

October 6, 2016

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

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143;
Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25;
*AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange
Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch,

As the Commission finalizes much-awaited reforms to promote competition in the business data services markets, it must establish clear rules to limit the ability of market leaders to use their market power over bottleneck last-mile facilities to squeeze out rivals in downstream markets for business communications solutions. Windstream and others have shown how large ILECs have been turning the wholesale market for Ethernet services on its head: charging competitive providers prices for last-mile Ethernet inputs that are equal to or greater than the prices charged to end-user customers for substantially the same capacity,¹ even though an ILEC

¹ See Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking at 15-16, 41-42, WC Docket Nos. 16-143, 05-25, RM-10593 (filed June 28, 2016) (“Windstream June 28, 2016 Comments”) (summarizing Windstream’s experience facing price squeezes for Ethernet inputs); Second Declaration of Matthew J. Loch ¶ 19, attached to Comments of TDS Metrocom, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (stating that “the wholesale rates available to TDS CLEC are typically higher” than ILEC retail rates, and that “[t]his is the case for various bandwidths generally in demand by the SMB customers . . . and, in some cases, *even more so* for bandwidths in excess of 100 Mbps”(emphasis added)); Declaration of James A. Anderson ¶¶ 20-23, attached to Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (discussing XO’s experience with price squeezes when purchasing “Type II,” or off-net inputs). See also *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tariff Investigation Order and Further Notice of

avoids substantial costs when providing the service to a carrier customer instead of an end-user customer.² This means competitive carriers have to pay for retail costs twice – once in operating their own retail sales team and fiber network beyond the last mile, and again to the ILEC, which charges for these costs even though it is not the carrier actually incurring them.

The result of this pay-twice regime is efficient competitive providers are being squeezed out of the market for retail packet-based communications solutions. As Dr. Willig explains, “[T]he bottleneck owner prices its critical input such that final downstream product sales are diverted away from a more efficient downstream competitor that must rely on this critical input, e.g., a rival downstream competitor that offers a service to the customer that better meets the preferences, needs or demands of the customer.”³ This sort of anticompetitive behavior for business data services has been recognized by the Commission. In the *Further Notice*, the Commission found that it is “likely that providers in non-competitive markets have . . . abilities and incentives to engage in such price manipulation” against competitive providers.⁴

The ultimate losers from increasing instances of wholesale Ethernet price squeezes are retail business data service customers. Given the lack of competitive alternatives for last-mile connectivity,⁵ small business, government, non-profit, and community-anchor institution (such as libraries and schools) customers’ prospects for competitive choice will dwindle, if not disappear, without a functioning wholesale market for competitive providers to purchase last-mile inputs for their own retail packet-based communications solutions.⁶

Proposed Rulemaking, FCC 16-54, 31 FCC Rcd. 4723, 4888 ¶ 442 (2016) (“*FNPRM*”) (noting that the competitive providers’ “allegations raise concerns that are not novel”).

² See Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking at 35-36, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 9, 2016) (“Windstream Aug. 9, 2016 Reply Comments”); Declaration of David Schirack, Mike Baer and Samuel Bushey ¶¶ 10-11, appended as Attachment C to Windstream Aug. 9, 2016 Reply Comments; Declaration of David Schirack and Mike Baer ¶ 8, appended as Attachment A to Windstream June 28, 2016 Comments.

³ Declaration of Robert D. Willig ¶ 20, appended as Attachment B to Windstream Aug. 9, 2016 Reply Comments (“Willig Declaration”).

⁴ *FNPRM* ¶ 442.

⁵ See Marc Rysman, *Empirics of Business Data Services* at 4933, Table 7, attached as Appendix B to *FNPRM* (showing that more than 77 percent of buildings have only one in-building facilities-based providers and that more than 99 percent of buildings have at most two facilities-based providers); Windstream Aug. 9, 2016 Reply Comments at 17-20 (highlighting record evidence, including from cable providers’ comments, that Ethernet over hybrid fiber coaxial facilities are, at best, occasional and inferior substitutes for fiber-based business data services).

⁶ See Windstream Aug. 9, 2016 Reply Comments at 24.

Although such practices are and have been prohibited by the Communications Act,⁷ some ILECs have taken the position that the Commission lacks authority to impose limits on their ability to engage in anticompetitive price squeezes.⁸ Policies that provide clear guidance – and guardrails – to parties negotiating wholesale agreements are thus essential to reducing discriminatory price squeezes. Moreover, as Dr. Willig has noted, regulation of wholesale pricing can enhance the investment incentives of both incumbent and competitive providers.⁹

As Chairman Wheeler recently reiterated, “[w]hen competition exists, consumers win. It drives innovation, investment and economic benefit.”¹⁰ Accordingly, at a minimum, the Commission should adopt a rule substantially in the form attached to this letter, which will set out the specific requirements for establishing a backstop on wholesale last-mile input rates for business data services, and will better guide parties in commercial negotiations. The Commission should adopt this rule, including an interim safe harbor, as a backstop to supplement additional actions needed for robust competition in the business data services markets.

