

November 3, 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,

Windstream Services, LLC (“Windstream”) and the Ad Hoc Telecommunications Users Committee (“Ad Hoc”) jointly submit this letter in the above-referenced proceedings,<sup>1</sup> in order to underscore the importance of preserving access for business, government, and non-profit end users to just and reasonable rates for business data services (“BDS”), whether those users purchase such services from a market leader or from a competitive provider. Windstream and Ad Hoc share the goal that enterprise customers that are similarly situated to wholesale carrier customers of BDS retain their right to obtain the same services at the same rates as carrier customers when business customers commit to comparable volumes, terms, or other rate-affecting conditions of service.

Windstream has made the point that, as a general rule, prices for wholesale services like BDS should be lower than prices for retail services that use BDS as an input and the price differential should at least equal the amount of the incremental costs of providing retail services that carriers avoid when they provide service to wholesale customers. These costs can include sales, marketing, system design, facilities, and customer service costs that are usually necessary for retail services but not services sold to a wholesale purchaser. This economic principle has been termed the parity pricing principle or efficient component pricing rule. The purpose of the parity pricing principle is to preserve efficient competition and overall choice in downstream communications solutions when a wholesale carrier purchaser is at least as efficient as the underlying wholesale input seller in providing all aspects of the downstream communications

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<sup>1</sup> *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 Proposed Rulemaking, FCC 16-54, 31 FCC Rcd. 4723 (2016) (“FNPRM”).

solution other than the business data service input.<sup>2</sup> Moreover, as Professor Robert Willig points out, the use of the parity pricing principle also addresses unreasonable discrimination “by essentially imputing the bottleneck input price at the level at which a [vertically integrated] firm is really charging itself for providing the bottleneck input to its retail customers.”<sup>3</sup> As Prof. Willig further explains, this principle can enhance, rather than suppress, incumbents’ investment incentives and can also enhance competitors’ investment incentives.<sup>4</sup> Conversely, the record demonstrates that, absent Commission action, market leaders have the incentive and ability to continue squeezing competitive providers out of the market for bundled or finished communications solutions by setting the price for bottleneck business data services inputs above the retail price for the downstream finished solution.<sup>5</sup> Given the lack of meaningful last-mile facilities-based competition in the overwhelming percentage of locations with demand,<sup>6</sup> if market leaders effectively squeeze competitive providers out of the market, business data

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<sup>2</sup> See Declaration of Robert D. Willig ¶ 21 (“Willig Declaration”) (noting that parity pricing “would ensure that a rival downstream competitor would not be disadvantaged in the cost of providing the downstream retail service as long as it is at least as efficient a supplier as is the bottleneck [input] owner in the downstream market”), 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>3</sup> *Id.* ¶ 25.

<sup>4</sup> See *id.* ¶ 26 (explaining how, “by promoting downstream competition,” the parity pricing rule “boosts incentives to invest in the provision of better and more cost effective retail services, as well perhaps as investment in infrastructure that will improve a firm’s competitive advantages”).

<sup>5</sup> See Windstream Aug. 9, 2016 Reply Comments at 24-28. To be clear, a finished service can also be another telecommunications service that uses BDS as an input, such as CMRS.

<sup>6</sup> See Marc Rysman, *Empirics of Business Data Services*, 31 FCC Rcd. 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); Reply Comments of the Ad Hoc Telecommunications Users Committee at 2-3, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 9, 2016) (“Ad Hoc Aug. 9, 2016 Reply Comments”) (cable services are not substitutable for ILEC BDS).

services customers will lose the choices and benefits of competition.<sup>7</sup> This is particularly an issue with respect to Ethernet services, which are not subject to any rate structure rules.

Ad Hoc has also pointed out that large business enterprises may function as their own provider of finished solutions, purchasing bottleneck business data service inputs in the same manner as carriers, with the same level of support and avoided retail expenses for the underlying business data service provider. In such a situation, Ad Hoc asserts that it would be inequitable and unlawfully discriminatory to treat a business customer differently from a carrier customer.

These perspectives are readily reconcilable. A regulatory framework based on the parity pricing rule can and should meet the Communications Act's non-discrimination requirement. Thus, the Commission should make clear that the wholesale rates under the parity pricing rule available to a market leader's carrier customers are also available to end user customers that (1) purchase the same or substantially similar business data services, (2) agree to substantially similar terms and conditions of service, including volume and/or term commitments, sales assistance, and network design functions. In such a situation, to prevent recursive discounts, end users similarly situated to carriers should pay the same price for the same service. Determining the availability of BDS rates based on these cost-causative factors is consistent with both the underlying economic principles of the parity pricing rule and with the non-discrimination requirements of Section 202 of the Communications Act.

