Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Verizon Tariff FCC Nos. 1, 11, 14, and 16	)	Transmittal No. 1335

PETITION OF WINDSTREAM SERVICES, LLC, INCOMPAS, EARTHLINK, AND SPRINT CORPORATION TO REJECT OR SUSPEND AND INVESTIGATE VERIZON TRANSMITTAL NO. 1335

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July 8, 2016

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Pursuant to Section 204(a)(1) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 204(a)(1), and Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, Windstream Services, LLC ("Windstream"), INCOMPAS, EarthLink, and Sprint Corporation ("Sprint"), respectfully request that the Commission reject Transmittal No. 1335 submitted by Verizon July 1, 2016. Verizon has failed to comply with the Commission's *Tariff Investigation Order*[1] with respect to required changes in its shortfall penalties and implementation of the elimination of "all-or-nothing" provisions, and it has failed to show that its proposed DS1 rate increases comply with the limits set by price cap and service band indices. In the alternative, Windstream requests that the Commission suspend and investigate Transmittal No. 1335.

INTRODUCTION AND SUMMARY

In a demonstration of its unilateral market power at a time when ILECs are arguing that "robust" competition disciplines business data services nearly everywhere,[2] Verizon proposes a

1 *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, 31 FCC Rcd. 4723 (2016) ("*Tariff Investigation Order*").

2 *See, e.g.*, Comments of AT&T Inc. at 10, WC Docket No. 16-143, WC Docket No. 05-25, RM-

2.85 percent *increase* in DS1 rates in the vast majority of areas in Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Washington, DC, even as productivity gains in the telecommunications sector continue to outpace inflation.[3] Clearly, the presence of competitor fibers or cable hybrid fiber-coax facilities is not preventing Verizon from implementing price increases for DS1s. And ironically, if allowed, Verizon would be converting its illegitimate and excessive shortfall penalties into recurring revenue from all DS1 customers.

Verizon attempts to justify these price increases as a restructuring to offset its anticipation of lower penalty revenue due to *Tariff Investigation Order* limits on unjust and unreasonable penalty provisions. Verizon, however, does not support its calculation of the reduction in shortfall penalty revenues. It simply asserts that these revenues will fall by $6.7 million. This alone requires rejection, or at least suspension and investigation of Transmittal No. 1335.

Verizon also seeks to continue to exercise market power through excessive penalties and "all-or-nothing" provisions. Although Verizon modifies its penalty clauses, its alternative calculations still can result in penalties that far exceed the amount of revenue that Verizon would receive through a customer meeting its commitment.

With respect to "all-or-nothing" provisions, Verizon would require customers to elect a discount plan at the level of Access Customer Name Abbreviation ("ACNA"), rather than the whole company. It is difficult and expensive for customers to shift circuits among their ACNAs, as migrating circuits must be disconnected and then reconnected. Verizon did not have to implement discount plan commitments in this manner, and other ILECs, such as Frontier, have implemented

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10593 (filed June 28, 2016).

[3] Verizon's filing of this proposed 2.85 percent increase for price capped DS1 prices occurred on the same day that a 0.6 percent increase for the same services took effect. This means Verizon is seeking (and already has partially obtained) a cumulative 3.47 percent price increase for DS1s in a one-month period.

the "all-or-nothing" prohibition in a much more flexible manner, consistent with the Commission's *Tariff Investigation Order*.

Verizon's proposed revisions frustrate the Commission's direction to remove unjust and unreasonable provisions that "decreas[e] facilities-based competition and the transition to newer technologies."[4] Failure to reject, or to suspend and investigate, Transmittal No. 1335 would irreparably harm Verizon customers, including Windstream, EarthLink, and Sprint. Under Section 204(a)(3), in the absence of suspension and investigation, these provisions will be deemed lawful and Windstream, EarthLink, Sprint, and other Verizon customers will be unable to obtain refunds or other damages with respect to provisions later found to be unlawful.

ARGUMENT

I. VERIZON HAS FAILED TO DEMONSTRATE THAT PROPOSED DS1 RATE INCREASES MEET PRICE CAP REQUIREMENTS.

In revisions to Tariffs Nos. 1 and 11, Verizon proposes to raise its price-capped DS1 rates by 2.85 percent across all zones.[5] Verizon attempts to justify these monopolistic rate increases – which come on top of increases in DS1 rates in its annual access filings[6] – as a "restructure" offset by lower penalty revenue resulting from the *Tariff Investigation Order*'s limits on unjust and unreasonable penalty provisions in Verizon's Commitment Discount Plan ("CDP") and National Discount Plan ("NDP"). According to Verizon, the limits on unjust and unreasonable penalties

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4 *Tariff Investigation Order* ¶ 11.

