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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***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**

Dear Ms. Dortch:

As INCOMPAS, its members EarthLink, Inc., Windstream Services, LLC, and BT Americas Inc., and other parties have explained, approval of Verizon's proposed acquisition of XO stands to harm competition and consumer welfare.[1] Under no circumstances should the Commission consent to the proposed transaction absent conditions designed to address the harms posed by the transaction, including, at a minimum, those set forth in the Appendix attached hereto (the "INCOMPAS Conditions").

The INCOMPAS Conditions would at least partially mitigate the harms that would result from the loss of XO as a maverick independent competitor, both within and outside of Verizon's incumbent LEC territory. *First*, the Commission should require that the combined company extend for up to seven years the terms of wholesale contracts pursuant to which XO is a seller and the terms for individual circuits that wholesale customers purchase from XO. The Commission should also prohibit Verizon from increasing for seven years the wholesale rates that XO currently charges customers for services provided pursuant to existing XO contracts or

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[1] *See* Letters from Sheba Chacko, BT Americas, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70 (filed Nov. 2, 2016); Letter from Thomas Jones, Counsel for EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70 (filed Sept. 12, 2016); Comments of Windstream Services, LLC, WC Docket No. 16-70 (filed May 12, 2016); Petition to Deny and Comments of Public Knowledge, WC Docket No. 16-70 (filed May 12, 2016); Petition to Deny of INCOMPAS, WC Docket No. 16-70 (filed May 3, 2016); Petition to Deny of DISH Network Corp., WC Docket No. 16-70 (filed May 3, 2016).

individual circuit arrangements, which generally are substantially lower than the wholesale rates that Verizon charges. The combined company would likely have the incentive to cease offering services on the rates, terms, and conditions currently offered by XO, both in its region and, when XO's pricing is disruptive, outside of its region. It would have the opportunity to act on this incentive because many INCOMPAS members purchase wholesale inputs from XO on a month-to-month basis. In addition, the combined company would likely have the incentive to weaken its rivals by raising its prices for wholesale business data services, eliminating an alternative that its competitors can use to ameliorate anticompetitive price squeeze behavior by its in-region incumbent LEC affiliate or by other incumbent LECs. The combined company would have the opportunity to act on this incentive even for services purchased pursuant to XO wholesale contracts because those contracts generally give XO the right to change its prices when it deems it appropriate to do so. This right is beneficial when exercised by a wholesale provider, such as an independent XO, that has the incentive to reduce prices over time, but it poses a threat when exercised by a wholesale provider that would no longer have an incentive to challenge its affiliate's pricing in its incumbent LEC region, or even to challenge another incumbent LEC's pricing, particularly where XO set a price floor that is lower than Verizon's.

Second, the Commission should prevent Verizon from using its increased market power to stifle competition in the provision of business services at bandwidths below 50 Mbps by imposing penalties on competitors that engage in pro-consumer technology transitions. Verizon continues to assess shortfall liability for TDM services, even when a wholesale customer is replacing those services with purchases of Ethernet services that more than cover the shortfall, and even when the TDM tariff option includes circuit portability such that the wholesale purchaser's spend is not tied to a specific end-user location. In acquiring XO's network assets, Verizon will increase its market power within its incumbent LEC service areas by eliminating XO, making it important for the Commission to adopt conditions that limit Verizon's ability to raise rivals' costs and reduce competition. Specifically, as detailed in the INCOMPAS Conditions, for a period of seven years, the Commission should require the combined company to allow its customers' Ethernet purchases to substitute for TDM purchases when calculating commitment attainment under tariffs providing for circuit portability. In addition, also for a period of seven years, the Commission should prohibit Verizon from applying early termination liability when a TDM business data services connection is prematurely disconnected and replaced with Ethernet, either at the same customer location or at any customer location where the purchaser disconnected a TDM connection of at least equal capacity purchased under a plan including circuit portability, until the end of the previously committed TDM term (or, if the remaining TDM term is longer than the longest Ethernet term commitment, until the end of the Ethernet term commitment).

Third, the Commission should require Verizon to continue to provide wholesale access to unbundled DS1 and DS3 capacity loops over its copper and fiber networks in a manner consistent with Sections 251 and 252 of the Communications Act of 1934, notwithstanding its IP transition plans. The continued availability of unbundled DS1 and DS3 capacity loop inputs will be even more important if the transaction is approved because it will help check the combined company's ability to increase prices for services below 50 Mbps.

Fourth, approval of the proposed transaction will increase Verizon's incentive and opportunity to maintain and extend its unnecessary and excessive special construction charges, which raise the costs competitive providers of business services must pay for critical wholesale inputs. The Commission should therefore make clear that Verizon may impose special construction charges only subject to the INCOMPAS Conditions, including that (1) existing facilities, even with routine maintenance and conditioning, do not have capacity available at or above the level requested by the wholesale customer, and (2) special construction charges are specifically for the deployment of new network delivery infrastructure required to fulfill the wholesale customer's request and do not address the costs of network delivery infrastructure that Verizon will use for its own operations.

