



May 12, 2016

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

Re: *Applications Filed for the Transfer of Control of XO Communications, LLC to Verizon Communications Inc.*, WC Docket No. 16-70

Dear Ms. Dortch:

Windstream Services, LLC (“Windstream”) hereby files the attached comments in response to the Public Notice regarding the above-referenced proceeding.¹ Pursuant to sections 0.457 and 0.459 of the Commission’s rules, 47 C.F.R. §§ 0.457, 0.459, Windstream hereby requests that the Commission withhold from any future public inspection of and accord confidential treatment to marked portions of the confidential copy of comments filed with the Office of the Secretary in the above-referenced proceeding. Windstream is also filing via ECFS the redacted version of the attached comments for public inspection, from which all of the information designated as confidential has been redacted.

Confidential treatment is required to protect highly sensitive commercial information about Windstream’s wholesale purchases, including information about the rates for and amounts of such purchases. Windstream asserts the following in support of this request:

1. Identification of the specific information for which confidential treatment is sought.

Windstream requests confidential treatment of text marked as “**CONFIDENTIAL**” in this submission.

2. Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.

Confidential treatment is requested in conjunction with Windstream’s submission of the attached comments in the above-referenced proceeding.

¹ See *Applications Filed for the Transfer of Control of XO Communications, LLC to Verizon Communications Inc.*, Public Notice, DA 16-393, WC Docket No. 16-70 (rel. Apr. 12, 2016).

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3. Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.

The information for which Windstream is seeking confidential treatment includes commercially sensitive information relating to Windstream's wholesale purchases, costs, and expenses. None of this information is available to the general public, and disclosure could affect competitive standing in the marketplace. The Commission has recognized that disclosure of information relating to market plans and business strategies can cause substantial competitive harm.²

4. Explanation of the degree to which the information concerns a service that is subject to competition.

The information for which Windstream is seeking confidential treatment includes information about its wholesale expenditures and purchases in connection with Windstream's provision of competitive complex communications solutions.

5. Explanation of how disclosure of the information could result in substantial competitive harm.

Disclosure of this information could hinder Windstream's ability to negotiate commercial agreements and purchase wholesale products and inputs used in its provision of competitive complex communications solutions.

6. Identification of any measures taken by the submitting party to prevent unauthorized disclosure.

The information provided includes confidential business information and is treated as such. The information is not ordinarily shared with unauthorized individuals, entities, or other third parties.

7. Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

To the best of Windstream's knowledge, the information for which Windstream is seeking confidential treatment has not been disclosed to the general public or to any particular third parties, unless subject to confidentiality protections.

² See *Sw. Bell Tel. Co., Cost Support Filed Under Request for Confidential Treatment*, Order, DA 99-178, 14 FCC Rcd. 987, 990 ¶ 7 (Competitive Pricing Div. 1999).

REDACTED – FOR PUBLIC INSPECTION

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8. Justification of the period during which the submitting party asserts material should not be available for public disclosure.

Windstream requests that the information remain confidential indefinitely, because its disclosure would negatively affect Windstream's future wholesale purchasing and commercial agreements.

9. Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Data subject to this request also would qualify for Exemption 4 of the Freedom of Information Act. Exemption 4 protects information that is (i) commercial or financial; (ii) obtained by a person outside of the government; and (iii) privileged or confidential.³

Please contact me if you have any questions or require any additional information.

Sincerely yours,



John T. Nakahata
Counsel to Windstream

³ See 5 U.S.C. § 552(b)(4); *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
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of XO Communications, LLC to Verizon)
Communications Inc.)
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COMMENTS OF WINDSTREAM SERVICES, LLC

Jennie B. Chandra
Malena F. Barzilai
WINDSTREAM SERVICES, LLC
1101 17th St., N.W., Suite 802
Washington, D.C. 20036
(202) 223-7664 (phone)
(330) 487-2740 (fax)

John T. Nakahata
H. Henry Shi
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

Counsel to Windstream Services, LLC

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COMMENTS OF WINDSTREAM SERVICES, LLC

Pursuant to the Commission’s April 12, 2016 Public Notice,¹ Windstream submits these comments regarding the Applications filed by XO Holdings (“XO”) and Verizon Communications Inc. (“Verizon”) (together “Applicants”) in the above-captioned proceeding.² Applicants have come nowhere near demonstrating that the transaction will be in the public interest. To the contrary, without substantial conditions to ensure competition from other providers sustainably and immediately can replace the competition that XO brings to the market, this transaction likely will substantially reduce competition, not only in areas where Verizon is a dominant incumbent local exchange carrier (“ILEC”), but also in areas where other ILECs are the largest providers of business data services.

Windstream—as the nation’s fifth largest ILEC, with substantial competitive local exchange carrier (“CLEC”) operations making it also the nation’s fifth largest provider of

¹ See *Applications Filed for the Transfer of Control of XO Communications, LLC to Verizon Communications Inc.*, Public Notice, DA 16-393, WC Docket No. 16-70 (rel. Apr. 12, 2016).

² Consolidated Applications to Transfer Control of Domestic and International Section 214 Authorizations, WC Docket No. 16-70 (filed Mar. 4, 2016) (“Verizon/XO Lead Application”); Letter from Bryan N. Tramont, Counsel to Verizon Communications Inc., and Thomas W. Cohen, Counsel to XO Holdings, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70 (filed Mar. 22, 2016) (“March 22 Supplement”).

business data services and managed services, and as the operator of the sixth largest fiber network (spanning approximately 125,000 miles)³—is in a strong position to evaluate the competitive impacts of the proposed transaction. Windstream provides advanced communications and technology solutions, including managed services and cloud computing, to hundreds of thousands of business data service locations nationwide, and it is particularly concerned about impacts on its business service customers and its ability to continue offering competitive services in the marketplace.⁴

I. SUMMARY

In this proceeding, the Applicants bear the burden of demonstrating that Verizon’s proposed acquisition of XO is in the public interest.⁵ Here, the Applicants’ showing is wholly inadequate to meet that burden. XO has been a particularly active and innovative competitor to Verizon, both within Verizon’s ILEC service areas and outside those areas. In addition to operating its fiber facilities, XO has developed Ethernet-over-Copper to a greater extent than other CLECs and has used that approach to provision Ethernet services up to 100 Mbps without being tied to Verizon’s business data service prices. This allows XO to beat Verizon’s Ethernet price in its ILEC regions, as well as put pressure on prices charged by AT&T in its ILEC

³ See Marc Rysman, *Empirics of Business Data Services* at 217 (“Rysman White Paper”), attached as Appx. B to *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) (“*Tariff Investigation Order and FNPRM*”).

⁴ Approximately 60 percent of Windstream’s total company revenues come from the provision of business services. See Comments of Windstream Corp. at 2 n.4, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015).

⁵ See, e.g., *In the Matter of Applications Filed by Frontier Communications Corporation and AT&T Inc. for the Assignment or Transfer of Control of the Southern New England Telephone Company and SNET America, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd. 9203, 9205 ¶ 8 (2014) (“*Frontier/AT&T Order*”) (citation omitted).

regions. As a CLEC, Windstream relies on XO (where XO is present) to provide a competitive check on Verizon's extremely non-competitive wholesale offerings. Windstream's ability to compete against Verizon for business data customers will be lessened if Verizon acquires XO.