5 *See* Verizon Telephone Companies ("Verizon") Tariff FCC No. 1 § 7.5.9.(A)(1) (14th rev. page 7-250), Transmittal No. 1335 (issued July 1, 2016) ("Verizon Revised Tariff No. 1"); *id.* § 7.5.16 (15th rev. page 7-274, 7-276, 7-278, 7-279); Verizon Tariff FCC No. 11 § 31.7.9 (10th rev. page 31-122), Transmittal No. 1335 (issued July 1, 2016) ("Verizon Revised Tariff No. 11"); Verizon Description and Justification at 4, Transmittal No. 1335 (July 1, 2016).

6 *See supra* note 3.

reduce their penalties by $6.7 million as compared to the base period.[7] Verizon, however, does not support its assertion that its penalty revenues will be reduced by $6.7 million, and thus fails to demonstrate that it has headroom to permit it to increase its DS1 rates.

Verizon's workpapers treat penalties as a collective rate element priced at a collective total, with a single unit of demand. It provides no explanation as to how it has applied the two different penalty options it proposes to create in making this calculation.[8] Without such a showing, there is no basis for Verizon's assertion that it is complying with the price cap limits as required by 47 C.F.R. § 61.49(b).

Accordingly, Verizon has not provided the support information justifying its latest rate increases, as required by 47 C.F.R. § 61.49(b), and thus Transmittal No. 1335 is not entitled to be considered *prima facie* lawful, and should be rejected or, in the alternative, suspended and investigated. Even if Verizon had complied with rule 61.49(b) and thus could be considered *prima facie* lawful, there is a high probability that the proposed increases in DS1 rates would be found unlawful after investigation. If the proposed rates are not at least suspended and investigated, they will be deemed lawful, which will irreparably harm customers subject to the revised rates because they will be precluded from obtaining refunds of these overcharges.[9] Suspension would not harm other interested parties and would not be contrary to the public interest.

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[7] *See* Verizon Workpaper Restructure – Current and Proposed, Transmittal No. 1335 (July 1, 2016).

[8] *See* Verizon Workpaper Restructure – Current and Proposed, Transmittal No. 1335 (July 1, 2016); Verizon CALLS TRP, Special Access Misc Penalties Restructure, lines 24,376 and 25,753, Transmittal No. 1335 (July 1, 2016). Moreover, as discussed in Section II, Verizon has also not complied with the *Tariff Investigation Order* in implementing the restrictions against penalties that exceed the lowest amount necessary to comply with the terms of the commitment.

[9] *See* 47 U.S.C. § 204(a)(3).

II. VERIZON'S PROPOSED SHORTFALL PENALTIES DO NOT COMPLY WITH THE *TARIFF INVESTIGATION ORDER*.

In the *Tariff Investigation Order*, the Commission ruled that "a reasonable shortfall fee should be set at a level no greater than the amount of revenue a customer would have paid had it met its minimum commitment."[10] The Commission further explained that, when a customer's commitment is defined in terms of a given service type, channel terminations for example, "we would expect as a general rule that the shortfall rate applied to the calculation will be no higher than the discounted or lowest rate in the plan for channel terminations."[11] Verizon's proposed shortfall calculations do not do so. Instead, they provide for penalties as the lesser of two calculations: the first option ("Option 1") is the same methodology that the Commission previously found yielded excessive shortfall penalties because the amount assessed per uncommitted channel termination exceeded the channel termination charge; the second option ("Option 2") calculates penalties based on monthly revenue levels at the start of the commitment, which produces penalties above applying the lowest rate to the number of shortfall channel terminations.[12] Thus, neither of Verizon's alternative shortfall penalties meets the Commission's requirements as set forth in the *Tariff Investigation Order*.

The problem with Verizon's proposed methodology is illustrated by the following

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[10] *Tariff Investigation Order* ¶ 132.

[11] *Id*. ¶ 135.