Finally, to ensure that current XO customers continue to have access to XO's competitively-priced, industry-leading Ethernet over Copper ("EoC") services, the Commission should prohibit the combined company from changing the terms and conditions on which those services are offered and altering the geographic coverage of XO's EoC platform for a period of seven years, except in locations where the combined company or the underlying incumbent carrier has elected to lawfully retire copper loops used to provide XO's EoC service. To the extent that the combined company or the underlying incumbent carrier lawfully retires copper loops used to provide XO's EoC service, the combined company must offer an equivalent substitute service at equivalent rates, terms, conditions, and coverage in the locations where copper is retired, also for a period of seven years.

Given the significance of this transaction and the loss of competition in wholesale and retail markets that would result if it is approved, the INCOMPAS Conditions, other than those proposed as ongoing obligations, should remain in effect for seven years in order to ensure that the harms of the transaction are addressed and consumers are protected for an adequate period of time, consistent with Commission precedent.[2]

[2] *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd. 6327, App. B (2016); *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, App. A (2011).

Please do not hesitate to contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones
Mia Guizzetti Hayes

Counsel for INCOMPAS

Attachment

cc: Lisa Hone
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APPENDIX

INCOMPAS Conditions

I. DEFINITION

1. "Company" means (i) the combined entity of the Applicants as of the Closing Date and (2) any affiliate as defined in Section 3(2) of the Communications Act of 1934.

II. CONTRACT AND CIRCUIT EXTENSION CONDITIONS

1. On the Closing Date, the Company shall provide each purchaser the option to extend, for a term of years chosen by the purchaser not to exceed seven years, the term of any agreement executed prior to the Closing Date for the purchase of wholesale service from XO.

2. On the Closing Date, the Company shall provide each purchaser the option to extend, for a term of years chosen by the purchaser not to exceed seven years, the term of each circuit purchased prior to the Closing Date from XO under an agreement for the provision of wholesale services.

3. Commencing on the Closing Date, and ending on the seventh anniversary of the Closing Date, for any service sold under an XO wholesale agreement described in Sections II.1 or II.2 above, the Company shall not charge customers recurring or non-recurring rates that are above the level offered by XO as of the release date of the Federal Communications Commission's order approving the transaction.

III. TDM BUSINESS DATA SERVICES PENALTIES

1. Commencing on the Closing Date, and ending on the seventh anniversary of the Closing Date, the Company shall:

   a. Count the purchase of Ethernet services toward the attainment of any purchaser's legacy TDM volume commitments with circuit portability; and

   b. Eliminate the assessment of early termination liabilities for individual circuits where the purchaser prematurely disconnects a TDM Business Data Services connection and replaces that connection with an Ethernet Business Data Services connection at either the same customer location or another customer location where the purchaser disconnected a TDM Business Data Services connection of at least equal capacity purchased under a plan including circuit portability, the term for which is equal to the longer of either (1) the time left on the terminated TDM connection's term or (2) the longest Ethernet term commitment.

IV. UNBUNDLED SERVICES

1. The Company shall confirm that it will make unbundled DS1 and DS3 capacity loops available over its copper and fiber networks at the rates provided for by Sections 251

and 252 of the Communications Act of 1934 and Sections 51.501-51.511 of the Commission's rules. The Company's conversion to IP-based technologies shall not discharge its unbundling obligation.

V. ETHERNET OVER COPPER

1. Commencing on the Closing Date, and ending on the seventh anniversary of the Closing Date, the Company shall not:

   a. Change without the purchaser's consent the terms or conditions on which any service provided over XO's Ethernet over Copper platform is offered; or

   b. Alter without the purchaser's consent the coverage of XO's Ethernet over Copper platform, except that, where copper loops are lawfully retired during the seven year time period:

      i. The Company shall offer a service substantially equivalent to the service offered on XO's Ethernet over Copper platform at substantially equivalent rates, terms, conditions, and coverage before copper is retired in the locations where copper will be retired.

VI. SPECIAL CONSTRUCTION CHARGES

1. The Company shall confirm that it will not impose special construction charges when a Wholesale Customer requests to purchase a TDM-based or packet-based Business Data Service, unless all of the following conditions are met:

   a. The special construction charge recovers the costs associated with a network build-out where the Company's existing facilities do not have capacity available at or above the level requested by the Wholesale Customer, even with routine maintenance and conditioning, meaning:

      i. For a requested service that is provided over the Company's fiber network, the Company does not have a fiber connection to the requested location; or

      ii. For a requested service that is provided over the Company's copper network (a) the Company has tested and found no spare copper loop facilities capable of fulfilling the Wholesale Customer's order, even with routine maintenance and conditioning; and (b) the Company does not have fiber at the relevant location.

   b. The special construction charge is specifically for the deployment of new network delivery infrastructure required to fulfill the Wholesale Customer's request and the Company certifies that it cannot use the infrastructure built with the special construction charge for any of the Company's retail services in the future.