The Applicants provide very little useful information on the extent to which XO competes with Verizon, especially, but not only, in Verizon's incumbent territories. But what we do know is that Verizon holds substantial market power in delivery of business data services, particularly last-mile access. Verizon's acquisition of XO—a leading competitive provider serving both retail and wholesale customers, and an innovator in deploying Ethernet-over-Copper—would increase its market power. Verizon will have even greater ability to use its power in order to drive out competition to deliver complex communications solutions to businesses and nonprofit and government institutions in Verizon's ILEC region. As the United States Department of Justice Antitrust Division has recognized, even small increases in market share by a dominant firm present significant competition problems.⁶

The Applicants also fail to address the extent to which this transaction—by removing XO as a retail competitor and an independent wholesale supplier of last-mile connections to buildings, whether through its own fiber or means such as Ethernet-over-Copper—will reduce competition in AT&T's ILEC region. Verizon and AT&T are the nation's two largest providers of enterprise communications solutions, especially among customers needing the most sophisticated solutions. Thus, Verizon may well benefit from engaging in coordinated behavior with AT&T to limit competition for business data services in each carrier's region, and to raise

⁶ See Verified Complaint at 12-14 ¶¶ 35-37, *United States v. United Continental Holdings, Inc. and Delta Airlines, Inc.*, Case No. 2:15-cv-07992 (D.N.J. Nov. 10, 2015) (“*DOJ United Complaint*”) (DOJ sued to block a swap of landing slots that increased United's share of slots by only 2 percentage points).

other rivals' costs by increasing the costs of last-mile connections that other rivals must use to provide their own suites of complex business communications solutions. Eliminating XO as an independent competitor in AT&T's ILEC region will facilitate the ability of AT&T and Verizon to coordinate with one another. By raising rivals' costs, AT&T and Verizon have the ability to squeeze other competitive providers of complex business communications solutions, and make it impossible for those providers to fill the competitive hole left when Verizon acquired XO. XO was one of the few significant constraints on Verizon's (and AT&T's) power to raise Windstream's costs. Now, if its acquisition of XO is approved, Verizon will have even more power to engage in anti-competitive price squeezes against Windstream and other CLECs.

Before the Commission can conclude that this transaction is in the public interest, it must impose several conditions on Verizon to address the significant potential for harm to competition that could result from Verizon's increase in market power both in its ILEC region and outside of its ILEC region, and to maximize the potential for other competitors sustainably to expand to fill the competitive void left by Verizon's absorption of XO. In particular:

- To mitigate anticompetitive price squeezes, the Commission should require Verizon to make wholesale services available in all regions at the lower of (1) Verizon's best retail price less all avoidable costs, or (2) for at least seven years after the transaction closes, XO's best price for comparable service in the same ILEC service area, including service offered over leased copper unbundled network element ("UNE") loops.
- Verizon must continue to make unbundled DS1 and DS3 capacity available over copper and fiber at Section 252 rates even after the conversion to IP-based networks.
- Verizon must reform its worst-in-class practices of charging special construction when it can leverage existing infrastructure or has its own foreseeable uses for any new network infrastructure being constructed.
- Verizon must eliminate TDM special access shortfall penalties that inhibit the transition of competitive providers' customers to IP-based connections.
- Verizon must commit to comply with any additional requirements imposed on other price cap ILECs in the Commission's Business Data Services proceeding.

By taking these steps, among others, the Commission can better ensure that other competitors will be able sustainably to fill in and replace XO's independent competitive presence, both in Verizon's and AT&T's ILEC territories, to the benefit of business data service customers.

II. BOTH APPLICANTS ARE SIGNIFICANT PROVIDERS OF COMPLEX ENTERPRISE COMMUNICATIONS SOLUTIONS, INCLUDING RETAIL AND WHOLESALE DATA SERVICES.

In the proposed transaction, Verizon seeks to strengthen its dominance of the enterprise communications marketplace, including with respect to business data services (“BDS”) by purchasing a smaller rival, XO Communications. As the successor to the nationwide enterprise business built by MCI during a time when Verizon could not provide interexchange services, Verizon is one the two largest enterprise communications providers in the country—with the other being AT&T. As a leading analyst explained, “AT&T and Verizon sustainably dominate the High-complexity segment” of the enterprise communications market—a segment that analyst described as firms that “employ over 5,000 people on average, with locations spread through the country (likely spanning the footprints of several carriers), and have sophisticated service requirements (e.g., system uptime, network latency and jitter, ability to serve and connect concurrent users) that entail service level agreements.”⁷ That analyst concluded, “[W]e expect that AT&T, Verizon, and—to a lesser degree CenturyLink—will remain the only providers with the network, service, and support capabilities to meet the needs of large enterprise customers”⁸ The FCC recently retained an expert economist who likewise reported that Verizon and AT&T are the two largest providers of BDS and managed services in the country,

⁷ Sanford C. Bernstein & Co., LLC, *U.S. Telecom: A Primer in the \$70B Enterprise Telecom Market (Cable's Opportunity = Telcos' Loss?)* at 3 (July 16, 2015) (“Bernstein Enterprise Report”).

⁸ *Id.* at 2.

with Verizon nearly twice as large as the third largest provider (CenturyLink) and nearly four times larger than the fourth largest provider (Level 3).⁹ These markets that Verizon dominates along with AT&T constitute approximately half of total enterprise communications spend among a small number of customers.¹⁰

Verizon, along with AT&T, is also one of the largest providers of wholesale Ethernet to other carriers—both fixed line and wireless inputs to BDS offerings. Indeed, an analyst concludes, “Verizon dominates the wholesale market as the company continues to see solid growth in demand for Ethernet from wireline and wireless carriers.”¹¹

XO has been a vigorous competitor to Verizon and AT&T, both nationally and within Verizon’s and AT&T’s ILEC regions. As XO itself told the FCC this past January: “XO is a facilities-based CLEC. It has metropolitan area fiber-based networks in . . . large and mid-sized metro areas, most of which were installed over a decade ago, over which it provides a variety of retail services to medium to large business and enterprise customers and Dedicated Services at wholesale to carrier customers.”¹² The XO Communications Network Map attached to the application shows that XO’s network facilities are primarily concentrated across the Verizon and

⁹ Rysman White Paper at 217.

¹⁰ Bernstein Enterprise Report at 4.

¹¹ Frost & Sullivan, *Wholesale Carrier Ethernet Services Market Update, 2015* at 28 (Aug. 2015) (“Frost & Sullivan Report”).

¹² Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking at 7, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“XO Business Data Services Comments”).

AT&T ILEC territories.¹³ XO explained that it uses its network to “provide[] ‘on-net’ (Type I) services to thousands of customers.”¹⁴ But XO’s competitive presence is not limited to its fiber.