[12] *See* Verizon Revised Tariff No. 1 § 25.1.7(B)(2) (1st rev. pages 25-14.1 to 25-14.2) (CDP); *id.* § 25.3.7(C)(3) (orig. page 25-80.1 to 25-80.2) (NDP). *See also* Verizon Revised Tariff No. 11, § 25.1.7(B)(2), 25.2.7(C)(3); Verizon Revised Tariff No. 14, § 23.1.7(C)(2); Verizon Revised Tariff No. 16, §22.1.7(C)(3). The impact of both options is compounded when TDM demand is falling year-over-year, but commitments are frozen in time and cannot be readjusted. *See* Comments of Windstream Services, LLC at 56-59, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 20, 2016).

example.[13] Suppose at the start of the commitment plan, a carrier committed to purchase 3,000 DS1 channel terminations. At that time, it had 1,000 in Zone 1 priced at $100 each, 1,000 in Zone 2 priced at $200 each, and 1,000 in Zone 3 priced at $300 each, for an average per DS1 of $200 each, or an aggregate monthly total of $600,000. Under Verizon's Option 2 penalty calculation, the monthly amount against which actual purchases would be compared in determining whether a shortfall penalty would apply would be 90 percent of the $600,000 month-one revenue, or $540,000. Assume that two years later, the carrier, having dropped 500 Zone 3 DS1s, purchases only 2,500 DS1s in a month. In that case, under Option 2, the purchasing carrier would face a penalty of $90,000.[14] However, the carrier could meet its commitment to purchase 3,000 total DS1s by purchasing 500 Zone 1 circuits.[15] Because the commitment was for 3,000 DS1s, not for $600,000 in spend, per month, Verizon's "expectation" would be no greater than the amount charged for the least expensive DS1 circuits, i.e., $50,000 (500 Zone 1 DS1s x $100/DS1).

Verizon provides no explanation for why it bases its penalty for circuit-based commitments on first-month revenue. Nor is this cured by Verizon's Option 1. As the Commission observed in the *Tariff Investigation Order*, "the Verizon CDP for DS1 and DS3 services bases its commitment level on channel terminations but uses a rate to compute the shortfall that includes charges for services in addition to the committed channel terminations such as charges for interoffice transport (including mileage and MUXing charges)."[16]

Accordingly, Verizon has yet to conform its shortfall provisions to the requirements of the

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[13] This example is simplified by using a one-month rather than a six-month review period.

[14] This is $540,000, 90 percent of the month-one purchases, less the total purchases two years later.

[15] Verizon's tariffs also permit commitments to be fulfilled through purchases of DS3s. We have not included that here to simplify the example.

[16] *Tariff Investigation Order* ¶ 139.

Tariff Investigation Order. As such, there is a high probability that the proposed shortfall liability provisions in Transmittal No. 1335 would be found unlawful after investigation. Allowing these provisions to be deemed lawful, which will occur if the Commission does not at least suspend and investigate them, will irreparably harm customers subject to excessive shortfall liability charges because they will be precluded from obtaining refunds of these overcharges.[17] Suspension would not harm other interested parties and would not be contrary to the public interest.

III. VERIZON'S PROPOSED ALL-OR-NOTHING PROVISIONS VIOLATE THE *TARIFF INVESTIGATION ORDER*.

Verizon's Transmittal No. 1335 does not faithfully implement the Commission's instructions regarding "all-or-nothing" provisions that serve as one means of locking up business data service demand. Specifically, the new "all-or-nothing" requirements in Verizon's CDP in Tariff FCC Nos. 1 and 11; NDP in Tariff FCC Nos. 1, 11, 14, and 16; and the Term Volume Plans in Tariff FCC No. 14 each ignore the Commission's determination that such provisions, which serve to "restrict a customer's purchase option without a corresponding reasonable business concern," are anticompetitive and unreasonable in violation of Section 201(b) of the Act. [18] Verizon has failed to comply fully with the Commission's instruction to remove such provisions from its specified tariff pricing plans on a prospective basis.[19]

In the *Tariff Investigation Order*, the Commission considered whether "all-or-nothing provisions" that "require that customers subscribing to one . . . plan[] include all purchases of a specific service type, such as DS1 or DS3, in that one plan for the duration of that plan" were

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[17] *See* 47 U.S.C. § 204(a)(3).

[18] *Tariff Investigation Order* ¶ 96.

