

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling to Clarify	)	
That Technology Transitions Do Not Alter	)	
The Obligation of Incumbent Local Exchange	)	WC Docket No. 14-_____
Carriers to Provide DS1 and DS3 Unbundled	)	
Loops Pursuant to 47 U.S.C. § 251(c)(3)	)	
	)	
Technology Transitions	)	GN Docket No. 13-5
_____	)	

**PETITION FOR DECLARATORY RULING OF WINDSTREAM CORPORATION**

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**PETITION FOR DECLARATORY RULING OF WINDSTREAM CORPORATION**

Pursuant to Section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2, Windstream Corporation requests that the Commission issue a declaratory ruling to confirm that an incumbent local exchange carrier’s (“ILEC’s”) obligations to provide DS1 and DS3 capacity loops on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. §§ 51.319(a)(4) and (5) are not altered or eliminated either by replacement of copper with fiber or by the conversion of transmission from TDM to Internet Protocol (“IP”) format.

**INTRODUCTION AND SUMMARY**

This petition asks the Commission to terminate a controversy regarding recent AT&T and Verizon filings asserting that either IP conversion or conversion from copper to fiber relieves them of their obligation to unbundle DS1 or DS3 capacity loops. The large ILECs’ arguments lack any support in the Commission’s unbundling rules, or the Commission’s decisions implementing the Communications Act’s loop unbundling requirements. Significantly, competing local exchange carriers do not become “unimpaired” simply because an ILEC

converts a DS1 or DS3 capacity loop from copper to fiber, or because an ILEC converts the mode of transmission over that loop to IP.

It is critical to the small and medium-sized enterprises that use business communications services provided over DS1 and DS3 capacity loops, and to the vibrancy of competition offering those services, for the Commission to maintain clarity as to ILEC unbundling requirements in the absence of new affirmative impairment findings or forbearance. Competitive LECs (“CLECs”) are by far the most significant alternatives to the ILECs in serving small and medium-sized customers, especially when those customers have more than one location, and CLECs use DS1 and DS3 loops not just to offer TDM-based transmissions, but also to provide Ethernet services.<sup>1</sup> Because small and medium-sized enterprises generally purchase services under multiyear (often three- to five-year term) contracts, CLECs today must bid on services that they will be providing three to five years from now. Uncertainty as to the availability of unbundled DS1 and DS3 capacity loops harms competitors’ ability to be sure that they can control the quality and attributes of these services, and to offer the lowest possible prices in competition with the ILEC. Were the requirement to unbundle DS1 and DS3 capacity loops to cease upon either copper loop retirement or conversion of a loop to IP, the result would be substantial increases in charges to CLECs for last-mile transmission. Such a result would directly contravene the Commission’s recent proclamation that “Technology transitions must not harm or undermine competition.”<sup>2</sup>

The Commission must not allow large ILECs to circumvent their obligations under the law. To obtain relief from unbundling obligations, ILECs must do so through Commission-approved routes, such as seeking a rule change or forbearance, rather than asserting their own

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<sup>1</sup> See *infra* at 7-9.

<sup>2</sup> *Technology Transitions, et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-184, at ¶ 110 (rel. Nov. 25, 2014) (“*Technology Transitions NPRM*”).

misguided interpretations of the law. In the absence of a change in rules or forbearance, ILECs remain obligated to provide access to DS1 and DS3 capacity loops irrespective of whether the loop is copper or fiber, or whether transmissions over the loop are in a TDM or IP format.

## **BACKGROUND**

This petition concerns last-mile facilities used by competitors to deliver cost-effective business services to many thousands of small and medium-sized businesses, nonprofits, and government entities. DS1 and DS3 capacity loops—the particular facilities at issue—are wholesale inputs that can be comprised of fiber, copper, or some combination of the two, and are used by competitors to offer both IP and TDM services at relatively lower bandwidth levels.<sup>3</sup>

Section 251(c)(3) of the Communications Act requires ILECs, including Windstream, to provide eligible requesting carriers with “non-discriminatory access to network elements on an unbundled basis.”<sup>4</sup> In adopting rules implementing this requirement, the Commission was required to consider, among other things, whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>5</sup>

In 2005, after eight years of rulemakings and appellate litigation and compiling a voluminous record over the course of three remand proceedings, the Commission reached a final determination that, with limited exceptions, CLECs are impaired in providing the services they

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<sup>3</sup> As defined by Commission rules, a DS1 loop is a “digital local loop having a total digital signal speed of 1.544 megabytes per second” and a DS3 loop is a “digital local loop having a total digital signal speed of 44.736 megabytes per second.” 47 C.F.R. § 51.319(a)(4)-(5).

<sup>4</sup> 47 U.S.C. § 251(c)(3).

