

**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)	WC Docket No. 15-1
Local Exchange Carriers to Provide DS1)	
and DS3 Unbundled Loops Pursuant to)	
47 U.S.C. §251(c)(3))	
)	
Technology Transitions)	GN Docket No. 13-5
)	

OPPOSITION OF AT&T SERVICES, INC.

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AT&T Services, Inc., on behalf of itself and its affiliates, hereby submits this Opposition to the Petition for Declaratory Ruling of Windstream Corporation.¹

INTRODUCTION AND SUMMARY

Citing a need to “terminate a controversy” that Windstream in fact has instigated, Windstream’s *Petition* asks the Commission to “confirm” that Incumbent Local Exchange Carriers (“ILECs”) must continue providing unbundled access to high capacity DS1 and DS3 loops after ILECs transition their legacy time division multiplexing (“TDM”) networks to all-Internet Protocol (“IP”) systems and from copper to fiber loops. In fact, the *Petition* seeks a *change*, not a clarification of the Commission’s existing unbundled network element (“UNE”)

¹ *Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. §251(c)(3)*, Petition for Declaratory Ruling of Windstream Corporation, WC Docket No. 15-1 and GN Docket 13-5 (Dec. 29, 2014) (“*Petition*”).

rules. In particular, the *Petition* asks the Commission to alter the ILECs' existing UNE obligations by requiring ILECs to provide unbundled access to packet-based technologies which the Commission correctly determined over a decade ago Competitive Local Exchange Carriers ("CLECs") should and could deploy themselves and which, therefore, are not subject to unbundling requirements. Windstream's effort to rewrite the Commission's longstanding determination not to require unbundling of next-generation IP-based networks should be rejected.

The Commission's unbundling rules are not—as Windstream claims—"technology neutral."² Rather, the Commission's *Triennial Review Order* based those rules on a "bright line . . . drawn between legacy technology and newer technology."³ Finding that CLECs were not impaired without access to those newer technologies — and that in many cases they were ahead of the ILECs in their deployment of them⁴ — the Commission adopted a rule denying unbundled access to next generation, packet switched technologies, including packet switching itself, fiber loops (particularly in "greenfield" situations) and the packet-switched features, functions and capabilities of hybrid loops.⁵ At the same time, the Commission required ILECs to provide unbundled access to the TDM capabilities of hybrid loops and of DS1 and DS3 loops —legacy technologies that the Commission unambiguously described as "TDM-based services."⁶ This

² *Petition* at 12.

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 293 (2003) ("*Triennial Review Order*").

⁴ *See id.* ¶ 275 ("Indeed, the record indicates that competitive LECs are currently leading the overall deployment of [Fiber to the Home] loops after having constructed some two-thirds or more of the FTTH loops throughout the nation.").

⁵ *See* 47 C.F.R. § 51.319(a)(2) - (3); *Triennial Review Order* ¶¶ 7, 537.

⁶ *Triennial Review Order* ¶ 294.

bright-line distinction between legacy technology and newer technology has been retained by the Commission,⁷ upheld by the courts,⁸ and remains the foundation of the agency's current unbundling rules.⁹

The "confirmation" that Windstream seeks would erase this "bright line" and destroy the careful balance that the Commission adopted in the *Triennial Review Order* and subsequent unbundling orders to maintain appropriate incentives for continued broadband investment. Windstream asks the Commission to subject ILECs to a regulatory Hobson's Choice: either (a) maintain a TDM network, regardless of cost, solely to satisfy Windstream's desire to continue receiving legacy DS1 and DS3 services on an unbundled basis, or (b) accept new and unwarranted unbundling obligations on the fiber and packetized capabilities of the next generation fiber network – obligations the Commission has considered and rejected and which would be imposed without the required impairment analysis. Windstream's *Petition* is inconsistent with the law and with longstanding Commission policies to encourage all providers to invest in next generation technology and should be denied.

DISCUSSION

I. THE COMMISSION'S RULES AND PRIOR DECISIONS DO NOT REQUIRE ILECS TO PROVIDE DS1 AND DS3 LOOPS ON THEIR NEXT GENERATION NETWORKS.

In the *Triennial Review Order*, the Commission required ILECs to unbundle DS1 and DS3 loops only for legacy TDM-based technology. In drawing a bright-line distinction between legacy and newer technologies, the Commission's rules do not require ILECs to unbundle DS1

⁷ *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, ¶ 22 (2005) ("*Triennial Review Remand Order*").

⁸ *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 585 (D.C. Cir. 2004) ("*USTA IP*").

⁹ *See* 47 C.F.R. § 51.319.

and DS3 loops after transitioning from TDM to all-IP networks or on all fiber loops. The Commission could only repudiate this rule by following the APA’s notice-and-comment rulemaking procedures and by satisfying the statutory “impairment” standard. Windstream’s *Petition* to expand the ILECs’ unbundling obligations fails both statutory mandates.