[19] *See id.* ¶¶ 111, 540.

unjust and unreasonable under the Act.[20] The answer was a decisive yes. As the Commission observed, such provisions render customers "unable to choose to keep their purchases out of the initial commitment associated with the portability plan by making a portion of their purchases" outside of that particular plan, which "precludes customers from managing their business data services purchases in an economically efficient manner, restricting how they purchase services from the incumbent LEC plans and restricting their ability to consider competitive alternatives."[21] The provisions "essentially prohibit a single company from purchasing exactly what could be purchased by two independent entities without any cost justification for this discrimination."[22]

Verizon's new all-or-nothing requirements bear a striking resemblance to its original unlawful terms. The new requirements impose all-or-nothing requirements at the level of ACNA, rather than holding company, but otherwise carry a similar effect as did the original provisions. For instance, "[i]f a customer subscribes to CDP on or after July 16, 2016, all eligible service types *under the ACNA(s) designated* for inclusion in such CDP must be included in CDP," except for limited exceptions that were also included in the previous version of the tariff pricing plan.[23] Transmittal No. 1335 includes analogous changes to the NDP and Term Volume plans.[24]

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20 *Id.* ¶ 96.

21 *Id.*

22 *Id.* ¶ 109.

23 Verizon Revised Tariff No. 1 § 25.1.1(D)(2) (1st rev. page 25-1.1) (emphasis added). The emphasized clause is the only addition to the previous provision. *See* Verizon Tariff FCC No. 1 § 25.1.1(D) (orig. page 25-1.1), Transmittal No. 871 (issued Oct. 31, 2007) ("If a customer subscribes to a CDP, all eligible service types must be included in CDP [with limited exceptions].").

24 *See* Verizon Revised Tariff No. 1 § 25.3.1(E)(1) (1st rev. page 25-49) ("At any time during the Term of the NDP, the NDP Customer may not simultaneously subscribe the Discounted Rate Elements for the ACNA(s) included in the NDP Customer's NDP to other existing or new tariff arrangements [including contract tariffs, individual contracts, or CDP]."); Verizon Tariff FCC No. 14 § 5.6.14(A) (4th rev. page 5-87), Transmittal No. 1335 (issued July 1, 2016) ("For

Under this new regime, Verizon would maintain the unlawful requirement that each ACNA, which is frequently associated with a legacy entity within a larger holding company, purchase all of its circuits on one pricing plan or another. This change only helps a wholesale purchaser to the extent that the wholesale purchaser wants to have one of its legacy entities purchase under one plan, while other of its legacy entities purchase under another plan, or, due to a specific exception, if the purchaser wishes to purchase some circuits under the CDP and others under the NDP.[25]

These new requirements pose the same problems that the Commission already identified, merely at a slightly different level of granularity. Any purchaser with substantial demand under an ACNA would have limited ability under these new provisions to "manage their special access purchases in an efficient manner," such as by reducing their minimum commitments with Verizon by allocating some DS1 or DS3 circuits to a circuit-based term-only plan or month-to-month rates.[26] Verizon historically has made it difficult to transfer circuits from one ACNA to another, by frequently requiring that the circuit be disconnected and reconnected.[27] In addition, a purchaser may not want to switch circuits among ACNAs for its own customer management reasons.[28] With such impediments, purchasers are forced to place all of an ACNA's demand into a discount plan and face the same impracticability of lowering their minimum commitments upon renewal that the

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TVPs established on or after July 16, 2016, during the TVP term, a customer may not concurrently subscribe the ACNA(s) included in TVP to the National Discount Plan . . . .").

[25] *See* Verizon Revised Tariff No. 1 § 25.1.1(D)(2) (1st rev. page 25-1.1) (allowing an exception for certain special access services that are purchased pursuant to the NDP, but none for those that the purchaser wishes to take free from any other plan).

[26] *Tariff Investigation Order* ¶ 100 (discussing Comments of XO Communications, LCC on the Further Notice of Proposed Rulemaking at 24, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016)).

[27] Declaration of Margaret Rubino, Attach. A ¶ 5.

[28] *Id*. ¶ 6.

Commission has noted.[29] The result of Verizon's proposed "all-or-nothing" requirements would be substantially to continue to "prevent the customer from splitting its purchases between two or more plans when a customer subscribes to the portability plan or option," and "also prevent the customer from keeping any of its purchases of the relevant type of circuit out of the calculation of the initial volume or revenue commitment required by the plan."[30]

To comply fully with the *Tariff Investigation Order*, Verizon must implement a less restrictive alternative that does not introduce anticompetitive effects. There are other ways to request and track how a customer would like to purchase individual circuits that serve the Commission's goal of protecting customers' purchase options against restrictions that are not supported by a corresponding reasonable business concern. Standard Access Service Requests ("ASR") have additional fields that can be used to facilitate more granular designations than requiring that all demand within an ACNA be placed into a plan. In fact, Frontier, in its changes, proposes a much less restrictive approach than Verizon's.[31]