<sup>5</sup> 47 U.S.C. § 251(d)(2)(B).

seek to offer without access to DS1 and DS3 capacity loops.<sup>6</sup> In particular, the Commission found that “the barriers to entry impeding competitive deployment of loops are substantial,”<sup>7</sup> and noted that “competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.”<sup>8</sup> As the Commission explained, “For fiber-based loops, the cost of construction does not vary significantly by loop capacity (*i.e.*, the per-mile cost of building a DS1 fiber loop does not differ significantly from the cost to construct a DS3 or higher-capacity fiber loop), but such costs do vary based on the length of the loop.”<sup>9</sup> Moreover, “[t]he most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location, rather than from lighting the fiber-optic cable.”<sup>10</sup> The Commission thus concluded that because “the costs of loop construction are fixed” regardless of revenue opportunities, CLECs cannot economically deploy their own DS1 and DS3 capacity loops in

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<sup>6</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2536, ¶ 5 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”). Pursuant to Commission rules implementing the unbundling provisions of the Telecommunications Act of 1996, in particular, specify that an ILEC must provide a requesting telecommunications carrier with nondiscriminatory access to: 1) a DS1 loop on an unbundled basis to any building (a maximum of 10 unbundled loops per single building) not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators; and, 2) a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. 47 C.F.R. § 51.319(a)(4), (5).

<sup>7</sup> *Id.* at 2617, ¶ 153.

<sup>8</sup> *Id.* at 2616, ¶ 150. *See also* fn.419 (explaining that “these costs include the costs of obtaining rights of way and other necessary legal permissions, the cost of the actual fiber-optic facilities, and the costs of physical deployment itself”).

<sup>9</sup> *Id.* at 2616, ¶ 150.

<sup>10</sup> *Id.*

most situations,<sup>11</sup> and ILECs, if not required to provide access to these loops, “could exercise its market power . . . to foreclose long-term competition.”<sup>12</sup> The Commission also observed that eliminating loop unbundling “could discourage competitive fiber deployment that otherwise might occur where revenue opportunities can be appropriately aggregated using UNEs and form a foundation for future competitive loop deployment.”<sup>13</sup>

In addition to its impairment finding, the *TRRO* emphasized that unbundled network elements (“UNEs”) place an important check on special access pricing and thus are needed even where competitive carriers otherwise can utilize an ILEC’s tariffed special access offering.<sup>14</sup> It noted that UNEs were created specifically as “an *alternative* to these services, available at alternative pricing”<sup>15</sup> and that their elimination would “thwart[] the very purpose of section 251(c)(3)”<sup>16</sup> and create an “unacceptable risk of significant abuse by incumbent LECs”<sup>17</sup>:

In summary, a rule that foreclosed access to all UNEs wherever competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes. Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market. Moreover, we believe that the uncertainty and risk associated with even the possibility of such abuse would chill competitive entry, because competitive carriers might well be averse to initiating service when they know that the incumbent could – on one day's notice, without Commission approval, and with

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<sup>11</sup> *See id.* at 2616, 2625, ¶¶ 150 and 166.

<sup>12</sup> *Id.* at 2568, ¶ 59.

<sup>13</sup> *Id.* at 2629, ¶ 173 fn.475.

<sup>14</sup> *Id.* at 2563, ¶ 52.

<sup>15</sup> *Id.* at 2562, ¶ 51.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2567, ¶ 59.

limited market-based discipline -- render competition untenable by raising tariffed prices. Such uncertainty is exceedingly detrimental to long-term competition, and we decline to interpret our impairment standard to require the instability that would characterize such a regime.<sup>18</sup>

Five years later, in its Order denying Qwest's petition for forbearance in the Phoenix market from, among other things, loop unbundling obligations, the Commission found that there was "nothing in the record to indicate the passage of time has lowered" the barriers to entry that underlie the UNE framework.<sup>19</sup> Furthermore, the Commission reinforced that UNEs continue to provide an important check on pricing of bottleneck facilities, noting that "[t]here are a number of reasons to be skeptical of the [concept] that incumbent LECs, even if not required to offer UNEs, would have an incentive 'to make attractive wholesale offerings.'"<sup>20</sup>

Most recently, the *Technology Transitions* Notice of Proposed Rulemaking emphasized that the Commission "must ensure that the customers of both incumbent and competitive LECs who currently depend on legacy services continue to have appropriate access to either adequate legacy or IP-based service alternatives."<sup>21</sup> According to the Commission, "the mere fact that a carrier obtains discontinuance authorization under section 214(a) for [TDM- or copper-based] services has no legal bearing on its obligation to provide UNEs . . . . The Commission has held

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<sup>18</sup> *Id.* at 2570-71, ¶ 63 (internal fn omitted).

<sup>19</sup> *See 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, 8670, ¶ 90 (2010) ("*Qwest Phoenix Forbearance Order*").

<sup>20</sup> *Id.* at 8639, ¶ 34 and n.102.