**I. The Economic Principles Underlying the Parity Pricing Rule Apply to Both Carrier and End User Customers that Purchase Comparable Bottleneck Inputs in a Similar Manner.**

A guiding principle of the Commission's regulatory framework for business data services must be that a market leader's prices for business data service used as inputs be lower than the implicit retail price for the BDS connectivity in a finished solution. Competition for finished communications solutions can be undermined by market leaders' ability and incentive to charge rates for bottleneck business data services inputs—such as last-mile connectivity to end user locations—that raise downstream rivals' costs of providing an alternative to the market leaders' own communications solutions in that downstream market.<sup>8</sup> As Prof. Willig explains in his declaration, the appropriate remedy is to require that rates charged to purchasers of input services should approximate the implicit rates that the market leaders charge their own retail customers for the same critical inputs as part of a finished, retail product.<sup>9</sup> By requiring this parity pricing, the Commission can constrain the ability of a monopolist or duopolist to eliminate even more efficient downstream providers of finished communications solutions that compete with its own finished services.

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<sup>7</sup> See Windstream Aug. 9, 2016 Reply Comments at 24.

<sup>8</sup> See *id.* at 29-30; Willig Declaration ¶¶ 13-17.

<sup>9</sup> See Willig Declaration ¶¶ 4, 8.

Efficient downstream providers include both competitive carriers that use BDS inputs for communications solutions they provide to their own end user customers and end user customers themselves, including companies like the members of Ad Hoc, that use the same inputs for their internal networks. With access to efficient prices for equivalent input services, both types of purchasers exert competitive pressure on the market leaders in the downstream markets, lowering prices and spurring innovation.<sup>10</sup> Competitive carriers like Windstream do so by offering the customer a more individualized, higher touch experience.<sup>11</sup> End user customers with sophisticated internal networks and sufficient demand can also put competitive pressure on market leaders by effectively providing their own “retail” solution using the same inputs as purchased by carrier customers.<sup>12</sup> Accordingly, the same economic principles underlying the pricing parity rule support the availability of efficient rates for comparable input services to both the wholesale purchaser and the similarly situated end user.

In practice, applying the parity pricing rule means that the Commission should determine the efficient price for BDS charged to an unaffiliated purchaser by removing from the retail price of the finished product those costs that market leaders do not incur in selling to purchasers of BDS inputs. These include the costs of sales and of network resources that are being provided by the BDS purchaser in assembling the finished communications solution (whether for their end user customers or for themselves).<sup>13</sup> As Windstream previously explained, the avoided costs of a streamlined sales process to carrier wholesale customers (and similarly situated end users self-provisioning their own finished solution) are significant.<sup>14</sup> To be sure, the parity pricing rule does not require providers to make rates for carrier customers available to all end user purchasers of their business data services. End user prices should include the costs of the retail sales process (if incurred) as well as the costs of network resources actually provided to the customer. At the same time, the Commission’s application of the parity pricing rule need not differentiate end users that are similarly situated to carriers from carriers themselves. Whether any given end user customer is similarly situated to carrier customers depends obviously on the quantity and nature of the end user customer’s purchases from the BDS provider. Sophisticated end users that

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<sup>10</sup> *See id.* ¶ 20 (stating that an efficient downstream rival “offers a service to the customer that better meets the preferences, needs or demands of the customer,” and that inefficient wholesale rates divert final downstream product sales away from such rivals).

<sup>11</sup> *See* Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith ¶ 21 (“Windstream Declaration”), appended as Attachment A to Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 21, 2016).

<sup>12</sup> *See* Ad Hoc Aug. 9, 2016 Reply Comments at 4-6.

<sup>13</sup> *See id.* ¶¶ 28-32.

<sup>14</sup> *See* Declaration of David Schirack, Mike Baer and Samuel Bushey ¶¶ 5, 9 (“Schirack/Baer/Bushey Declaration”), appended as Attachment C to Windstream Aug. 9, 2016 Reply Comments.

purchase in quantities sufficient to generate savings from more streamlined sales processes, and that purchase inputs that do not use network resources provided in the finished retail solution, should have access to the same wholesale discounts that are available to carrier customers.

## **II. Discounts Based on the Parity Pricing Rule Are Consistent with the Communications Act Including Sections 201 and 202.**

As further explained in Windstream's Reply Comments, Sections 201 and 202 of the Communications Act confer authority on the Commission to enact rules precluding market leaders from using their control of bottleneck inputs to squeeze efficient downstream competitors out of the market.<sup>15</sup> Regulations implementing the parity pricing rule would not restrict the availability of wholesale services or rates to end users that are purchasing similar quantities and types of services as their carrier counterparts. Adopting parity pricing regulations also would not affect the rights of end user customers to continue purchasing business data services from an incumbent provider.<sup>16</sup> Indeed, Sections 201 and 202 safeguard against anticompetitive behavior by market leaders in the rates charged to other carriers,<sup>17</sup> and in the rates charged to similarly situated carrier and end user customers.<sup>18</sup>

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<sup>15</sup> See Windstream Aug. 9, 2016 Reply Comments at 38-46; Ad Hoc Aug. 9, 2016 Reply Comments at 4-6. See also Letter from Colleen Boothby, Counsel to Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, WT Docket No. 11-65, at 5 (filed June 13, 2011) (market power in the special access market enables ILECs to engage in anti-competitive price squeezes of their competitors in retail markets for which special access is an input).