* * *

⁷ See Windstream Aug. 9, 2016 Reply Comments at 38-44 (discussing Commission authority under Sections 201(b), 202(a), 251(b)(1), and 251(c)(4)).

⁸ See Joint Comments of CenturyLink, Inc., Consolidated Communications, FairPoint Communications, Inc., and Frontier Communications Corp. at 80, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016).

⁹ See Willig Declaration ¶ 26 (noting that wholesale price regulation “does not curtail the ability of the bottleneck owner to attain earnings from its investment in its bottleneck facilities,” and unlocked competition downstream would spur all providers to invest to deliver more efficient and better finished retail communications solutions, as well as to invest in more advanced facilities “that will improve a firm’s competitive advantages over retail sales.”).

¹⁰ Tom Wheeler, Chairman, FCC, Remarks at the Competitive Carriers Association Annual Convention at 1 (Sept. 20, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0920/DOC-341337A1.pdf.

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

Sincerely,



John T. Nakahata

Henry Shi

Counsel to Windstream Services, LLC

Attachment

cc: Claude Aiken
Pamela Arluk
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Proposed Rule

Sec. _____. Wholesale pricing standard

(a) Definitions.

(1) Business data service means any telecommunications service that provides point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections, whether using circuit-switching or packet-switching technology and whether using dedicated or shared infrastructure (including Ethernet connectivity offered over Passive Optical Network technology).

(2) Charge means all recurring and nonrecurring charges for connectivity that would be paid by a customer for service to a specific end-user location including, but not limited to, any port and transport charges and any network facilities construction or other cost recovery charges. A charge does not include a short term promotion, as defined in 47 C.F.R. 51.613(a)(2), irrespective of whether a business data service provider is an incumbent LEC.

(3) Substantially equivalent connectivity means any connection that supports substantially equivalent transmission, in terms of amount of capacity and service quality, as based upon the customer's experience at the end-user location without regard to the technology and network infrastructure used.

(4) High-capacity connections means circuits capable of transmitting data symmetrically at 1.5 Mbps or greater.

(5) Retail customer means, with respect to a business data service, a purchaser or subscriber that is not a wholesale customer.

(6) Wholesale customer means, with respect to a business data service, a purchaser or subscriber that is a telecommunications provider that purchases or leases the business data service for use in providing services to its own end user or telecommunications provider customers.

(b) A business data service provider shall offer to wholesale customers any and all business data services offered to retail customers.

(c) A business data service provider's wholesale charge shall not exceed the lowest business data service charge offered to a retail customer for substantially equivalent connectivity, inclusive of all discounts and credits available to the retail customer, minus the retail costs avoided by the business data service provider as identified in accordance with subsection (d).

(d) For purposes of this section, the retail costs avoided by the business data service providers include all incremental costs that the business data service provider does not incur in provisioning the business data service to the wholesale customer, but does incur in provisioning the business data service to a retail customer, including but not limited to the costs of

- (1) network resources and facilities that are part of the business data service provided to retail customers, such as middle-mile transport and interconnection to the Public Switched Telephone Network, and that are not provided to or used by the wholesale customer purchasing the business data service, net of any reasonable cost recovery for network facilities required exclusively for a wholesale customer;
 - (2) salaries, benefits, and other compensation and expenses for personnel that perform tasks and services included in the business data service sold to retail customers, such as network design (including determination of customer needs, development and presentation of customer proposals), technical, and customer account support, but which are not used by the wholesale customer purchasing the business data service;
 - (3) advertising, promotional, marketing, administrative, and other planning and operational expenses (including competitive analysis, service identification and specification, pricing analysis, test market planning, demand forecasting, and identification and establishment of distribution channels) incurred in the sale and provisioning of the business data service to retail customers, and that are not incurred in the provision of the business data service to wholesale customers; and
 - (4) uncollectible charges to retail customers for business data services.
- (e) In calculating the wholesale charge pursuant to subsection (c), a business data service provider may utilize an interim safe harbor of 18 percent in lieu of calculating retail costs avoided in accordance with subsection (d).
- (f) A business data service provider may not use bundling of services or other means to evade the requirements of this section.
- (g) A business data service provider must establish compliance with this rule by submitting a report of an independent third party auditor to the Commission annually on the anniversary of the effective date of the rule.
- (h) Any complaint brought to enforce this section shall be subject to 47 U.S.C. 208(b)(1).