As XO further explained, “XO provides service to many more end users and carriers using facilities and services it leases and purchases (‘Type II’ facilities or ‘off-net’ services), in combination with XO’s own metro network facilities or on a standalone basis.”¹⁵ Among the ways that XO provides service is through combining leased copper-based DS0 UNE loops from Verizon and AT&T with XO’s own electronics to “offer[] Ethernet over Copper (‘EoC’) at speeds up to 100 Mbps.”¹⁶ According to XO, “EoC has proven to be and remains an attractive service for consumers desiring advanced capabilities and a pivotal means to jumpstart the transition to IP-based networks.”¹⁷ XO, in particular, has been uniquely successful in developing and operating EoC service as a more cost-effective alternative to Verizon’s BDS services up to 100 Mbps.¹⁸ As explained in its filings, XO “has been an industry innovator and was one of the first carriers to exploit the opportunity to use copper loops to bring IP-based services to locations

¹³ Verizon/XO Lead Application at Attach. 2.

¹⁴ XO Business Data Services Comments at 7.

¹⁵ *Id.* at 7-8.

¹⁶ *Id.* at 8

¹⁷ See Letter from Thomas Cohen, Counsel to XO Communications LLC, to Marlene H. Dortch, Secretary, FCC, at 2, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1 (filed June 5, 2015) (“XO June 5, 2015 Ex Parte”).

¹⁸ See Declaration of James A. Anderson ¶ 17 (“Anderson Declaration”), attached to XO Business Data Services Comments. In contrast, Windstream reports that its Ethernet-over-Copper offerings most commonly provide capacity of up to 20Mbps, and sometimes up to 45Mbps, but as a practical matter cannot provide higher capacities due to a number of limitations. See Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith ¶¶ 61-63 (“Windstream Declaration”), attached as Attach. A to Comments of Windstream Services LLC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (“Windstream Business Data Services Comments”).

that did not have fiber—which are still a clear majority of buildings in the country. In 2006, XO pioneered the deployment of high-capacity services over copper facilities with the launch of its EoC service.”¹⁹ As of February 2015, XO reported that it provides EoC in more than 565 local serving offices and to approximately 953,000 buildings.²⁰ XO’s EoC provides a cost-effective alternative to Verizon and AT&T’s Ethernet services in areas where a sufficient number of copper loops are available for lease, and EoC is capable of delivering speeds demanded by many enterprise customers. XO also leases DS1 facilities and services from Verizon and AT&T.²¹

Through this combination of service configurations, XO has deployed a nationwide Ethernet access network to more than two million business locations.²² It is now the eighth largest provider of Ethernet in the nation based on number of business ports in service.²³

¹⁹ Comments of XO Communications on the Tech Transitions Notice of Proposed Rulemaking and on the Petition for Declaratory Ruling of Windstream at 4, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015) (“XO Technology Transitions Comments”). *See also* Press Release, XO Communications, “XO Communications Extends its Ethernet Services Leadership with New Speeds and Expanded Nationwide Coverage” (Nov. 7, 2012), <http://www.xo.com/about/news-and-events/press-releases/xo-communciations-extends-its-ethernet-services-leadership-with-new-speeds-and-expanded-nationwide-coverage/> (“As one of the first service providers to deploy EoC technology on a nationwide basis, XO Communications has been a pioneer in providing business and wholesale customers with more cost-effective alternative Ethernet access options to fiber optic technology.”).

²⁰ *See* XO Technology Transitions Comments at 5.

²¹ *Id.* at 9.

²² Press Release, XO Communications, *supra* note 19.

²³ *See* 2015 U.S. Carrier Ethernet Leaderboard, VERTICAL SYSTEMS GROUP (Feb. 25, 2016), <http://www.verticalsystems.com/vsglb/2015-u-s-carrier-ethernet-leaderboard/>.

III. THE APPLICATION FAILS TO ADDRESS NEARLY ALL OF THE PROPOSED TRANSACTION’S IMPACTS ON COMPETITION AND CONSUMERS.

In addressing a proposed merger, the Commission routinely considers “whether a transaction will enhance, rather than merely preserve, existing competition” and takes an “extensive view of potential and future competition and its impact on the relevant market.”²⁴ The Commission is not able to perform this critical examination here, because the applications omit many key facts that are critical to assessing the proposed transaction’s effect on both competition and consumers. The Applicants have provided only limited information regarding the extent to which XO facilities overlap Verizon facilities in Verizon’s ILEC territories, and insufficient information to assess the extent to which XO’s facilities support competing service. The Applicants provide no information on the extent to which XO uses UNEs to compete with Verizon in providing BDS offerings, especially—but not only—in Verizon’s ILEC territories. And they provide no information about the potential for coordinated behavior between Verizon and AT&T, particularly in the wholesale market, or the loss of XO as a vigorous competitor to AT&T.

In particular, the Applicants fail to acknowledge:

- that XO has been uniquely successful in developing and operating EoC as an alternative to Verizon’s ILEC BDS up to 100 Mbps;²⁵
- that XO has been investing substantial sums to serve as an alternative provide of fiber-last mile connectivity;²⁶
- the important role XO plays in offering diversity in network infrastructure; and

²⁴ See, e.g., *Frontier/AT&T Order*, 29 FCC Rcd. at 9206 ¶ 10.

²⁵ Anderson Declaration ¶ 17.

²⁶ XO, among other investment initiatives, launched a \$500 million “On-Net Initiative” in 2014. See XO Business Data Services Comments at 10.

- that XO's wholesale prices generally are substantially lower than other ILECs' (including Verizon's), as well as many other CLECs' (which is why Windstream commonly prefers to use XO's offerings where available).

Just as significantly, the Applicants provide no reason to conclude that Verizon, which along with AT&T is one of the largest providers of enterprise business services, will continue to make wholesale services available to third parties, as XO has done—rather than coordinating behavior to raise rivals' costs to cement its dominant position and preclude competition, particularly to serve multi-location customers with a broad regional or national presence that includes areas both within and outside of Verizon's ILEC territories.

The BDS markets—in which Verizon and XO compete with respect to the same or similar products and geographies—already are highly concentrated.²⁷ Verizon and AT&T offer the largest BDS networks in the country, in terms of locations served and overall revenue.²⁸ Using nationwide shares as a proxy for share in each of the Verizon and AT&T ILEC regions, in only a miniscule number of census blocks where ILECs provide special access do HHIs fall below the level at which the Department of Justice considers “highly concentrated.”²⁹ Indeed,

²⁷ See Attachment to Letter from Jennifer Bagg, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 8, WC Docket No. 05-25 (filed Apr. 18, 2016) (noting that based on a nationwide analysis of the FCC's data on BDS revenue, the Herfindahl-Hirschman Index exceeds the “highly concentrated” level in 99 percent of census blocks).

²⁸ See Rysman White Paper at 217. See also Frost & Sullivan Report at 27 (showing that Verizon and AT&T collectively accounted for nearly 53% of total wholesale Ethernet revenue in the United States in 2014, and that their combined market share *increased* by 5 percentage points from 2013 to 2014).