<sup>16</sup> See 47 U.S.C. § 251(g).

<sup>17</sup> See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, As Amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling; Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, FCC 01-98, 16 FCC Rcd. 7418, 7449 ¶ 55 (2001) (citing Section 201 and 202 as “safeguard[s] against anticompetitive conduct”); *AT&T Communications Tariff F.C.C. No. 15*, Memorandum Opinion and Order, FCC 91-252, 6 FCC Rcd. 5648, 5650 ¶ 22 (1991) (concluding that “the practices embodied in Transmittal 1854 have serious potential anticompetitive consequences and thus must be viewed as unreasonable discrimination” under Section 202(a)); *AT&T Communications Revisions to Tariff F.C.C. No. 1 & 2*, Memorandum Opinion and Order, DA 90-824, 5 FCC Rcd. 3833, 3835 ¶ 19 (Comm. Carrier Bur. 1990) (determining that “AT&T’s conduct had ‘significant enough anticompetitive consequences to find an unreasonable practice’” under Section 201(b) (internal citation omitted)).

<sup>18</sup> See, e.g., *Petition of First Data Resources, Inc. Regarding the Availability of Feature Group B Access Service to End Users*, Memorandum Opinion and Order, 1986 WL 291786 (1986) at \*4 ¶ 13 (“interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and IC [interexchange carrier]

To determine whether end user customers are similarly situated to carrier customers for purposes of the availability of wholesale rates, the Commission's rules should consider the following factors:

1. Are the input services purchased by the end user customer from the market leader similar to those purchased by carrier customers in terms of functions performed and network resources used? For example, as Windstream previously explained, competitive carriers provides network components such as middle-mile transport and interconnection to the Public Switched Telephone Network over their own facilities to their own retail customers.<sup>19</sup>
2. Is the end user customer able to make volume and term commitments comparable to carrier customers? To the extent that a market leader offers different tiers of wholesale rates depending on the level of volume commitment, an end user customer should have access to the same rates for the same volume commitments as made by a carrier customer.
3. Does the market leader provide the same quantity and quality of sales-related services to the end user customer as it does to its carrier customers, which are less costly than sales-related services provided to other retail customers? For example, retail sales-related services include designing the finished communications solution and providing sales, technical, and other customer-support services, which are not included in the input services that carrier customers and some enterprise customers purchase when they purchase BDS.

If the answers to all of the questions above are “yes” with respect to an end user customer, then the wholesale rates available to carrier customers should also be made available to that end user customer. This approach to determining whether end user customers are similarly situated to carrier customers is consistent with long-standing principles under the Communications Act that

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customers”); *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, FCC 84-51, 97 FCC 2d 1082, 1187 (1984) (“[W]e seek to eliminate so far as possible differences in services and rates based on whether the customer is a carrier or end user.”); *Amendment of Sections 64.702 of the Commission’s Rules & Regulations (Third Computer Inquiry)*; *Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Thereof; Communications Protocols Under Section 64.702 of the Commission’s Rules & Regulations*, FCC 86-252, 104 FCC 2d 958, 1042 ¶ 165 (1986) (concluding that “[c]arriers should not restrict the availability of [comparably efficient interconnection] to any particular class of customer or enhanced service competitor”), *modified on reconsideration, Amendment of Sections 64.702 of the Commission’s Rules & Regulations (Third Computer Inquiry)*, FCC 87-102, 2 FCC Rcd. 3035 (1987).

<sup>19</sup> See Schirack/Baer/Bushey Declaration ¶¶ 10-11; Windstream Aug. 9, 2016 Reply Comments at 35-36. See also Willig Declaration ¶ 30.

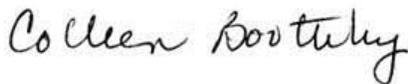
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allow carriers to charge different rates for “like” services based on differences in the cost of providing the same service to different types of customers.<sup>20</sup>

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

Sincerely,



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<sup>20</sup> See, e.g., *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) (stating that cost differentials are to be considered “when determining whether the discrimination is unreasonable or unjust”); *Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charges Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers*, Memorandum Opinion and Order on Third Further Reconsideration, 10 FCC Rcd. 1570, 1571 ¶ 8 (1994) (stating that charging different prices for “like” services would be unreasonably discriminatory if “there is no cost justification or other basis to support the discrimination”).