shifts the balance in regulatory proceedings, effectively allowing private parties to set in motion proceedings of their own crafting under a fixed and compulsory timeline to overturn laws adopted by Congress. Moreover, Section 10 may permit complete deregulation of a single provider simply by FCC inaction<sup>6</sup> – resulting in incongruent regulatory treatment of similar entities. Even the current FCC Chairman has called the statute “unusual”.<sup>7</sup>

Not only is the statute unusual, but the Commission has not established procedural rules to govern the forbearance process. Its related orders and many of its decisions have raised questions about interpretations of the law, the precedential impact of forbearance determinations, receipt and use of confidential and late-filed information, and the timely release of decisions. These problems are even more acute because forbearance petitions are being filed with increasing frequency by incumbent carriers and

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To force Commission action, the law provides that if a decision is not reached by this deadline, the requested forbearance is deemed granted.

<sup>6</sup> This aspect of Section 10 has already produced perverse results. Certain Commissioners find “inaction” so fundamentally antithetical to the decision-making process that they have decided it is preferable to vote in favor of granting certain forbearance petitions rather than have those petitions take effect through the “deemed granted” process notwithstanding their grave concerns with granting the requested relief. *See* Concurring Statement of Commissioner Copps, *Fones4All Corp. Petition for Expedited Forbearance*, Memorandum Opinion and Order, 21 FCC Rcd 11125 (2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267678A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267678A2.pdf) (“*Fones4All Order*”).

<sup>7</sup> *See*, Speech of FCC Chairman Kevin J. Martin to the 2006 ABA Administrative Law Conference, Washington, D.C. (Oct. 26, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268089A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268089A1.pdf). The Chairman gave several reasons for this conclusion. First, Section 10 delegates to the Commission the authority to essentially waive statutory provisions – a task normally left to Congress. Second, it does not expressly require the use of notice and comment rulemaking procedures or other Administrative Procedure Act (“APA”) safeguards. Third, petitions are deemed granted if the Commission fails to act within the statutory deadline.

because these petitions seek to terminate the enforcement of provisions vital to the development of competition and innovative choices and lower prices for all telecommunications consumers. In effect, the forbearance provision has become a way to “short-circuit” the intent of Congress, and it is time for Congress to reassert its authority.

## II. Specific Problems with FCC Implementation of the Forbearance Provision

### Problem #1: “Deemed Granted” Forbearance Petitions

The language of Section 10, which provides that a forbearance petition is automatically “deemed granted” if the Commission does not act by the statutory deadline, has probably generated the most legal controversy. This situation has arisen only a few times to date, but one instance in particular has impacted all subsequent forbearance proceedings.

In March 2006, the Commission, with only four members at the time, failed to issue a decision by the statutory deadline, permitting a Verizon petition<sup>8</sup> seeking deregulation for its high-capacity broadband services to be “deemed granted”. A one-paragraph News Release and three statements from the FCC commissioners were all that commemorated the event.<sup>9</sup> Other carriers seeking the same relief as Verizon then relied on the

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<sup>8</sup> *Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004).

<sup>9</sup> *See Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release (Mar. 20, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264436A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.pdf).

Commission's "inaction" as precedent, filing "me too" forbearance petitions.<sup>10</sup> Shortly before the expiration of the statutory deadline for action, Verizon had notified the Commission that it wished to narrow the scope of the forbearance it sought. Since the Commission did not issue a decision on the merits of the Verizon petition, and since Verizon never formally amended its petition, however, the scope of the forbearance "deemed granted" to Verizon, and the precedent, if any, that "deemed grant" created, is unclear.

Problem #2: Lack of Procedural Requirements for Forbearance

Since the forbearance provision was enacted, the Commission has received numerous requests for it to adopt procedural and substantive requirements to provide explicit guidance to interested parties and a consistent framework for its consideration of forbearance requests. While the Commission has managed to make correct decisions on some forbearance petitions, the lack of a specific procedural framework has made the Commission's job that much more difficult. Implementing basic rules could settle a variety of outstanding questions and concerns. For instance, rules could deal with how the Commission treats the use of confidential information. This issue first surfaced during consideration of the *Anchorage Forbearance Petition*<sup>11</sup> when the Commission

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<sup>10</sup> ACS, AT&T, Citizens Telecom, Embarq, Frontier, and Qwest each filed "me too" forbearance petitions based on the Verizon default grant.

