

October 21, 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:

On October 19, 2016, Jennie Chandra, Vice President, Public Policy and Strategy, Windstream Services, LLC (“Windstream”), Prof. Robert Willig of Princeton University, and Henry Shi and I, on behalf of Windstream, met separately with Claude Aiken, Legal Advisor to Commissioner Clyburn; Travis Litman, Legal Advisor to Commissioner Rosenworcel; and Stephanie Weiner, Legal Advisor to Chairman Wheeler, General Counsel Howard Symons, and Matt DelNero, Chief of the Wireline Competition Bureau. Eric Einhorn, Senior Vice President of Government Affairs, Windstream, joined us for the meeting with Stephanie Weiner, Howard Symons, and Matt DelNero.

In each of these meetings, Prof. Willig summarized his declaration, submitted in the above-captioned proceedings, which set out the economic underpinnings of the Parity Pricing Principle and its application to business data services sold by incumbent facilities owners to competitive providers that combine that input with additional services to create business communications solutions.<sup>1</sup> These complete, retail solutions include last-mile business data services connectivity—a bottleneck input—as well as a host of design and customer interfacing services, and value-added features that could be provided by the bottleneck input supplier or a competitor purchasing the bottleneck input and adding these other services.<sup>2</sup> Competitive providers may be more efficient and innovative in providing the latter set of services and features to customers than the owner of bottleneck facilities, and therefore be able to offer more attractive finished communications solutions to customers, but still be foreclosed from competing in that

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<sup>1</sup> See Declaration of Dr. Robert Willig, appended as Attachment B to Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 9, 2016) (“Windstream Aug. 9, 2016 Reply Comments”).

<sup>2</sup> See *id.* ¶ 28.

downstream market as a result of the bottleneck owner's pricing for connectivity.<sup>3</sup> Owners of bottleneck facilities that also offer downstream products have the incentive and ability "to charge anticompetitive wholesale prices to CLECs in order to limit or eliminate their ability to compete for the provision of retail services."<sup>4</sup>

Professor Willig explained that, in the absence of facilities-based competition, regulatory attention to the parity between the price of last-mile Ethernet connectivity charged to downstream competitors and the imputed price that the owner charges its own end users for the same connectivity would be required "to preserve efficient competition in the downstream product market."<sup>5</sup> Regulation based on the Parity Pricing Principle would help achieve this result by requiring a bottleneck owner to charge downstream competitors no more for the same last-mile connectivity separately than it charges its own end-user customer for that last-mile connectivity as part of the communications solutions.<sup>6</sup> To approximate this wholesale price, the Commission should deduct from the price that the facilities owner charges for its finished communication solution those costs that are avoided when the owner is selling just the last-mile connectivity to competitive providers.<sup>7</sup> Professor Willig emphasized that regulating the wholesale rate based on the Parity Pricing Principle achieves important public policy benefits by unleashing competition from, and spurring further investment by, more efficient and innovative providers of the retail services, without "curtail[ing] the ability of the bottleneck owner to attain earnings from its investment in its bottleneck facilities."<sup>8</sup>

The Commission's regulation of wholesale prices for business data services based on the Parity Pricing Principle need not address every implementation detail upon adoption to have meaningful benefits for competition. A rule substantially in the form proposed by Windstream, which defines the relevant finished communication solution and identifies the types of costs that are avoided when a facilities owner provides connectivity on a wholesale basis, would help guide commercial negotiations and could enable parties to reach agreement without the need to file a complaint.<sup>9</sup> The Commission has recognized that a regulatory framework, like this one, can have a productive impact on commercial negotiation in the context of voice and data roaming.<sup>10</sup>

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<sup>3</sup> *See id.* ¶ 18.

<sup>4</sup> *Id.* ¶ 18. *See also id.* ¶¶ 12-19.

<sup>5</sup> *Id.* ¶ 20. *See also* ¶¶ 24-26.

<sup>6</sup> *See id.* ¶ 25.

<sup>7</sup> *See id.* ¶ 32.

<sup>8</sup> *Id.* ¶ 26.

<sup>9</sup> Indeed, companies have multiple sources of evidence to guide them in their commercial negotiations pursuant to this framework. For example, companies can look generally to prevailing channel partner compensation in the industry, which could serve as a proxy for costs of some retail operations avoided when selling to wholesale customers.

