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July 6, 2016

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *In the Matter of XO Holdings and Verizon Communications Inc. Consolidated Applications for Consent to Transfer Control of Domestic and International Authorizations Pursuant to Section 214 of the Communications Act of 1934, As Amended; WC Docket No. 16-70; Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC, a Subsidiary of XO Holdings, Seek FCC Consent to a Long-Term De Facto Transfer Spectrum Leasing Arrangement Involving Local Multipoint Distribution Service and 39 GHz Spectrum, ULS File No. 0007162285*

Dear Ms. Dortch:

On July 1, 2016 Christopher Murray of EarthLink; Thomas Jones of Wilkie Farr & Gallagher LLP, representing EarthLink; Eric Einhorn and Jennie Chandra of Windstream; John Nakahata of Harris, Wiltshire & Grannis LLP, representing Windstream; Katherine Mudge of Global Capacity; and the undersigned met with Michael Ray, Terri Natoli, Linda Ray, Zach Ross, Daniel Kahn, Madeleine Findley, Eric Ralph, Kate Mataves, and Pam Megna of the Wireline Competition Bureau and Joel Rabinovitz and Varsha Mangal of the Office of the General Counsel. During the meeting, we made the following points regarding the above-captioned transaction proceedings.

We emphasized that Verizon's proposed acquisition of XO's wireline assets and the proposed leasing arrangements through which Verizon Wireless would acquire *de facto* control of Nextlink's LMDS and 39 GHz spectrum are interrelated, and the Commission should therefore consolidate its

review of the transactions.<sup>1</sup> The proposed leasing arrangements would eliminate a possible future source of competitive wireless broadband service, forestalling XO's announced options for developing its spectrum in the flexible use 5G environment that the Commission is considering in the *Spectrum Frontiers* proceeding. Verizon Wireless's exercise of its option to purchase the Nextlink spectrum licenses would render the loss of possible future wireless competition permanent. Moreover, it appears that Verizon intends to use XO's wireline assets to support its own wireless business. Accordingly, the public interest requires that the Commission analyze the competitive effects of the totality of the proposed transactions.

We further explained that the Applicants have failed to meet their burden of demonstrating that the transactions, as proposed, promote competition and are in the public interest.<sup>2</sup> As INCOMPAS has explained, the Applicants have not provided information that is sufficient to allow the Commission and interested parties to evaluate the impact of the proposed transactions on various geographic and product markets, much less attempted to identify those markets. We stressed that while we appreciate the Commission's recent request for further information necessary to assess the competitive impact of the wireline transaction, the public interest requires considerable further analysis of the harms and purported benefits of both that transaction and the proposed leasing arrangements. Importantly, Verizon already has substantial market power in its incumbent LEC region in the provision of business data services and also is a dominant wireless provider. As the DOJ recognizes, even small increases in a dominant firm's market share can pose significant harm to competition.

The Applicants have attempted to downplay the wireline transaction's impact on the provision of retail and wholesale business data services, suggesting that the presence of nearby cable and/or competitive LEC facilities negates the risk of harm from reduced competition. But, the simple fact is that Verizon has market power in its region, and there is no circumstance under which increased market power is justified. As INCOMPAS has explained, the Applicants' assertions regarding the competitive effects of the wireline transaction fail to differentiate between business data services and non-business services, such as cable-provided best-efforts broadband, or to account for the fact that the presence of one in-building competitor cannot sufficiently constrain incumbent LEC prices.<sup>3</sup> The latter concern is particularly acute because XO, unlike Verizon, commonly distinguishes itself from other providers by offering a lower-priced option for wholesale capacity at locations where it is available. In all events, the Applicants assume – without any basis for doing so – that the remaining competitors actually offer services (either on a wholesale or retail basis) that meet the definition of business data services. Finally, the presence of nearby competitors will not sufficiently constrain Verizon's market power post-transaction because the relevant geographic market is a building location,

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<sup>1</sup> See Petition to Deny of INCOMPAS, WC Docket No. 16-70, at 3-4, 22-26 (filed May 3, 2016) (“INCOMPAS Wireline Petition to Deny”); see also Petition to Deny of INCOMPAS, ULS File No. 0007162285 (filed May 3, 2016).

<sup>2</sup> INCOMPAS Wireline Petition to Deny at 5-7.

<sup>3</sup> *Id.* at 8-10.

and, as the record of the business data services proceeding makes clear, the competitive case to build is limited. The elimination of XO as a competitive source of business data services would enable Verizon and AT&T to more easily coordinate pricing, further cementing their market power in their respective regions.

We expressed particular concern that XO has been uniquely successful in offering Ethernet-over-Copper (“EoC”) as a cost-effective alternative to incumbent LEC wholesale and retail business data services and that the proposed transaction would eliminate this source of competition.<sup>4</sup> In particular, we explained that it is unlikely that another competitive carrier would be able to replace XO as a provider of EoC because XO has developed special expertise in the provision of EoC that other competitors have been unable to replicate, and XO has sunk significant investment in 5,600 fiber route miles of metro fiber and an extensive network of collocations that would be difficult, perhaps impossible, for a competitor to replicate. Moreover, beyond stating that it will honor XO’s current contractual commitments, Verizon has provided no assurances that it will continue to offer EoC. Even if it did continue to offer EoC, Verizon likely would do so pursuant to terms and conditions that are far less favorable than those that XO currently offers.

Finally, we explained that that the proposed wireline transaction will eliminate XO as a low-cost competitive alternative source of voice interconnection and a reasonable Internet traffic exchange partner.<sup>5</sup> XO has offered VoIP interconnection pursuant to Sections 251 and 252 of the Communications Act, while Verizon refuses to publicly offer VoIP interconnection on a nondiscriminatory basis. Similarly, while XO enters into reasonable Internet traffic exchange agreements, Verizon’s Internet traffic exchange agreements reflect its substantial market power. Approval of the proposed wireline transaction would provide Verizon with the ability to extend to the XO network its anticompetitive voice interconnection and Internet traffic exchange policies and practices.

In short, Verizon’s acquisition of control of XO and *de facto* control of the Nextlink spectrum would eliminate a vigorous and innovative competitor that is both a buyer and a seller in the business data services marketplace and a possible future source of competitive wireless services, not to mention a fierce advocate for issues of critical importance to competitive providers. The Commission should therefore require the Applicants to provide quantifiable and verifiable evidence that the wireline and wireless transactions would enhance competition and promote the public interest. As currently proposed, the transactions would do neither.

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<sup>4</sup> *Id.* at 11, 21.

<sup>5</sup> *Id.* at 14-20.

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Please do not hesitate to contact me with any questions regarding this submission.

Sincerely,

/s/ Angie Kronenberg

Angie Kronenberg  
Chief Advocate and General Counsel  
INCOMPAS

cc: Michael Ray  
Terri Natoli  
Linda Ray  
Zach Ross  
Daniel Kahn  
Madeleine Findley  
Eric Ralph  
Kate Matraves  
Pam Megna  
Joel Rabinovitz  
Varsha Mangal