Accordingly, the Commission should reject the proposed "all-or-nothing" provisions in Verizon's Transmittal No. 1335, or in the alternative, suspend and investigate them. There is a high probability that the proposed ACNA-based "all-or-nothing" provisions in Transmittal No. 1335 would be found unlawful after investigation. If these provisions are not at least suspended

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29 *See Tariff Investigation Order* ¶ 100. Transmittal No. 1335 also fails to comply with the *Tariff Investigation Order* with regard to the Commission's determinations of what constitutes an unjust, unreasonable, and thus unlawful shortfall penalty. *See supra* Section II.

30 *Tariff Investigation Order* ¶ 103.

31 *See* Frontier Telephone Companies Tariff FCC No. 5 § 5.6.19(A)(2) (2d rev. page 5-132), Transmittal No. 67 (issued July 1, 2016) (requiring customers to issue ASRs to add or convert existing DS3 Special Access Lines billed month-to-month and/or under other term pricing plans to the DS3 Term Volume Plan). *See also* Frontier Description and Justification at 4, Transmittal No. 67 (July 1, 2016).

and investigated, they will be deemed lawful, which will irreparably harm customers because those subject to excessive shortfall liability charges will be precluded from obtaining refunds of these overcharges.[32] Suspension would not harm other interested parties and would not be contrary to the public interest.

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[32] *See* 47 U.S.C. § 204(a)(3).

CONCLUSION

For these reasons, the Commission should reject Transmittal No. 1335 as containing unjustified rate increases and unreasonable practices declared unlawful in the *Tariff Investigation Order*. In the alternative, the Commission should suspend and investigate Transmittal No. 1335.

Respectfully submitted,

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July 8, 2016

CERTIFICATE OF SERVICE

I, Alexandra Tate, do herby certify that on this 8th day of July, 2016, I have caused the foregoing Petition of Windstream Services, LLC, INCOMPAS, EarthLink, and Sprint Corporation to Reject or Suspend and Investigate Verizon Transmittal No. 1335 to be served on the following parties:

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/s/ Alexandra Tate
Alexandra Tate

Attachment A

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

In the Matter of	)	
	)	
Verizon Tariff FCC Nos. 1, 11, 14, and 16	)	Transmittal No. 1335

DECLARATION OF MARGARET RUBINO

1. My name is Margaret Rubino. My business address is 4001 N Rodney Parham Rd., Little Rock, AR 72212. I am a Sr. Negotiator and Account Manager at Windstream.

2. I have a Bachelor's degree in mechanical engineering from Tufts University, and a Master's degree in Telecommunications Management from Keller Graduate School of Management. I started my career with the New York State Department of Public Service as a Junior Engineer, and after a series of promotions my last title there was a Telecommunications Policy Analyst IV. I left the Department of Public Service to take a position with Z-Tel Communications, Inc., a Florida-based CLEC, as a Regional Vice President, Industry Policy. Z-Tel subsequently underwent a name change to Trinsic Communications, Inc. I served a variety of roles there, most recently as Senior Vice President, Regulatory and Legal Affairs. I joined PAETEC Communications, Inc. in 2007 as a Carrier Relations Manager. PAETEC was acquired by Windstream in 2011.

3. In my current role as a Sr. Negotiator and Account Manager at Windstream, I am responsible for negotiating and managing the implementation of interconnection agreements and commercial contracts with Windstream's vendors, including Verizon. I also represent Windstream on a number of industry groups, change management, and CLEC user forums.

4. My declaration addresses impediments to Windstream's ability to move circuits and customers at the level of Access Customer Name Abbreviation ("ACNA").

5. Verizon does not allow Windstream to simply or easily move circuits from one ACNA to another ACNA. In particular, Verizon frequently requires the disconnection of the circuit under the old ACNA and installation of the circuit under the new ACNA. This commonly involves incurring non-recurring charges.

6. Moreover, Windstream cannot simply shift a customer from one ACNA to another simply to manage DS1 or DS3 procurement. Windstream assigns circuits to ACNAs today based on where the various entities offer service and have equipment, whether the customer is receiving other services from that entity, and on other factors related to delivering service to the end user customer.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: July 8, 2016

Margaret D Rubino

Margaret Rubino