<sup>10</sup> *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, DA 14-1865, 29 FCC

Finally, Windstream reiterated that the interim rules adopted in the *Emerging Wireline Order* last year to ensure the continued availability of inputs for competitive business data services providers post-IP transition should remain in place until the Commission “identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable” and “such rules and/or policies become effective.”<sup>11</sup> Windstream explained that the Commission cannot reasonably conclude that the market will ensure that rates for the provision of packet-based services will remain just and reasonable in the absence of rate-regulated TDM services.<sup>12</sup> Such a conclusion is especially unjustified with respect to services of 50 Mbps (or even 100 Mbps) or below. The attached tables show that, based on the Commission’s data collection, more than 86 percent of buildings that have aggregate business data services demand of 50 Mbps or less have *zero* competitive facilities-based providers, and virtually all of the remainder (14 percent) have only one competitive facilities-based provider (i.e., are subject to a duopoly). These customer locations include many schools, libraries, government entities, telemedicine sites, and businesses. Given these data, as well as substantial evidence in the record indicating that competitive carrier overbuilding fiber to these buildings is almost never economically viable,<sup>13</sup> the Commission cannot reasonably conclude that the Ethernet marketplace is generally competitive or that conditions set out in the *Emerging Wireline Order* for sunseting comparable wholesale access have been met. The Commission cannot

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Rcd. 15,483, 15,493 ¶ 31 (Wireless Telecomms. Bur. 2014) (concluding that providing “additional guidance” on what constitutes commercial reasonableness “will facilitate the ability of parties to negotiate successful data roaming agreements”); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, FCC 11-52, 26 FCC Rcd. 5411, 5412 ¶ 2 (2011) (“[I]n order to facilitate the negotiation of data roaming arrangements, we provide guidance on factors that the Commission could consider when evaluating any data roaming disputes that might be brought before the agency.”); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, 25 FCC Rcd. 4181, 4191 ¶ 19 (2010) (“Our expectation is that, with the revised rule adopted in this Order setting out an underlying obligation to provide automatic roaming, we have laid the foundation to enable carriers to successfully negotiate reasonable roaming arrangements . . .”).

<sup>11</sup> *Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; 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*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, 30 FCC Rcd. 9372, 9443 ¶ 132 (2015).

<sup>12</sup> See Letter from Jennie B. Chandra, Vice President Public Policy and Strategy, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 16-143, RM-10593, at 15-17 (filed Oct. 17, 2016).

<sup>13</sup> See *id.* at 3-6 (summarizing record evidence).

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reasonably sustain a finding that packet-based business data services at or below 50 Mbps (or even 100 Mbps) are competitive in all markets nationwide; even if one interprets the econometric analysis of the pricing data as inconclusive, there is a substantial difference between inconclusive pricing analysis and a finding of competitive markets, especially in light of the structural analysis showing that 86 percent of locations with 50 Mbps or less in aggregate demand have only one provider. It is extremely far-fetched to assume that barriers to entry are so low as to discipline prices at these locations, but that entry has nonetheless not occurred. That would be, at best, wishful thinking.<sup>14</sup>

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

Sincerely,



John T. Nakahata  
*Counsel to Windstream Services, LLC*

cc: Claude Aiken  
Matt DelNero  
Travis Litman  
Howard Symons  
Stephanie Weiner

Attachment

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<sup>14</sup> See Letter from Tamar E. Finn, Counsel to U.S. TelePacific Corp. d/b/a TelePacific Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593, at 3 (filed Oct. 20, 2016) (stating that “an ILEC has proposed to increase TelePacific’s current Ethernet monthly recurring rates upon the expiration of its contract” by “17-20% . . . for 10-50 Mbps service”).

# Number and Percent of Buildings by Number of In-Building Competitors

Total Buildings in Sample: 468,560

## Buildings with cumulative demand <=50 Mbps

In Numbers

		Number of Buildings
	0	324,499
In-Building	1	48,831
Competitor	2	1,767
	3	111
	4 or more	26
Total		375,234

In Percentages

		Percent of Buildings
	0	86.5%
In-Building	1	13.0%
Competitor	2	0.5%
	3	0.0%
	4 or more	0.0%
Total		100.0%

## Buildings with cumulative demand <=100 Mbps

In Numbers

		Number of Buildings
	0	333,692
In-Building	1	60,463
Competitor	2	2,340
	3	186
	4 or more	53
Total		396,734

In Percentages

		Percent of Buildings
	0	84.1%
In-Building	1	15.2%
Competitor	2	0.6%
	3	0.0%
	4 or more	0.0%
Total		100.0%