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**VIA ECFS** ***EX PARTE***

November 8, 2016

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

Re: *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; *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143

Dear Ms. Dortch:

On November 4, 2016, Eric Einhorn, Senior Vice President of Government Affairs for Windstream Services, LLC ("Windstream"), spoke by telephone with Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel, regarding the above-referenced proceedings. Windstream described to Litman the content of its October 31, 2016 meeting with Commissioner Rosenworcel.[1]

In the October 31 meeting, Windstream urged the Commission to ensure its new regulatory framework for business data services preserves the availability of competitive choice and affirms existing protections against unjust and unreasonable price increases. Windstream stated that the Commission at a minimum should (1) adopt rules that make clear that incumbent providers cannot unreasonably discriminate against competitors by charging more for last-mile connectivity when purchased on a wholesale basis and (2) maintain measures put in place just last year that protect customers of DS1 and DS3 service from price shocks when their incumbent providers switch to IP-based services. The Commission also should not conclude that markets for Ethernet services are generally competitive—especially for 50 Mbps and below offerings, where there is no valid factual basis in the record to support this conclusion. Without these minimal

1 *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 06-143, 05-25, RM-10593 (filed Nov. 2, 2016).

safeguards, the Commission's "new start"[2] for the business data services market would, after much fanfare, represent a significant step backwards for business data services customers.

*First*, the Commission's order should include rules prohibiting incumbent providers from discriminating against wholesale customers by charging more for last-mile capacity when offered on a standalone wholesale basis, compared to the effective price charged to the incumbents' retail customers as part of a finished communications solution. Incumbent LECs, who are the sole providers at more than 77 percent of buildings with business data service demand,[3] currently have the incentive and ability to discriminate against their downstream competitors by charging wholesale rates that unreasonably pass through costs for services that the incumbent is not performing for the wholesale customer.[4] And as Windstream and others have previously explained, potential competitors with nearby fiber cannot be expected to constrain market power for these buildings because the costs of extending their fiber cannot be economically justified, a result that is confirmed by the Commission's long experience with difficulties in building access and the widespread industry practice of pricing services on a building-specific basis.[5] These marketplace conditions allow incumbents to execute price

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2 *See 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, 4725 ¶ 4 (2016) ("*FNPRM*").

3 *See* Marc Rysman, *Empirics of Business Data Services*, 31 FCC Rcd. at 4933, Table 7, attached as Appendix B to *FNPRM*.

4 *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed Oct. 21, 2016) ("Windstream October 21, 2016 Ex Parte"). *See also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 10-113, 25 FCC Rcd. 8622, 8639 ¶ 34 (2010) (concluding that an incumbent in a duopoly "may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs").

5 *See* Letter from Jennie B. Chandra, Vice President, Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, at 3-6, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed Oct. 17, 2016) ("Windstream October 17, 2016 Ex Parte") (citing declarations and other record evidence confirming that competitive providers are rarely able to build to demand of 100 Mbps and under). *See also* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 8, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed July 25, 2016) (observing that "ILECs respond to competition on a building-by-building basis and not uniformly across a census block"); Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 7, WC Docket Nos. 05-25, and 15-247, GN Docket No. 13-5, RM-10593 (filed Mar. 14, 2016) (citing study

squeezes that have been documented in the record, and that threaten to eliminate competitive alternatives to the incumbent service provider.

Competitive providers need to be able to purchase connectivity to the building at reasonable wholesale prices, which should account for the costs that the incumbent provider avoids for services included in sales to retail customers that are not provided to or needed by the wholesale customer. A clear statement from the Commission that wholesale rates must account for these avoided costs and a rule identifying these types of costs would help guide commercial negotiations. Half-hearted measures merely requiring wholesale rates to be no greater than retail would embolden incumbents to continue saddling competitors with retail costs they do not incur,[6] and to squeeze their competition out of the business data services market.[7]

Wholesale rates that account for these avoided costs are not a giveaway to competitive providers. Consistent with the economic principles summarized by Dr. Robert Willig, limiting wholesale rates under these market conditions can help unleash competition from, and spur further investment by, more efficient and innovative downstream providers, without "curtail[ing] the ability of the bottleneck owner to attain earnings from its investment in its bottleneck facilities."[8] Providers must still be able to combine the whole business data services inputs with their own services and facilities into compelling solutions in order to win customers. Nondiscriminatory wholesale rates would put competitive providers on, at best, equal footing with the incumbent, instead of having to pay twice for many costs: once for its own costs of providing retail service, and again to the incumbent for costs that the latter does not incur.

*Second*, the Commission's reforms should not cause customers to pay higher prices for the wholesale Ethernet inputs that are comparable to the rate-regulated TDM inputs being discontinued by incumbent providers. Yet this perverse outcome would be realized if the Commission were to conclude that competition for Ethernet services at or below 45 Mbps (the bandwidth of a DS3 connection) was sufficient to ensure just and reasonable rates.[9] Reaching

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by TeleGeography finding that Ethernet pricing within a metro area are attributable to factors including the "number of service providers connected to the customer building").

6 These costs are significant and include the costs of providing support and network design for customers and providing fiber network transport beyond the last mile. *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 1-2, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed Oct. 6, 2016).

7 *See* to Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking at 24, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 9, 2016) ("Windstream Aug. 9, 2016 Reply Comments").

8 Declaration of Dr. Robert Willig ¶ 26, appended as Attachment B to Windstream Aug. 9, 2016 Reply Comments. *See also* Windstream October 21, 2016 Ex Parte at 1-2.

9 *Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange*

such a conclusion—against the weighty evidence in the record—will sunset the interim protections that the Commission established last year in the *Emerging Wireline Order*, and expose customers to Ethernet rates that the large ILECs readily acknowledge are significantly higher than rates for comparable TDM service.[10] Indeed, the Commission's data show that 86 percent of customer locations that have aggregate demand at or below 50 Mbps have no other facilities-based provider, and less than 1 percent of these locations have more than one competitive facilities-based provider.[11] These customer locations include many schools, libraries, government entities, telemedicine sites, and businesses.[12] As an example, Windstream is the eighth largest provider of category one E-Rate services in the country—and a strong majority of that service is provided by Windstream's CLEC operations. Allowing increases to connectivity costs for these important customers is not justified by the economics (as costs are going down in IP) and would be the opposite of technology transitions effects in other countries.[13]

If you have any questions or need more information, please feel free to contact me.

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*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) ("*Emerging Wireline Order*").

[10] *See* Windstream October 21, 2016 Ex Parte at 3-4; Letter from Christopher T. Shenk, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, FCC, at 9, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Sept. 16, 2016) (comparing AT&T's current lowest-bandwidth Ethernet rate to AT&T's DS1 rate); Letter from Melissa E. Newman, Vice President, Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, at 5-6, WC Docket Nos. 16-143, 15-247, and 05-25, RM-10593 (filed Sept. 30, 2016) (comparing CenturyLink's current lowest-bandwidth Ethernet rate to CenturyLink's DS1 rate).

[11] *See* Windstream October 21, 2016 Ex Parte at 3-4.

[12] *See Emerging Wireline Order* ¶ 101 ("Competition provided by competitive carriers that often rely on wholesale inputs offers the benefits of additional choice to an enormous number of small- and medium-sized businesses, schools, government entities, healthcare facilities, libraries, and other enterprise customers.").

[13] *See* TeleGeography, Local Access Pricing Service, H2 2015 Local Access Market Summary (2015) (showing that weighted average 50 Mbps Ethernet rates in Global Enterprise Network cities outside of the United States are 39 percent lower than corresponding DS3 rates).

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

cc: Travis Litman