²⁹ Declaration of William Zarakas and Susan Gately, Table 7, Panel 7A, attached to Comments of Sprint Corporation, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016). The correct geographic market is a building, not a census block. However, because publicly-available data is available on a census block basis, we use the census block here.

nearly all of these census blocks have HHIs at or above levels at which the Department of Justice has challenged even small increases in market share.³⁰

With their unparalleled reach, Verizon and AT&T are the largest wholesale providers of last-mile dedicated business service connections in the country. In particular, *** BEGIN

CONFIDENTIAL *** [REDACTED]

[REDACTED]

[REDACTED] *** END

CONFIDENTIAL ***³¹ This puts Verizon and AT&T in a unique position to execute price squeezes to push other enterprise business solution providers out of the market—both individually in their own regions, and also when multilocation customers need enterprise business solutions at locations in both Verizon and AT&T territories. Like most incumbent carriers, Verizon and AT&T realize significant last-mile investment advantages, including: (1) lower network build out costs, (2) the ability to spread costs over a much larger customer base, and (3) lock-up agreements to defend their high market share. Acquiring XO will only amplify the advantages for Verizon.

Moreover, although the Applicants claim that 78 percent of XO-served buildings within Verizon’s service territories are served by other CLECs or cable companies,³² the Applicants provide no information as to the types of connections (if any) operated by the other alleged competitors, whether the connections (if any) are capable of supporting dedicated BDS, and if

³⁰ *Id.* See also DOJ United Complaint at 13 ¶ 37 (DOJ sued to block a swap of landing slots that increased United’s share of slots by only 2 percentage points, where the pre-transaction HHI was 5440).

³¹ See Windstream Declaration ¶ 80.

³² See March 22 Supplement at 2.

so, at what capacity levels. Without such information, it is impossible to begin to assess the degree to which actual competition would exist or be diminished as a result of this transaction.

And while the Applicants fail to consider pricing of competitors, Windstream, based on its own experience, finds this also is a significant factor to consider. In Windstream's experience, XO has been a price leader in on-net and EoC services, which has placed pricing pressure on Verizon and AT&T. Specifically, *****BEGIN CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *****END CONFIDENTIAL*****³³

Furthermore, XO's EoC service, where available, provides an important competitive alternative to Verizon's and AT&T's Ethernet services, which are not subject to ex ante price regulation. Approximately 50 percent of the Ethernet circuits that Windstream purchases from XO or approximately 32 percent of Ethernet expense with XO are provisioned as EoC. These connections currently provide Windstream symmetrical bandwidth of up to 100 Mbps, and XO has indicated that it has been "exploring ways to increase downlink speeds using EoC significantly beyond what is offered today."³⁴ It is important for Windstream, and other competitors, to have diversity of choice so that they can provide customized services to meet customer needs, ensure that the services provided are affordable, and protect against service

³³ XO's own data also show that for Ethernet services in particular, XO's price for a 10Mbps Ethernet-over-copper circuit, at \$400 per month, is substantially below that charged by ILECs for the same bandwidth tier provided over fiber, at \$750 per month. *See* Letter from Thomas Cohen, Counsel to XO Communications LLC, to Marlene H. Dortch, Secretary, FCC, at 6, GN Docket No. 13-5, RM-11358 (filed June 9, 2015) ("XO June 9, 2015 Ex Parte"); XO Technology Transitions Comments at 9 (observing that XO has deployed Ethernet-over-Copper service "at a price (on a per Mbps basis) significantly below that for traditional TDM DS_n services").

³⁴ *See* XO Technology Transitions Comments at 5.

outages or technical problems. XO offers Windstream an alternative to Verizon Ethernet services when deploying its own network facilities is not economically feasible. Although Windstream has invested in building its network, for many business locations there simply is no viable business case for Windstream to overbuild the incumbent.

If this transaction is permitted to go through without conditions, Verizon would have an increased incentive and ability to choke off enterprise business solution competition in its ILEC service area, including shutting down EoC and eliminating the price competition XO brings, and Verizon would have an increased ability to cooperate with AT&T to raise rivals' costs to choke off enterprise business solution competition nationwide.

IV. IF THE COMMISSION PERMITS VERIZON TO ACQUIRE XO'S FIBER AND ETHERNET OVER COPPER ASSETS, IT MUST IMPOSE CONDITIONS TO PREVENT VERIZON FROM RAISING RIVALS' COSTS AND EXECUTING PRICE SQUEEZES TO FORECLOSE COMPETITION.

“[T]he Commission has recognized that a proposed transaction may lead to both beneficial and harmful consequences, and the Commission's public interest authority enables it, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served.”³⁵ In this case, before the Commission can conclude that this transaction is in the public interest, it must impose several conditions on Verizon to address the reduction in competition caused by Verizon's acquisition of a vigorous competitor and alternative supplier of retail and wholesale connections.

These conditions will ensure that other competing providers can continue sustainably to operate and to challenge Verizon and AT&T in providing complex business solutions to enterprise users, offsetting the loss of XO and improving upon the competitive status quo, as the

³⁵ *Frontier/AT&T Order*, 29 FCC Rcd. at 9206 ¶ 11 (citations omitted).

public interest standard requires.³⁶ First, to mitigate the likelihood of successful anticompetitive price squeezes, Verizon should commit to making wholesale last-mile services available in all regions at, whichever is lower: (1) Verizon’s best retail price less all avoidable costs, or (2), for at least seven years after the transaction closes, at rates that do not exceed XO’s best prices for comparable service, including service offered over leased copper loops. Second, Verizon must continue to make unbundled loop facilities available over both copper and fiber at Section 252 rates even following the conversion to IP-based networks. Third, Verizon must reform its worst-in-class practices of charging special construction when it could use existing infrastructure or will have its own foreseeable uses for the new network infrastructure. Fourth, Verizon must eliminate its TDM special access shortfall penalties that inhibit the transition of competitive providers to IP-based services. Fifth, Verizon must commit to comply with any additional requirements imposed on other price cap ILECs in the Business Data Services proceeding.

A. The Commission Should Require Verizon to Offer All Wholesale Last-Mile Services in its ILEC Region at the Lower of (1) Verizon’s Best Retail Rates Less All Avoidable Costs, and (2), at Least for Seven Years, Current Best Prices Offered by XO.

As noted by multiple competitive carriers, large ILECs—with Verizon being no exception—are currently discriminating against carrier customers by charging less for retail end-to-end service than what they charge wholesale customers for merely one component of this

³⁶ Jon Sallet, General Counsel, Federal Communications Commission, Speech at the Telecommunications Policy Research Conference: The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews (Sept. 25, 2015) (“The Commission has traditionally noted that it can take merger-specific steps to enhance, and not just, protect, competition.”) (citing *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd. 14,712, 14,738 (1999)).

connectivity.³⁷ These competitors are then forced to charge higher prices to their own retail customers, which allows Verizon to sustain its own supracompetitive prices. This practice is all the more insidious because Verizon's wholesale prices logically should be *lower* than its retail rates because it is less costly to provision wholesale services, especially when the last-mile input purchased is just one component of end-to-end retail service. Verizon's ability to carry out these discriminatory practices will only increase with the expanded market power it gains by acquiring XO, which today offers lower-priced access and places pressure on Verizon to lower its prices. Thus, the Commission should act to mitigate this harm by making clear that Verizon is required to offer all wholesale last-mile services in its ILEC region at rates that incorporate a discount off of its best retail rates that accounts for all avoidable costs, including network access outside of the last mile. Moreover, for a period of seven years, Verizon should be required to charge prices no higher than the best prices offered by XO for comparable services.