<sup>21</sup> *Technology Transitions NPRM* at ¶ 29. This is consistent with the recommendation in the National Broadband Plan that the Commission adopt wholesale access frameworks to "ensure widespread availability of inputs for broadband services." *See id.* at ¶ 108 (*citing* Omnibus Broadband Initiative, Connect America: The National Broadband Plan, GN Docket No. 09-51, at 36 (2010)).

that ‘the provision of an unbundled network element is not the provision of a telecommunications service.’”<sup>22</sup>

As recognized by the *Technology Transitions* Notice of Proposed Rulemaking, CLECs are a key source of competition for enterprise services.<sup>23</sup> Whether for customers with only one location or multiple locations, GeoResults data show that CLECs, in fact, account for a greater percentage of wireline communications expenditures than cable across all sizes of business service customer locations, standing second only to the ILECs:

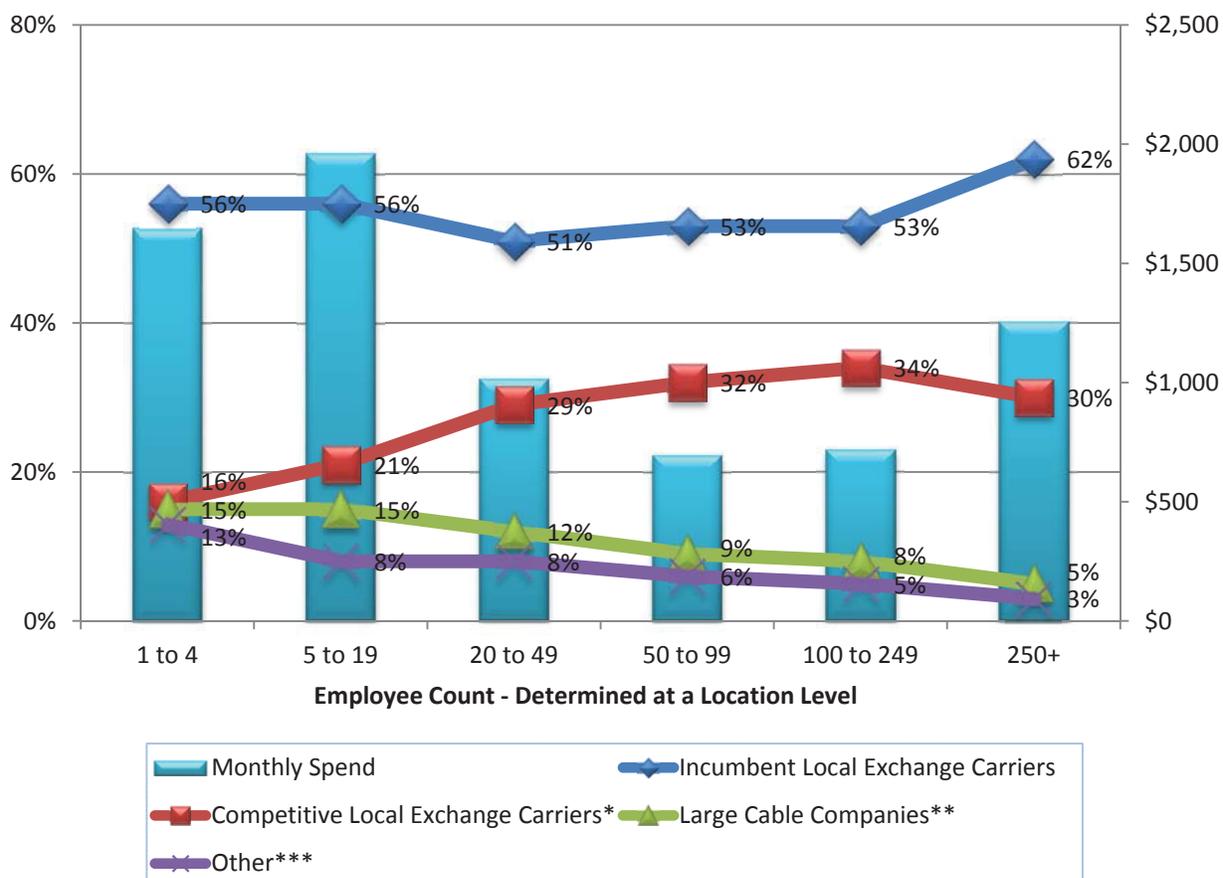
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<sup>22</sup> *Technology Transitions NPRM* at ¶ 109 (quoting *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, 20595, ¶ 95 (1997)). See also *id.* at ¶ 106, fn.203 (clarifying that “No discontinuance would affect an incumbent LEC’s obligations to provide unbundled access to loops under section 51.319(a)(4) of our rules”).

<sup>23</sup> *Id.* at ¶ 6.

Figure 1

### Monthly Non-Residential, Single Location Customer Expenditures on Wireline Communications



Source: Estimated for wireline communications during 3rd Quarter of 2014, as compiled by the independent market research firm GeoResults.