<sup>11</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*"). In this petition, ACS sought and was partially granted forbearance from certain dominant carrier obligations and local network unbundling requirements.

refused a request by interested parties to utilize the confidential information from its recently decided *Omaha Forbearance Order*<sup>12</sup> even though this information established the framework used in determining the outcome. The Omaha framework has been cited in support of subsequent forbearance requests of a similar nature, and the Commission has relied largely on that framework. Most recently, the Omaha framework was utilized in the proceeding addressing Verizon’s petitions for forbearance from unbundling and dominant carrier obligations in six major markets.<sup>13</sup> Confidential information must be protected, but interested parties should be able to know what standard is being used to determine whether forbearance is warranted.

Rules can also address the problem of “late” filed information – that is, information filed by the petitioner far past the initial filing date, including *ex parte* submissions close to (or even on the eve of) the statutory deadline. Such late filings in some cases have been used as key support to justify the Commission’s decisions, but the information has been filed so late as to not permit adequate time, if any, for review or response by interested parties. Given the recent proliferation of forbearance petitions, the statutory deadline, and the

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<sup>12</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005). (“*Omaha Forbearance Order*”), *aff’d sub nom. Qwest Corp. v. FCC*, Case No. 05-1450b (D.C. Cir. Mar. 23, 2007) available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/05-1450b.pdf>.

<sup>13</sup> *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (“*Verizon Six Market Forbearance Petition*”). Most recently Qwest has filed similar petitions for forbearance in the Denver, Minneapolis, Phoenix, and Seattle markets (the “*Qwest Four Market Forbearance Petition*”) and Verizon has filed petitions seeking forbearance for the entire state of Rhode Island and the Virginia Beach MSA. The same issue is likely to resurface yet again in the context of those petitions.

significant resource burden forbearance petitions impose on the Commission, carriers should be required to submit “complete as filed” petitions at the outset of a proceeding or be subject to “resetting the clock” upon the filing of a complete record.

In the Omaha, Anchorage, and the Verizon Six Markets forbearance proceedings, the initial filings by the incumbent carrier in support of its petitions provided insufficient, irrelevant, and unverifiable data to support relief. This severely limited the value of comments filed by interested parties in response to those petitions, and it forced the Commission to request that the petitioner submit to the record additional support for its requested forbearance. The problem caused by the inadequacy of initial forbearance petitions is compounded due to the statutory deadline under which the FCC is required to act upon these petitions.

The procedural issues mentioned above also are compounded by the fact that incumbents can file and refile forbearance petitions at will. If a company’s petition is rejected by the Commission, it can immediately refile that petition with only minor adjustments from the rejected petition. This places an enormous strain on FCC staff and resources as the Commission is obligated to devote significant resources to each petition when their efforts could be better focused on policy initiatives such as universal service reform or intercarrier compensation reform. Finally, the cost to the industry to fight each and every petition drains valuable capital that could be better spent on broadband investment.

On November 30, 2007, in response to a petition filed by XO and other competitive carriers, the FCC released a Notice of Proposed Rulemaking (“NRPM”) seeking comment on whether forbearance procedures are necessary and what rules should be implemented. Members of this Subcommittee have expressed a desire that the FCC implement these procedures. I’d like to thank Congressman Stearns for his leadership last year in highlighting the need for the FCC to implement these rules. I’m confident that the Congressional interest is what spurred the FCC to issue the NPRM. Now, it is time for the Commission to issue an order adopting such rules.

The competitive industry will continue to be a major source of investment for broadband technologies and delivering advanced services to consumers and businesses. As Congress considers policies to encourage broadband access and next generation deployment there are two fundamental issues that must be addressed:

- **Protect legacy copper infrastructure as a valuable broadband resource**

Congress should encourage the FCC to amend its rules to preserve access to copper facilities by subjecting all retirement proposals to a formal review process and a presumption that such retirements are not in the public interest. This is a necessary step for the U.S. to take, if it is to regain its position as a broadband leader.

- **Reform Section 10 of the 1996 Telecommunications Act**

The introduction of HR 3914 is an important step to reform Section 10 by removing the “deemed granted” language. Congress should also encourage the FCC to implement necessary procedures to ensure the forbearance process is properly used.

By addressing these fundamental issues, Congress and the FCC can ensure certainty and stability in the telecommunications market and consumers and businesses will continue to benefit from competition, innovation and choice in broadband services. Thank you for the opportunity to appear before the Subcommittee today.