When subject to meaningful competition, a typical supplier would charge its wholesale customers less per unit than its retail customers. This is because the supplier incurs fewer costs on a wholesale basis (e.g., costs for sales, product development, marketing, customer support, billing, and uncollectibles are avoided or greatly reduced), and the supplier commonly is assured reduced churn and greater revenue certainty by wholesale customers' committing to larger volumes and longer purchase terms. The 1996 Act recognizes this, and specifies that the savings should flow through to carrier customers, which can then charge their retail customers

³⁷ See Windstream Business Data Services Comments at 50-51; Comments of TDS Metrocom, LLC at 25-29, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016). See also XO Business Data Services Comments at 43 (alleging price squeezes by AT&T).

competitive rates for communications solutions.³⁸ Avoided and avoidable costs in these instances include network access costs for provisioning capacity outside the last-mile portions of the network.

In gauging the appropriate size of such an avoided cost discount, the Commission could establish proxies for avoidable costs. For example, the Commission could look to, among other things, the amount of the sales agent or channel partner commissions that are avoided in wholesale carrier-to-carrier transactions. The Commission could use such findings to help set an administrable benchmark for identifying avoided sales costs.

In addition, as Windstream has previously discussed, such a discount should also reflect the value and costs avoided in wholesale arrangements resulting in greater volumes and longer purchase terms,³⁹ which produce benefits that Verizon touted in its tariff investigation Direct Case.⁴⁰ According to Verizon, its discount plans “promote economic efficiency and are procompetitive. These plans allow Verizon to share with customers the efficiencies it achieves from reduced administrative costs and greater business certainty.”⁴¹

³⁸ Specifically, Sections 251(c)(4) and 252(d)(3) of the Communications Act, 47 U.S.C. 251(c)(4) and 252(d)(3), require ILECs to make available all telecommunications services at wholesale rates that, in contrast to retail rates, exclude “the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.” As Windstream previously has explained, this requirement covers Ethernet as well as TDM special access services sold from tariffs. Windstream Business Data Services Comments at 70-72.

³⁹ *Id.* at 74; Reply Comments of Windstream Services, LLC at 31-33, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (filed Feb. 19, 2016).

⁴⁰ *See* Direct Case of Verizon at 12-13, WC Docket No. 15-247 (filed Jan. 8, 2016) (“Verizon Direct Case”).

⁴¹ *Id.* (citing Declaration of Eric R. Emch, Ph.D. and Donald K. Stockdale, Jr. J.D., Ph.D. ¶¶ 46-52 (“Emch/Stockdale Declaration”), attached to Verizon Direct Case). Verizon also argues that volume commitments “reduce transactions costs, permit nonrecurring costs to be recovered over a longer period, reduce uncertainty (including by limiting the possibility of *ex*

Moreover, the Commission should condition this transaction on a commitment by Verizon, for a period of seven years, to charge prices no higher than the best prices offered by XO for comparable services, just as it had done in prior transactions including most recently in the Charter/Time Warner Cable/Bright House transaction.⁴² As noted above, ***BEGIN

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This is consistent with pricing data previously filed by XO.⁴³ Grandfathering XO's rates, as proposed by Windstream, would be consistent with Commission action in approving the CenturyLink and Qwest transaction.⁴⁴

post opportunistic behavior), help realize economies of scale, and assist the seller in making appropriate investments in, and allocations of, capacity," Emch/Stockdale Declaration ¶ 50, and "longer term lengths," according to Verizon, are "associated with larger discounts, as the increased term length provides greater certainty, reduces further the risk of stranded investment, and provides a longer period over which to spread any nonrecurring costs," Verizon Direct Case at 35.

⁴² See *Applications filed by Qwest Communications International, Inc. and CenturyTel, Inc. d/b/a/ CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 26 FCC Rcd. 4194, 4223 at Appx. C (2011) ("*Qwest/CenturyLink Order*") ("The rates as of the Merger Closing Date for any service provided by CenturyLink or Qwest will not be increased for either existing or new customers at any building listed in Attachment 2 for seven years following the Merger Closing Date . . ."). See also *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign and Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, FCC 16-59 at Appx. B (rel. May 10, 2016) (prohibiting new usage-based charges for a period of seven years).

⁴³ XO's own data also show that for Ethernet services in particular, XO's price for a 10 Mbps Ethernet-over-copper circuit, at \$400 per month, is substantially below that charged by ILECs for the same bandwidth tier provided over fiber, at \$750 per month. See XO June 9, 2015 Ex Parte at 6; XO Technology Transitions Comments at 9 (observing that XO has deployed Ethernet-over-Copper service "at a price (on a per Mbps basis) significantly below that for traditional TDM DSn services").

⁴⁴ See *Qwest/CenturyLink Order*, 26 FCC Rcd. at 4223, Appx. C.

B. The Commission Should Require Verizon to Continue to Provide Unbundled DS1 and DS3 Capacity Over Fiber and in IP.

To prevent Verizon from using its increased market power to choke off competition in the business services market and to allow competitors to replace the lost competition from XO, the Commission should impose a condition on the transaction requiring Verizon to continue to provide unbundled DS1 and DS3 capacity over fiber and irrespective of a transition to IP-based networks. These legacy facilities are particularly useful, when combined with a carrier's own electronics, in providing Ethernet services below 50 Mbps, including to small retail chains, schools, medical providers, and widespread offices of governmental entities. Congress enacted the unbundling requirements of Section 251(c) of the Communications Act "with a recognition of the market barriers faced by new entrants,"⁴⁵ and intended for unbundled network elements to be available as "an alternative to" special access services where limited access to the bottleneck facilities would impair a competitive carrier's ability to provide the services it seeks to offer.⁴⁶ Access by competitive carriers to unbundled copper and DS1 and DS3 capacity loops is an essential element for robust competition to reach smaller sites.

Econometric evidence in the FCC's Business Data Services rulemaking shows that UNEs—although limited in availability—partially discipline ILEC BDS pricing. In particular, Professor Jonathan Baker, a former FCC Chief Economist and former Director of the Bureau of

⁴⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, 16,984 ¶ 5 (2003).

⁴⁶ *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, 2562 ¶ 51 (2005) ("TRRO"). See also 47 U.S.C. § 251(d)(2).