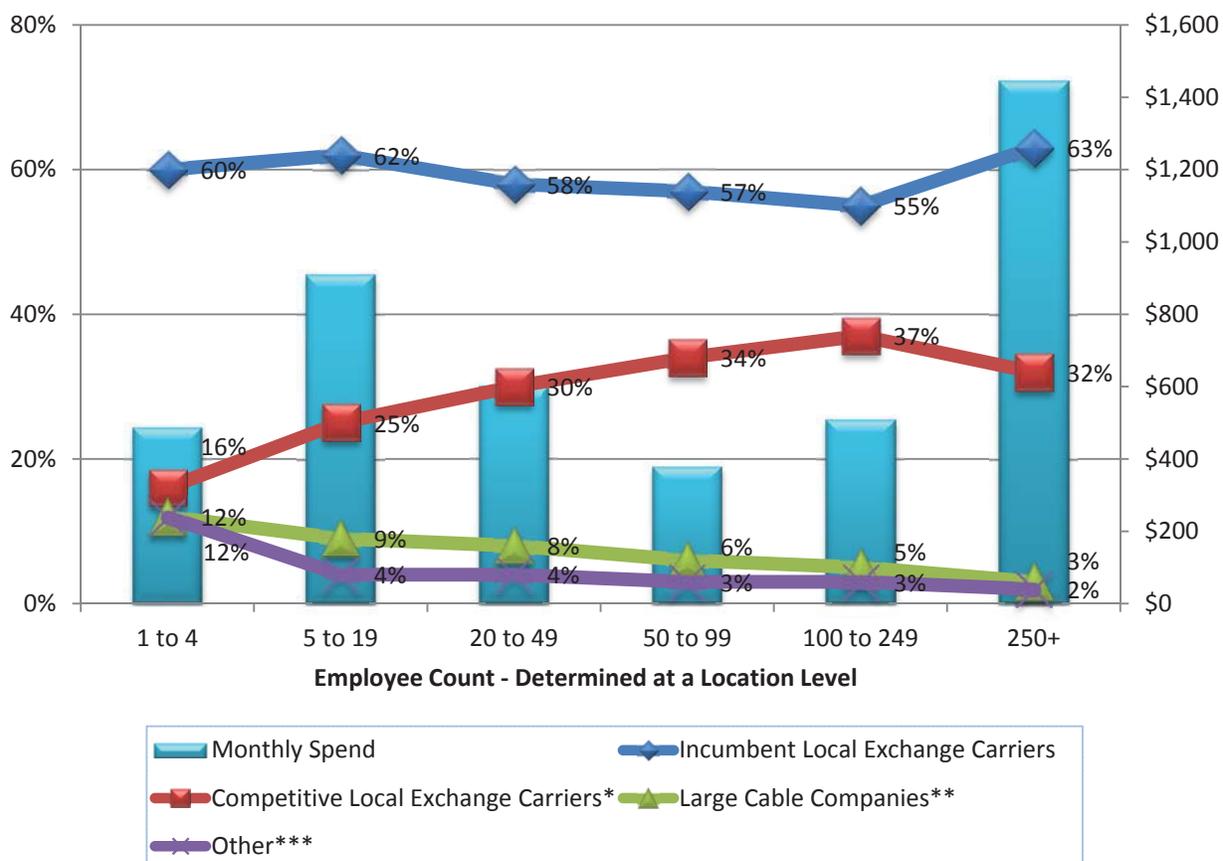
\* “Competitive Local Exchange Carriers” includes revenues from services both over CLECs’ network facilities as well as last-mile facilities leased from ILECs.

\*\* “Large Cable Companies” are the top 15 cable providers, which together address more than 90% of non-residential locations in cable service areas. A de minimis market share is held by smaller cable companies, and the data source groups these into the “Competitive Local Exchange Carriers” category.

\*\*\* This category primarily includes wireless providers offering business phone line service.

Figure 2

### Monthly Non-Residential, Multilocation Customer Expenditures on Wireline Communications



Source: Estimated for wireline communications during 3rd Quarter of 2014, as compiled by the independent market research firm GeoResults.

\* “Competitive Local Exchange Carriers” includes revenues from services both over CLECs’ network facilities as well as last-mile facilities leased from ILECs.

\*\* “Large Cable Companies” are the top 15 cable providers, which together address more than 90% of non-residential locations in cable service areas. A de minimis market share is held by smaller cable companies, and the data source groups these into the “Competitive Local Exchange Carriers” category.

\*\*\* This category primarily includes wireless providers offering business phone line service.

Eliminating unbundled DS1 and DS3 capacity loops as a result of conversion of loops from copper to fiber or from TDM to IP, and thereby requiring all CLECs to migrate to DS1 or DS3 special access or Ethernet services, would force CLECs and small and medium-sized customers who purchase communications services that use DS1 and DS3 inputs to pay substantially more for comparable last-mile access.

