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April 11, 2017

Ex Parte

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 for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593

Dear Ms. Dortch,

On April 7, 2017, Eric Einhorn, Senior Vice President of Government Affairs and Strategy, Windstream Services, LLC ("Windstream") and I, on behalf of Windstream, met with Commissioner O'Rielly and his Legal Advisor Amy Bender. On April 10, we met with Claude Aiken of the Office of Commissioner Clyburn.

We discussed that it is important for the Commission to take the time and to provide the information for interested parties to assess the impact of the proposed Order. Although the draft rules provide that the Commission will release a list of "competitive" counties, no such list accompanies the draft Order, or is in the record to date. Although Windstream's outside counsel and outside consultants can review the data, there is no certainty that they would create a list identical to the Commission's, and in any event would not be able to share such a list with Windstream. This means that Windstream and other commenters cannot fully evaluate and adequately comment on the impact of the draft Order on consumers who use low-bandwidth (i.e., DS1 and DS3) BDS, including small businesses, non-profits, and anchor institutions, such as schools, libraries, and rural healthcare clinics.

We also discussed that the proposed half-mile test is too long and unsupported by the record for a DS1 or DS3 service. The statements made by carriers that they would deploy at distances "up to" a half mile were statements about an upper limit as demand at a location increased, not for DS1s and DS3s.[1] Indeed, the data shows that for locations with aggregate demand no larger than a DS3, 86 percent are served only by the ILEC. The hypothesized entry will occur, if at all, only at much shorter distances, given the very limited amount of expected revenue to offset the considerable costs of construction. We noted that the draft Order does not

[1] *See* Letter from John Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25 & RM-10593, at 17-21 (filed Mar. 27, 2017) ("March 27 Ex Parte").

even acknowledge, let alone address in a reasoned manner, the detailed economic study that Windstream provided to model the costs of deploying additional fiber networks – under which entry to provide a single DS1 or DS3 service at a location is infeasible.[2]

Furthermore, the second prong of the test for abandoning price protections is founded entirely on the presence of "best efforts" Broadband Internet Access Service ("BIAS") as reported by cable companies on Form 477, even though the Order expressly reaffirms that "best efforts" services are not in the BDS product market. The draft fails to analyze the suitability of these networks to provide BDS, the relative lower quality of Ethernet-over-HFC, and the constraints on expanding these networks to provide BDS due to the competing demands of residential video and best efforts BIAS.[3] The draft simply omits all discussion of these issues, which is unreasoned and arbitrary.

In the event the Commission continues with the direction proposed in the draft Order, it should provide for an adequate transition. Windstream suggests a three-year transition. A transition is needed here for several reasons. First, the draft Order is premised on the potential for competitive facilities deployment, but such deployment cannot happen overnight. If sufficient lead time is not given for potential competition to become actual competition, a key premise of the draft Order will by stymied. Second, both sellers and buyers of DS1 and DS3 special access services will need time to adjust to the oncoming regime. Contracts will need to be negotiated; wholesale purchasers will need to renegotiate contracts with the end users; providers that purchase DS1s and DS3s will need time to transition to other arrangements to ameliorate price shock – or to shift customers to other providers if they cannot continue to be served economically. Migrating end users from TDM to Ethernet is time consuming, and requires substantial expense for both the provider and the end user (who frequently must purchase new customer premises equipment).

Finally, we asked that the Commission further clarify the language in Paragraph 163. These contracts were negotiated against a backdrop of existing tariffs and price caps but are structured in a variety of manners. The language of Paragraph 163 should thus be modified to reflect that backdrop, which will better preserve contractual expectations. A failure to do this would likely result in an even more draconian price shock for both wholesale purchasers and their customers served using BDS inputs. Windstream suggest modifying Paragraph 163 to add the underlined text:

> We recognize that our detariffing actions will change the legal framework for existing service arrangements for business data services, many of which

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[2] *See* Attachment A to Letter from Jennie B. Chandra, Vice President, Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, at 9, GN Docket Nos. 13-5, 12-353, RM-10593, WC Docket Nos. 05-25, 15-1 (filed June 8, 2015).

[3] *See* March 27 Ex Parte at 12-16.

> assume a tariffing environment and may not expire until after the end of the transition to mandatory detariffing. We do not intend our actions to disturb existing contractual or other long-term arrangements, <u>including contract tariffs, term and volume tariff discount plans, and individual circuit plans. Moreover, for long-term arrangements under which the rates for the TDM services are not contained in the long-term arrangement, in order to preserve the contractual expectation that prevailed prior to this Order, such rates should be frozen as of the effective date of this Report and Order and continuing through the expiration of the long-term arrangement.</u>

Likewise, to the extent that a contract tariff expressly provides for an extension or renewal of its term, the Commission should also preserve that bargained-for exchange between the parties. Accordingly, Windstream proposed that the Rule § 1.776 be revised as follows to add the underlined text:

> Special access contract-based tariffs that were in effect on or before the effective date of the rules adopted in [[FCC 17-XXX, Effective [INSERT EFFECTIVE DATE FROM PUBLICATION IN FEDERAL REGISTER]]] are grandfathered. Such contract-based tariffs may not be extended, renewed or revised<u>, except that any extension or renewal expressly provided for by the contract-based tariff may be exercised pursuant to the terms thereof</u>. Upon mutual agreement, parties to a grandfathered contract-based tariff may replace it at any time with a new contract-based tariff negotiated under the rules adopted in [[FCC 17-XXX, Effective [INSERT EFFECTIVE DATE FROM PUBLICATION IN FEDERAL REGISTER]]].

Sincerely,

John Nakahata
Counsel to Windstream

cc: Commissioner O'Rielly
Amy Bender
Claude Aiken