Economics at the Federal Trade Commission, found that a UNE-based provider lowers the ILEC price by an additional 3.69 percent for any given number of in-building and nearby providers.⁴⁷

Nevertheless, Verizon has informed the Commission that its view is that the obligation to provide unbundled DS1 and DS3 capacity loops vanishes when a loop is comprised of fiber or transmits traffic in an IP format.⁴⁸ Likewise, in its recent notices of intent to retire its copper facilities in certain wire centers, Verizon states that after the retirement it will “no longer offer services over copper facilities,” with no mention of its continuing obligations to provide access to DS1 and DS3 capacity unbundled loops pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.319(a)(4)-(5).⁴⁹

As Windstream and others—including numerous state commissions—have explained, Verizon’s position is contrary to the text of the current unbundling rules and the express language of the Commission’s *Triennial Review Order* and the *Triennial Review Remand Order*.⁵⁰ The TRRO emphasized that unbundled DS1 and DS3 capacity loops place an important

⁴⁷ Letter from Jonathan Baker to Marlene H. Dortch, Secretary, FCC, at Attachment A, Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 58, WC Docket No. 05-25, RM-10593 (filed Apr. 14, 2016).

⁴⁸ Verizon’s Opposition to Windstream’s Petition for Declaratory Ruling at 2, WC Docket No. 15-1, GN Docket No. 13-5 (filed Feb. 5, 2015).

⁴⁹ See, e.g., *Public Notice of Retirement of Copper Loops Under Rule 51.333(a)*, VERIZON (Feb. 23, 2016), <http://www.verizon.com/about/sites/default/files/MA-9-WCs-Copper-Retirement-Feb-23-2016-NOTICE.pdf> (providing notice for nine wire centers in Massachusetts).

⁵⁰ See Reply Comments of Windstream Services, LLC With Respect to Its Petition for a Declaratory Ruling at 8-16, GN Docket No. 13-5, WC Docket No. 15-1 (filed Mar. 9, 2015). See also, e.g., Letter from Gregory J. Doyle, Manager, Telecommunications, Minnesota Department of Commerce, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Mar. 28, 2016); Letter from Karen Charles Peterson, Commissioner, Massachusetts Department of Telecommunications and Cable, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket No. 15-1 (filed Mar. 16, 2016); Letter from David E. Screven, Assistant Counsel, Pennsylvania Public Utility Commission, to Marlene H. Dortch, Secretary, FCC, at 1-2, WC Docket No. 15-1 (filed Mar. 11, 2016); Letter from James Volz, Chairman, et al.,

check on special access pricing as a complementary market-opening tool, without which there would be “an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors’ wholesale inputs to prevent competition in the downstream retail market.”⁵¹ Indeed, the Commission’s decisions to forbear from dominant carrier regulation of Ethernet special access service for the large ILECs are predicated in part on the existence of unbundled network element alternatives.⁵²

DS1 and DS3 capacity loop unbundling rules recognize the substantial advantages enjoyed by ILECs in provisioning last-mile access. As the Commission recognized in the *Qwest Phoenix Forbearance Order*, the “passage of time has [not] lowered [the] barriers” to deployment of competitive facilities, nor has it lessened the danger of “downstream” customer impacts that can arise where a single party holds substantial market power in the upstream

Vermont Public Service Board, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Mar. 3, 2016); Letter from Crystal Rhoades, Commissioner, et al., Nebraska Public Service Commission, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Feb. 23, 2016); Letter from Steven V. King, Executive Director and Secretary, Washington Utilities and Transportation Commission, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket No. 15-1 (filed Feb. 11, 2016). *See also* Letter from Philip J. Macres, Counsel to Midwest Association of Competitive Communications, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket No. 15-1 (filed Apr. 21, 2016).

⁵¹ *TRRO*, 20 FCC Rcd. at 2570-71 ¶ 63 (footnote omitted).

⁵² *See, e.g., Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18,705, 18,716-17 ¶ 20 & n.86 (2007) (“[W]e observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.”).

wholesale market.⁵³ Fiber is not a novel mode of transmitting DS1 and DS3 traffic. Fiber has been in existence since the 1970s, and legacy loops comprised of fiber were installed as very low-risk investments. Indeed, in upholding the requirement that incumbents provide competitive access to newly deployed entrance conduit in brownfield areas at regulated rates, the Commission highlighted the inherently “more favorable environment” incumbents have for building out last-mile facilities “due to existing relationships with property owners and prospective customers.”⁵⁴

Without ongoing unbundling obligations for DS1 and DS3 capacity loops, Verizon would be able to eliminate this source of competition to the post-transaction firm. Verizon could continue to use legacy copper and fiber loops to provide its own IP services, but could block CLECs from doing the same or permit them to do so only at much higher cost. In addition, Verizon could prevent CLECs from similarly utilizing its “new” fiber builds that repurpose legacy UNE infrastructure, such as buried conduit, pole attachments, and building entry portals.

C. The Commission Must Prevent Verizon from Raising Rivals’ Costs Through Inappropriate Special Construction Charges.

In addition, for this transaction to serve the public interest by enhancing the sustainability of replacement competition for XO, the Commission must impose a condition on the transaction to prevent Verizon from raising rivals’ costs through inappropriate and excessive special construction charges. ILECs impose special construction charges, in addition to regular charges for service, where new deployment of fiber or other facilities is necessary to provide the

⁵³ *Petition 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, 8670 ¶ 90 (2010).

⁵⁴ *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) From Enforcement of Obsolete ILEC Legacy Regulations that Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, FCC 15-166, ¶ 83 (rel. Dec. 28, 2015).

wholesale special access service and the ILEC has no other requirement for the facilities. However, competitive LECs and business services customers have increasingly observed the imposition of unwarranted special construction charges by Verizon as a way to impose de facto, additional last-mile price increases. This is particularly the case with fiber. In fact, XO itself noted last year that the percentage of cases in which special construction is imposed is more than 80 times higher for Verizon than AT&T.⁵⁵ Windstream’s own data shows—based on an analysis submitted to the Commission that compares special construction quotes to completed orders for the first three quarters of 2015—that Verizon is more than 40 times as likely to impose Ethernet special construction charges than AT&T, and much more likely to impose special construction charges on Ethernet as compared to TDM special access services.⁵⁶

Unwarranted special construction charges, whether imposed on orders for TDM-based or IP-based services, have a negative impact on business, nonprofit, and government consumers—by driving up prices these customers pay, and by often erecting a pricing barrier to use of competitive alternatives that is so high that customers essentially have no choice but to stay with the incumbent. The Commission has long recognized that charges for facilities construction can be a source of impermissible unreasonable discrimination, and a means to attempt to avoid the “basic common carrier responsibility” for “planning and investing in facilities” to respond to reasonable requests for service.⁵⁷ The Commission should not allow these harms to continue—or potentially be enhanced—with further consolidation of Verizon’s market power.

⁵⁵ Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, WC Docket No. 05-25 (April 23, 2015).

⁵⁶ Windstream Declaration ¶ 101.

⁵⁷ See *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, FCC 84-51, 97 FCC 2d 1082, 1212-13 (1984).