Nevertheless, some ILECs are asserting that they lack any obligation to provide unbundled DS1 and DS3 capacity loops when they retire copper or transition from TDM-based to IP-based services. In its recent notices of intent to retire its copper facilities in certain wire centers, Verizon states that after the retirement it will “no longer be required to offer UNEs or other services over copper facilities,” and confirms only that it “will offer to requesting carriers a 64 kbps voice-grade channel over fiber loops,” with no mention of its continuing obligations to provide access to DS1 and DS3 capacity unbundled loops pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.319(a)(4)-(5).<sup>24</sup> AT&T also has claimed that there is “no high capacity loop UNE requirement in an all-IP environment,”<sup>25</sup> and disavows any plans to ensure that the access provided “is functionally equivalent to that provided immediately before the experiment” through unbundling, notwithstanding the Commission’s direction.<sup>26</sup> In its reply comments on its *Technology Transitions* proposal, AT&T expressly disclaims any obligation to continue to

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<sup>24</sup> See “Public Notice of Network Change Under Rule 51.333(a)” for Midlothian, VA, available at <http://www.verizon.com/about/networkdisclosures>. See also Short Term Public Notice Under Rule 51.333(A) for Orchard Park, NY, Hummelstown, PA, Farmingdale, NJ, Lynnfield, MA, Belle Harbor, NY, and Ocean View, VA.

<sup>25</sup> Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 13-5, et al., at 11 (filed May 30, 2014). See also AT&T Reply Comments, GN Docket Nos. 13-5, 12-353, at 40-41 (filed Apr. 10, 2014) (“AT&T Reply”).

<sup>26</sup> *Technology Transitions, et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, FCC 14-5, 29 FCC Rcd. 1433, 1528, Appendix B ¶ 35 (rel. Jan. 31, 2014) (“*Technology Transitions Order*”).

provide unbundled DS1 and DS3 capacity loops after the IP transition, stating that “any obligation (with which AT&T will comply) to provide unbundled access to DS1s and DS3s is limited to those situations where TDM remains in place.”<sup>27</sup>

### **ARGUMENT**

With some large ILECs claiming that they need not provide DS1 or DS3 capacity loops after the IP transition, Windstream urges the Commission to confirm that an incumbent’s obligations to provide unbundled DS1 and DS3 capacity loops do not end with the replacement of copper with fiber or with the conversion of the transmission of traffic over loops to an IP format. Specifically, the Commission should make clear that all ILECs subject to Section 251(c)(3) are required to continue to provide unbundled DS1 and DS3 capacity loops where the impairment trigger has been met, regardless of whether they have retired copper facilities or transmit traffic over those loops in an IP format, and they cannot unilaterally alter those requirements in a network change notification or with service discontinuance.

The plain language of the rules and the Commission’s Orders does not limit ILECs’ DS1 and DS3 capacity loop unbundling obligations to copper facilities or facilities supporting TDM-based services. There is no justification for failing to apply these rules during and after the IP transition without a showing—as would be required in support of a forbearance request—that changed conditions undermine the policy rationale underlying the loop unbundling rules. If an ILEC wishes to eliminate its obligations to provide unbundled DS1 and DS3 capacity loops, it instead may do so only by (1) demonstrating the trigger in 47 C.F.R. § 51.319(a)(4) or (5) for a finding of non-impairment has been met, (2) obtaining a Commission ruling, by rulemaking, that

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<sup>27</sup> AT&T Reply at 40.

impairment no longer exists, or (3) filing a petition for forbearance pursuant to 47 U.S.C. § 160, and meeting each relevant statutory requirement.

### **I. The Commission’s Rules Governing DS1 and DS3 Capacity Loop Unbundling Are Technology Neutral and Survive the IP Transition.**

Nothing in the text of the Commission rules that address DS1 and DS3 capacity loop unbundling limits ILECs’ UNE obligations to copper facilities or TDM services. The express language of the Commission’s DS1 and DS3 capacity loop rules is technology neutral.<sup>28</sup> The local loop network element itself is defined without reference to technology: “The local loop network element is defined as a transmission facility between a distribution frame (or its

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<sup>28</sup> See 47 C.F.R. § 51.319(a)(4)(i) (“DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, *but are not limited to*, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.”) (emphasis added); 47 C.F.R. § 51.319(a)(5)(i) (“DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.”) The Commission in its *Technology Transitions NPRM* last month affirmed this focus on functionality rather than technology when referring to the “requirement to unbundle DS1 and DS3 *capacity* loops.” *Technology Transitions NPRM* at ¶ 29 (emphasis added).

Likewise, the impairment triggers define the areas in which unbundling obligations apply based on the size of the wire center and the cap established by the Commission—not the facility or technology used to provision the loops. See 47 C.F.R. § 51.319(a)(4) (“DS1 loops. (i) Subject to the cap described in paragraph (a)(4)(ii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center...(ii) Cap on unbundled DS1 loop circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops.”); see also 47 C.F.R. § 51.319(a)(5) (“DS3 loops. (i) Subject to the cap described in paragraph (a)(5)(ii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS3 loop unbundling will be required in that wire center...(ii) Cap on unbundled DS3 loop circuits. A requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops.”).

equivalent) in an incumbent LEC central office and the loop demarcation point at the end-user customer premises.”<sup>29</sup> The rules then further define the DS1 and DS3 capacity loop unbundling obligations only by the specific capacity available to the customer (i.e., 1.544 megabytes per second for DS1 capacity and 44.736 megabytes per second for DS3 capacity), not the nature of the physical connection (copper or fiber) or the transmission protocol (TDM or IP) used to convey traffic. These rules are in stark contrast to unbundling provisions pertaining to loops traditionally used to provide service to residential and very small business customers (“mass market loops”); the mass market loop unbundling rules expressly consider both facility type (*i.e.*, copper, hybrid or fiber) and traffic format (*i.e.*, packet-based or non-packet-based).<sup>30</sup>

The *TRRO*, which adopted the DS1 and DS3 capacity loop rules in place today, sought to “remove any uncertainty” about the scope of the DS1 and DS3 unbundling obligations.<sup>31</sup> The Commission, in particular, made clear that these rules were distinct from copper- and TDM-based provisions previously adopted in the *Triennial Review Order* (“*TRO*”). Setting out its “Unbundling Framework,” the Commission noted that technology-based limitations in the *TRO* applied to “unbundling obligations with regard to facilities used to provide broadband service to *mass market customers*.”<sup>32</sup> This finding was consistent with text in the *TRO* itself that

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<sup>29</sup> 47 C.F.R. § 51.319(a).

<sup>30</sup> Compare 47 C.F.R. § 51.319(a)(4), (5) (requiring unbundling of DS1 and DS3 capacity loops without any reference to technology) with 47 C.F.R. § 51.319(a)(2) (for mass market hybrid loops, exempting packet switching facilities, features, functions and capabilities) and 47 C.F.R. § 51.319(a)(3) (excluding from unbundling fiber-to-the-curb and fiber-to-the-home mass market loops, except in limited circumstances).

<sup>31</sup> *TRRO* at 2542, ¶ 13, fn.38.

<sup>32</sup> *Id.* at 2545, ¶ 21 (emphasis added) (clarifying the basis for the Commission’s prior decision to place limits on unbundling obligations pertaining to fiber loops (*TRO*, *infra* n.36, at 17145, ¶ 278), loops utilizing packet-switched equipment versus TDM-based equipment (*TRO* at 17152, ¶ 293), and packet switching (*TRO* at 17323, ¶ 541)). The *TRRO* also summarized the

distinguished between mass market loops subject to technology-based limitations and DS1 loops, which were not expressly limited to certain technologies.<sup>33</sup> The Commission in the *TRRO* also recognized, more generally, that “other orders . . . substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the *mass market*.”<sup>34</sup> But nowhere did the *TRRO* find that the *TRO*—or any other FCC decision—had placed limits on the Commission’s revised technology-neutral unbundling obligations for DS1 and DS3 capacity loops.

Recent Commission decisions reaffirm that ILECs should not be allowed to use the IP transition as basis for escaping DS1 and DS3 capacity loop unbundling obligations. The *Qwest Phoenix Forbearance Order* finds that while the Commission’s unbundling regime “substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the *mass market*,” the Commission merely has “placed caps on the ability to obtain other high-capacity loops and transport.”<sup>35</sup> In addition, the recently adopted *Technology Transitions* Notice of Proposed Rulemaking recognizes “the critical importance of ensuring that technology

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import of the *TRO* as “eliminat[ing] most unbundling requirements for broadband architectures serving the *mass market*” and having “the effect of limiting unbundled access to next-generation loops serving the *mass market*.” *TRRO*, 20 FCC Rcd. at 2535, ¶ 2 (emphases added).

<sup>33</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16,978, 17,173, ¶ 325, n.956 (2003) (“*Triennial Review Order*” or “*TRO*”) (stating “DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, e.g., two-wire and four-wire HDSL or SDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated”).

<sup>34</sup> *TRRO*, 20 FCC Rcd. at 2562, ¶ 49.

<sup>35</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8677, ¶ 108.

transitions do no harm to the benefits of competitive access”—an outcome that cannot be achieved if ILECs are allowed to cite the IP transition as basis for subverting DS1 and DS3 capacity loop unbundling obligations.<sup>36</sup>

Finally, the Commission should be critical of large ILEC suggestions that deployment of fiber and transmitting data over ILEC last-mile facilities are new developments warranting a change in course. In fact, the Commission recognized that many legacy DS1 and DS3 capacity loop facilities, at the time when unbundling obligations were adopted, already incorporated fiber and conveyed data traffic. For example, when defining DS1 and DS3 capacity loops in the *TRO*, the Commission specifically noted that these loops “are provided over various transmission media,” including “fiber optics.”<sup>37</sup> The Commission, in the *Qwest Phoenix Forbearance Order*, also noted that it was unconvinced that forbearance from unbundling obligations would affect Qwest’s investment incentives, because “for the most part, the loop and transport UNEs at issue in this proceeding are legacy facilities that already have been constructed.”<sup>38</sup>

## **II. Many Small and Medium-Sized Businesses, Nonprofits, and Government Entities Would See Reduced Choices and Higher Prices if the Commission Fails to Enforce Continued Unbundling of DS1 and DS3 Capacity Loops.**

Unbundled DS1 and DS3 capacity loops are used to provision competitive communications offerings, in IP as well as TDM formats, to many small businesses and nonprofits as well as smaller sites of multi-location business, government, and nonprofit entities. These facilities often offer the most cost-effective means for bridging the last-mile gap between

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<sup>36</sup> *Technology Transitions NPRM* at ¶ 92.