To address Verizon's unjustified, competition-impeding special construction practices, the Commission should impose a condition to mandate that, where a CLEC is ordering TDM-based or packet-based special access services, Verizon may only impose special construction charges for network build-out where *both* of the following two conditions are met. *First*, existing Verizon or XO facilities, even with routine maintenance and conditioning, do not have capacity available at or above the level requested by the CLEC. In the case of a CLEC requesting a service that requires fiber, this condition is fulfilled where Verizon or XO does not already have fiber connecting to the relevant location.⁵⁸ In the case of a CLEC requesting a service that can be provided over copper, this would be fulfilled where (a) Verizon has tested and found that no spare copper loop facilities would be capable of fulfilling the CLEC's order, even with routine maintenance and conditioning,⁵⁹ and (b) Verizon or XO does not have fiber at the relevant location. *Second*, the special construction charges must not address the costs of network delivery infrastructure that Verizon will use for its own operations. Verizon should only impose special construction charges where it must deploy new network delivery infrastructure (e.g., conduit, subduct, buried, aerial infrastructure) to fulfill a CLEC's request, and where it certifies

⁵⁸ Verizon also should not be permitted to charge for construction of duplicative fiber if it already has fiber with capacity available at the customer location. This includes instances where Verizon has fiber running to a building but the fiber's Optical Line Terminal may not connect to the appropriate port to support the requested service (e.g., a GPON network that does not connect from the OLT to an Ethernet port). To the extent new electronics must be added either at the Central Office or the customer premises, or additional intra-building cable must be installed, that work may be subject to special construction charges if other conditions are satisfied.

⁵⁹ Examples include removal of bridge taps and loading coils.

that it will not use the infrastructure—including the supporting infrastructure, such as conduits and poles—for any of its or its affiliates’ retail services in the future.⁶⁰

In addition, to ensure special construction charges do not cause significant delay in deployment of competitive services to customers, the Commission should require that Verizon

⁶⁰ This ILEC certification is consistent with—and, indeed, cannot and should not override—the basic requirement that the ILEC cannot charge for any facilities that it can use to serve other customers. In application, this means the ILEC should not charge special construction for any of the following:

- Construction and interconnection of a link between the GPON ONU and, as applicable, an ILEC’s serving Ethernet or TDM node; x Poles that are not limited to the CLEC customer’s exclusive future use;
- Any costs for conduit, subduct, buried or aerial infrastructure when
 - o This infrastructure is located in a public right-of-way, except in circumstances where the ILEC certifies that it will not have any other future use for the infrastructure (e.g., the infrastructure runs to a single customer at a particular location, and no other customers are located along the route or at the terminus point of the infrastructure); or
 - o The infrastructure traverses private property but will serve a multi-tenant location; x Fiber or cable that is not limited to the CLEC customer’s exclusive future use;
- Any splitters, amplifiers, or other passive infrastructure that have the capability to serve more than the CLEC’s customer at the same location or locations that could be served from the same fiber;
- Any network electronics and/or equipment that have the capability to serve more than the CLEC’s customer;
- Any intra-building cable that could be used to serve more than the CLEC’s customer;
- Power plant augmentation (e.g., battery backup, commercial power feed, rectifiers, uninterruptable power supply) required for electronics that have the capability to serve more than the CLEC’s customer; or
- Labor for which an ILEC would derive any benefit other than that needed to fulfill the CLEC’s order (for example, an ILEC should not be able to charge all the way from a central office to a building when the bulk of the fiber on the run from a central office to a splice box, or place where a splice box could be placed, will support service to other customers, either at that location or at locations passed en route).

See Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593 (October 6, 2015).

respond to a CLEC's request within five days with an explanation of the basis for its conclusions that special construction is needed (consistent with the tariff) and a detailed cost estimate for the special construction.⁶¹ Furthermore, Verizon should be required to submit to a reasonable number of audits per year to ensure that its no-use certifications remain valid.

D. The Commission Must Prevent Verizon From Raising Rivals' Costs Through Imposing TDM Special Access Shortfall Liability When Migrating to Ethernet.

Another way in which Verizon is raising rivals' costs is through manipulation of its shortfall penalty terms. Verizon is continuing to assess shortfall liability for TDM services, even when a wholesale customer is replacing these 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. And with the acquisition of XO's network assets, Verizon will increase its market power within its incumbent service areas by eliminating XO, making it all the more important for the Commission to eliminate other ways in which Verizon raises rivals' costs so that other competitive providers can continue to discipline Verizon's increased market power.

The Commission can address this concern by, as a condition of permitting the proposed transaction, (1) requiring Verizon to count Ethernet purchases toward the attainment of legacy TDM volume commitments with circuit portability, and (2) preventing Verizon from applying early termination liability to instances where a TDM special access connection is prematurely disconnected and replaced with Ethernet, either at the same customer location or at any customer

⁶¹ This should include information on whether the building already has a GPON and/or Ethernet connection, the specific route designed between Verizon's central office and the CLEC's customer location, labor hours and associated tasks included in the quotation, and proposed installation location and description of any electronics included in the quotation.

location for disconnected TDM connection that included circuit portability, of at least equal capacity to the end of the previously committed term (or if the remaining TDM term is longer than the longest Ethernet term commitment, to the end of that Ethernet term commitment). Such conditions would advance the public interest, and there is no reasonable, pro-competitive rationale for not imposing them.

As Windstream noted in its opposition to the ILECs' direct cases in the tariff investigation,⁶² Verizon's tariffed commitment plans impose punitive shortfall charges if a wholesale customer fails to meet the minimum committed volumes based on historic TDM special access purchase levels, and do not allow the customer to "count" purchases of Ethernet circuits toward that minimum commitment. This regime substantially raises wholesale input costs—either through the purchase of unneeded circuits or through penalties—for rivals that are seeking to expand their offerings using Ethernet inputs, and makes it increasingly difficult for competitive providers to compete with Verizon's retail offerings.

Verizon asserts that its "technology-transition provisions" permit carrier customers to "move to new technologies."⁶³ However, Windstream has found that these provisions, while ostensibly providing the ability to migrate from a DS1 or DS3 special access service to Ethernet, are very narrow and difficult, if not impossible, to invoke and implement.⁶⁴ First, no new customer location can qualify for the transition and count toward Windstream's commitment level. Second, any Ethernet circuit that Windstream leases at the same location to replace a DS1

⁶² See Opposition of Windstream Services, LLC at 15, WC Docket No. 15-247 (filed Feb. 5, 2016).

⁶³ Verizon Direct Case at 38.

⁶⁴ The Verizon commitments are expressed in terms of DS1s, and DS3s and converted to DS1 equivalents for the purpose of fulfilling the commitments.

or DS3 circuit will not qualify as a migration unless it has a term limit at least as long as, if not longer than, the prior circuit, which means Windstream often has to sign up for a longer term and potentially incur a larger early termination liability. (Usually the potential term of the wholesale input is misaligned with the term of the retail service provided by Windstream, so Windstream either would have to renegotiate its customer contract or pay for an unused circuit.) Third, the replacement circuit has to cost at least as much as the DS1 or DS3 circuit, even though Ethernet is more cost-efficient than TDM. Fourth, the tariff imposes short timeframes for notifications and disconnections, and the failure to meet any of these timing requirements disqualifies the Ethernet circuit from counting toward the commitment.⁶⁵

This leads to a situation whereby even though a CLEC pays rates reflecting the circuit portability option (thus covering any costs related to early terminations and customer changes) and even though a CLEC's total spend on last mile access (including DS_n and Ethernet) is increasing—and thus the CLEC is delivering more revenue than was assured through the percentage volume commitment—the CLEC can still be subject to shortfall penalties because the CLEC's volume of DS1 and DS3 circuits is deemed to be too low.⁶⁶ This is economically irrational, and only serves the purpose of raising rivals' costs during a time of technology transition. Indeed, Verizon's approach is an outlier as compared with other large ILECs.