<sup>37</sup> *See TRO*, 18 FCC Rcd. at 17,104, fns. 633-34. *See also TRRO*, 20 FCC Rcd. at 2616, ¶ 150 (discussing the fixed costs of DS1 and DS3 capacity loop construction with respect to “fiber-based loops”).

<sup>38</sup> *See Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8677, ¶ 108.

individual customer locations and the extensive fiber networks competitors have already built and continue to expand.<sup>39</sup> Moreover, unbundled DS1 and DS3 capacity loops are accompanied by performance standards administered by state commissions,<sup>40</sup> and thus allow for more effective control over quality of communications services provided to business service customers. In light of these conditions, DS1 and DS3 capacity loops are still in high demand and are often necessary inputs for competitive carriers' delivery of innovative and tailored offerings to business service customers.

The IP transition does not alter the fundamental economics of last-mile deployment—which have been recognized in a series of Commission decisions, including the *TRO*, the *TRRO*, and the *Qwest Phoenix Forbearance Order*.<sup>41</sup> As the Commission noted in the *TRO*, deployment of last-mile facilities to customers that do not require high bandwidth presents “extremely high economic and operational barriers,” and “overbuilding to enterprise customers that require services over [DS1 and DS3] facilities generally does not present sufficient opportunity for competitors to recover their costs. . . .”<sup>42</sup> The Commission echoed this sentiment in the *TRRO*:

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<sup>39</sup> For example, Windstream has invested billions to make its fiber network the sixth largest in the nation. This network spans 118,000 fiber miles – enough fiber to circle the Earth five times.

<sup>40</sup> See, e.g., Verizon Performance Assurance Plan, Version 4.0 (December 26, 2006) (containing performance metrics for DS1 and DS3 capacity UNE loops), available at [http://www22.verizon.com/wholesale/attachments/east-perf\\_meas/NewYorkPAP20061226\\_black.doc](http://www22.verizon.com/wholesale/attachments/east-perf_meas/NewYorkPAP20061226_black.doc) (last viewed December 22, 2014).

<sup>41</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8623, 8661, ¶¶ 2, 73 (“[C]ompetitors offering business services largely must rely on inputs purchased from Qwest itself to provide service,” and thus “We find potential competition from either supply-side substitution or from de novo entry to be unlikely in the Phoenix MSA.”).

<sup>42</sup> *TRO*, 18 FCC Rcd. at 17,173-74, 17,156, ¶ 325 and n.859. See also Letter from Joan Marsh, Director, Federal Government Affairs, AT&T Corp., to Marlene Dortch, Secretary, FCC, CC Dockets No. 01-338, 96-98, 98-147, at 3 (filed Jan. 14, 2003) (“A competitor’s opportunity to address buildings with non-ILEC high capacity facilities is also limited, because the market

“[C]ompetitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers.”<sup>43</sup> The “passage of time has [not] lowered these barriers,” noted the more recent *Qwest Phoenix Forbearance Order*,<sup>44</sup> nor has it lessened the danger of “downstream” customer impacts that can arise where a single party holds substantial market power in the upstream wholesale market.<sup>45</sup> If an ILEC can increase the costs of last-mile access for competitive providers and thereby necessitate increased prices for its rivals’ customers, the ILEC will be able to raise the prices for its own customers as well. Wholesale price hikes may even force CLECs to exit the market altogether, and customers therefore would lose the ability to purchase the competitors’ innovative and tailored services.<sup>46</sup>

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for deploying such facilities is mature. Much of the competitive build-out of alternatives to the ILECs’ high capacity facilities occurred even before passage of the 1996 Act. Furthermore, as acknowledged by the Commission, the ILECs have extensive local fiber deployment and, when the fiber was deployed, substantial unused capacity was also installed. Thus, the number of instances in which there is an overlap between previously unaddressed high demand locations and positive conditions for building (building access, proximate transport ring capacity, practical rights of way access, etc.) is now relatively small.”).

<sup>43</sup> *TRRO*, 20 FCC Rcd. at 2616, ¶ 150.

<sup>44</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8670, ¶ 90.

<sup>45</sup> *See id.* at 8639, ¶ 34. *See also id.* at 8645, ¶ 40 (noting that the Commission is focused on “ensur[ing] that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets.”).