And while a wholesale purchaser overall is paying Verizon *more* than ever before for BDS inputs, Verizon's overall costs for provisioning these services, in contrast, are *less* than when provisioned exclusively with legacy technology and facilities. Verizon would not have

⁶⁵ Windstream Declaration ¶ 104.

⁶⁶ See Verizon Telephone Companies, Tariff FCC No.1 § 25.3.7(C) (May 25, 2007), <https://www.verizon.com/tariffs/PDFViewer.aspx?doc=172553> (calculating shortfall penalties).

voluntarily transitioned to newer technologies if the latter were not the case. Indeed, Verizon has consistently failed to provide any facts that establish its voluntary transition to IP-based BDS offerings overall is resulting in a net increase to its costs.⁶⁷

⁶⁷ Verizon has attempted multiple, strained arguments; none justify its practices. Verizon contends that it “has to bear the costs of physically connecting new circuits and disconnecting old ones when customers take advantage of circuit portability.” *See* Rebuttal Case of Verizon at 7, WC Docket No. 15-247 (filed Feb. 26, 2016). These costs, however, are not related to circuit shortfall, but are related to portability, and thus are already priced into the DS1 and DS3 rates paid for portability. As noted above, Verizon itself voluntarily chooses to deploy Ethernet to any given location; if recovery of other costs were really such a concern, Verizon rationally would decline to offer the less profitable service. To the extent Verizon may be arguing that there would be unrecovered costs of establishing the Ethernet circuit, that seems fanciful. First, such an argument assumes that the costs of setting up the Ethernet circuit exceed the costs of establishing the TDM circuit. Second, it assumes that Ethernet recurring and non-recurring charges (including potential early termination fees if all expected monthly payments are not made) are insufficient to recover the costs of the Ethernet circuit over the term applicable to such circuits, which are not governed by the NDP. Third, it ignores the fact that Verizon prices its wholesale Ethernet services at per-Mbps levels above the rates for comparable capacity provisioned by DS1 services. Fourth, it disregards Verizon’s own claims elsewhere that provisioning Ethernet over fiber is more efficient than operating legacy technologies over time, and thus can enable higher margins than TDM services. *See* Comments of Verizon at 5-8, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593 (filed Feb. 5, 2015) (stating that fiber offers increased reliability, better performance, and improved energy efficiency). Verizon adds that “portability reduces the time over which Verizon can recover those circuit-specific, non-recurring costs,” Verizon Direct Case at 61, but this cannot justify ignoring Ethernet purchases when calculating shortfall penalties for TDM circuits that are purchased at rates reflecting portability. Again, the hypothesized decreased time over which Verizon can recover its costs of establishing the TDM circuit are already priced into its DS1 and DS3 rates with portability. Furthermore, counting the amounts spent on Ethernet circuits toward the minimum commitment levels should not increase an ILEC’s absorbed costs in planning and deploying its TDM and IP networks. The TDM network is already in place, and TDM purchases with portability do not establish any expectation of location-based demand. With respect to the IP network, if the ILEC lacks the requisite facilities at any given location to provide a CLEC customer with the Ethernet service input, then the CLEC customer has to purchase either a TDM circuit at that location to fulfill the commitment or an Ethernet circuit located elsewhere. As noted before, neither wholesale nor retail customers possess the ability to force an ILEC to deploy Ethernet service to a location against its will.

E. The Commission Should Mandate That Verizon Comply With Any Requirements Imposed on Other Price Cap ILECs in the Business Data Services Proceeding.

Finally, the Commission should require, as a condition of this transaction, Verizon to agree to comply with any requirements imposed on the industry in the Business Data Services proceeding. Because Verizon's Ethernet forbearance petition was "deemed granted" rather than ruled on by the Commission,⁶⁸ as was the case with all other similar petitions, Verizon has asserted that it has broad forbearance from Title II with respect to the services enumerated in its Petition, and has used this leeway to engage in anticompetitive behavior, as discussed above.

If the Commission does not act formally to reverse Verizon's grant of forbearance (entirely or at least insofar as it exceeds the grants to other ILECs), the Commission should impose a condition on this transaction that Verizon must agree to comply with any requirements imposed on other price cap ILECs in the Business Data Services proceeding. To the extent the Commission chooses to rely on Section 251 for any reforms, this will prevent any uncertainty regarding even application of the reforms to all ILECs.⁶⁹ And for any reforms adopted pursuant to Sections 201 and 202, Verizon will not be unjustifiably excluded.

Indeed, Verizon agreed in its recent joint letter with INCOMPAS in the Business Data Services proceeding that it "would not oppose an order placing Verizon on the same footing

⁶⁸ See News Release, FCC, *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*, WC Docket No. 04-440 (rel. Mar. 20, 2006), *pets. for review pending*, Sprint Nextel et al. v. FCC, No. 06-1111 (and consolidated cases) (D.C. Cir. filed Mar. 29, 2006); Petition of the Verizon Telephone Companies For Forbearance at 1, WC Docket No. 04-440 (filed Dec. 20, 2004).

⁶⁹ Windstream Business Data Services Comments at 72-73 (explaining that Verizon does not have forbearance from Section 251).

today with regard to Ethernet services” as other ILECs who have received forbearance relief.⁷⁰

The Commission, likewise, recognizes in its recent Business Data Services Notice of Proposed Rulemaking, that parity in regulation of price cap ILECs’ BDS offerings and such reversal of Ethernet forbearance would be “appropriate.”⁷¹

V. CONCLUSION

The Applicants wholly have failed to provide an adequate basis for the Commission to conclude that the transaction furthers the public interest by enhancing competition. To the contrary, without significant safeguards and conditions, the transaction is likely to reduce competition in the Verizon ILEC region, to reduce competition in the AT&T ILEC regions where XO is likely to cease being an aggressive competitor and wholesale service provider, and to facilitate coordinated conduct between Verizon and AT&T to raise rivals costs so as to preclude effective threats to their positions as the nation’s largest suppliers of complex enterprise communications solutions. The Commission thus should adopt multiple conditions and

⁷⁰ See Letter from Kathleen Grillo, Senior Vice President, Public Policy & Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 05-25, RM-10593 (filed Apr. 7, 2016).

⁷¹ *Tariff Investigation Order and FNPRM* ¶ 517.

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safeguards that will allow the remaining providers other than Verizon and AT&T to compete sustainably even when purchasing wholesale last mile access from Verizon and AT&T.

Respectfully submitted,



Jennie B. Chandra
Malena F. Barzilai
WINDSTREAM SERVICES, LLC
1101 17th St., N.W., Suite 802
Washington, D.C. 20036
(202) 223-7664 (phone)
(330) 487-2740 (fax)

John T. Nakahata
H. Henry Shi
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

Counsel to Windstream Services, LLC