<sup>46</sup> The Commission has long recognized that by raising rivals’ costs, the seller of an input with market power can raise the market price for all consumers, to their detriment. *See Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8639-41, ¶ 34 and fn.102. *See also Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, 12 FCC Rcd 15,756, 15,803 ¶ 83 (1997) (“a carrier may be able to raise prices by increasing its rivals’ costs or by restricting its rivals’ output through the carrier’s control of an essential input.”); *News Corp. and The DirectTV Grp., Inc., Transferors, & Liberty Media Corp., Transferee*, Memorandum Opinion and Order, FCC 08-66, 23 FCC Rcd. 3265, 3295 (2008) (“[W]here a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals’ costs either by raising the price at which it sells the input to

As recognized in the *Qwest Phoenix Forbearance Order*, the existence of unbundled DS1 and DS3 capacity loops continues to place an important check on pricing of high-capacity services.<sup>47</sup> This conclusion is consistent with the Commission’s earlier finding in the *TRRO* that DS1 and DS3 capacity loops provide a check on ILEC special access rates, including in areas subject to Phase II pricing flexibility.<sup>48</sup> The Commission also noted in the *TRRO* that the presence of UNEs “lessens the risk that incumbent LECs could use pricing flexibility to drive competitors from the market such as through targeted rate reductions to end user customers.”<sup>49</sup>

Indeed, the Commission’s decisions to forbear from dominant carrier regulation of Ethernet special access service for the large ILECs are predicated on the existence of DS1 and DS3 TDM special access and UNE alternatives.<sup>50</sup> AT&T itself relied on the continued

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downstream competitors or by withholding supply of the input from competitors. By doing so, the integrated firm may be able to harm its rivals’ competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete.”) (citing Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 *Antitrust L. J.* 513, 527-38 (1995) and Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 *Yale L. J.* 209, 234-38 (1986)).

<sup>47</sup> See *Qwest Phoenix Forbearance Order* at 8639, ¶ 34 and n.102.

<sup>48</sup> See *TRRO*, 20 FCC Rcd. at 2569-70, 2574-75, ¶¶ 62, 65 (noting check on special access pricing).

<sup>49</sup> *TRRO* at 2569, fn.167. Furthermore, “[b]ecause the ‘impairment’ standard differs from the pricing flexibility triggers,” the *TRRO* found, “a competitor could well be ‘impaired’ without access to a bottleneck facility even in a jurisdiction in which the incumbent LEC has been granted pricing flexibility.” *Id.* at 2569, ¶ 61.

<sup>50</sup> E.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of Bellsouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18705, 18717 ¶ 20 n.86 (2007) (“[W]e observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to

availability of “these still-highly-regulated ILEC TDM inputs” to justify forbearance with respect to Ethernet services in its brief before the D.C. Circuit when defending the Commission’s Ethernet forbearance orders.<sup>51</sup> And in another filing opposing regulation, AT&T even went so far as to adopt a different view of the FCC’s DS1 and DS3 capacity loop unbundling rules—with AT&T asserting that it was “not until the 2005 Triennial Review Remand Order that the Commission established any relief for DS<sub>n</sub> loops and transport (and even then only in limited geographic areas).”<sup>52</sup>

Allowing ILECs now to ignore the plain language of the FCC’s DS1 and DS3 capacity loop unbundling requirements—on which they themselves relied when seeking to avoid regulation from other provisions—would upend the existing regulatory regime. There are no grounds to deviate from the Commission’s long line of decisions and findings. A departure from this Commission precedent would undermine the Commission’s core value of competition, resulting in higher prices for business consumers and reduced innovation and investment.<sup>53</sup>

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section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.”).

<sup>51</sup> Brief for Intervenors AT&T Inc., et al. in Support of Respondents at 11 (filed Dec 3, 2008), *Ad Hoc Telecommunications Users Committee, et al., v. FCC*, No. 07-1426 (D.C. Cir. 2008) (“Because these [ATM and frame relay over TDM circuits] are alternative technologies [to Ethernet] within the same market for enterprise services, competing providers could purchase these still-highly-regulated ILEC TDM inputs to compete effectively in that market, even in circumstances where the provider could not deploy its own facilities-based alternative or purchase capacity from a third-party provider, and even if petitions had any basis for challenging the Commission’s conclusions about Ethernet-over-TDM.”) (internal citations omitted). Predictably, AT&T offers a different, creative view of the unbundling rules when it is seeking to avoid or reduce its regulatory burden.

<sup>52</sup> Reply Comments of AT&T Inc., WC Docket No. 09-223, at 9 (Feb. 22, 2010).

<sup>53</sup> See *Technology Transitions Order*, 29 FCC Rcd. at 1452, 1528, ¶ 58 and Appendix B ¶ 35. Negative consequences will fall on both ILEC customers and competitive carrier customers, as the incumbents no longer will be disciplined by their primary competitors’ pricing.

## CONCLUSION

For the foregoing reasons, Windstream urges the Commission to confirm that an ILEC's obligations to provide DS1 and DS3 capacity loops on an unbundled basis are not altered or eliminated either by replacement of copper with fiber or by the conversion of transmission from TDM to IP format.

Respectfully submitted,

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