A. The Commission’s Rules Require ILECs To Unbundle DS1 And DS3 Loops Only For Legacy Network Facilities.

Under Section 251 of the Telecommunications Act of 1996,¹⁰ the Commission may order ILECs to provide requesting telecommunications carriers “nondiscriminatory access to network elements on an unbundled basis” when, “at a minimum,” “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.”¹¹ In the *Triennial Review Order*, the Commission expressly declined to impose unbundling requirements on certain broadband technologies, such as fiber, and packet switching capabilities.¹² The Commission based its decision as to which facilities ILECs would be required to unbundle — and, just as importantly, those facilities that would not be unbundled — on a “bright line . . . drawn between legacy technology and newer technology.”¹³ The Commission concluded that this bright line would be “best drawn based on technological boundaries rather than transmission speeds, bandwidth, or some other factor,” citing as an example the fact that “the technical characteristics of packet-switched equipment

¹⁰ Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹¹ 47 U.S.C. § 251(c)(3), (d)(2)(B).

¹² See *Triennial Review Order* ¶¶ 273, 288, 537 (determining that incumbent ILECs do not have to unbundle, among other things, FTTH loops in greenfield situations, broadband services over FTTH loops in overbuild situations, the packetized portion of hybrid loops, and packet switching capabilities). The Commission subsequently extended the unbundling requirements and limitation applicable to FTTH loops to Fiber to the Curb (“FTTC”) loops.

¹³ *Id.* ¶ 293.

versus TDM-based equipment . . . are well-known and understood by all members of the industry.”¹⁴ The D.C. Circuit upheld this aspect of the *Triennial Review Order*.¹⁵

The *Triennial Review Remand Order* “retain[ed] the unbundling framework . . . adopted in the *Triennial Review Order*”¹⁶ and reiterated the bright line distinction between legacy and newer technologies.¹⁷ To be sure, the Commission’s “line drawing” between TDM and packetized technology did not eliminate the CLECs’ “existing rights . . . to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers.”¹⁸ But the Commission just as clearly limited this “existing right” to legacy services provided over legacy network equipment. As the Commission described them, DS1s and DS3s are “TDM-based services . . . [that] are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs.”¹⁹ The Commission found that incumbents typically provide these services through “the features, functions, and capabilities of their networks as deployed to date — *i.e.*, a transmission path provided by means of the *TDM form* of multiplexing over their digital networks.”²⁰ As the D.C. Circuit recognized when it upheld the Commission’s

¹⁴ *Id.*

¹⁵ See *USTA II*, 359 F.3d at 585 (“We therefore uphold the Commission’s rules concerning hybrid loops, FTTH, and line sharing on the grounds that the decision not to unbundle these elements was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband.”).

¹⁶ *Triennial Review Remand Order* ¶ 22.

¹⁷ See *Triennial Review Remand Order* ¶¶ 21-22, 33 (citing *Triennial Review Order* ¶ 293); see also *id.* ¶ 166 (contrasting DS1 and DS3 loops with dark fiber); *id.* ¶ 220 n.598 (“[W]e do not require packet switches to be unbundled.”).

¹⁸ *Triennial Review Order* ¶ 294; see also *id.* ¶ 291 (“[T]he availability of TDM-based loops, such as DS1s and DS3s, provide competitive LECs with a range of options.”).

¹⁹ *Id.* ¶ 294.

²⁰ *Id.* (emphasis added).

distinction between DS1/DS3 and next-generation networks, “limiting access to the fiber portion of the hybrid loops . . . give[s] ILECs incentives to deploy fiber . . . [and] stimulates [CLECs] to seek innovative access options for broadband, including self-deployment.”²¹

As a result of these decisions, the Commission’s current unbundling rules expressly deny CLECs unbundled access to packet-based facilities and capabilities of the ILECs networks, including certain fiber technologies. Based on its determination that, on a national basis, CLECs were not impaired without access to packet switching, including routers and DSLAMs, the Commission declined to require that packet switching be made available as a stand-alone network element.²² In establishing the ILECs’ obligations to provide unbundled access to loops, the Commission’s rule distinguishes among “copper loops,”²³ “hybrid loops,”²⁴ “fiber loops,”²⁵ “DS1 loops,”²⁶ “DS3 loops”²⁷ and “dark fiber loops.”²⁸ With respect to copper loops, ILECs are required to provide unbundled access, but “[t]he availability of DS1 and DS3 copper loops is subject to the requirements of paragraphs (a)(4) and (a)(5) of this section,”²⁹ which limit the ILECs’ obligation to provide DS1 and DS3 loops to those geographic areas where certain triggers have not been met.³⁰ With respect to hybrid loops, ILECs are “not required to provide

²¹ *USTA II*, 359 F.3d at 580.

²² *Triennial Review Order*, ¶537.

²³ 47 C.F.R. § 51.319(a)(1).

²⁴ *Id.* § 51.319(a)(2).

²⁵ *Id.* § 51.319(a)(3).

²⁶ *Id.* § 51.319(a)(4).

²⁷ *Id.* § 51.319(a)(5).

²⁸ *Id.* § 51.319(a)(6).

²⁹ *Id.* § 51.319(a)(1).

³⁰ *Id.* § 51.319(a)(4), (5).

unbundled access to the packet switched features, functions and capabilities.”³¹ Instead, they are required to provide competitors intending to offer broadband services access to the “time division multiplexing features, functions, and capabilities . . . including DS1 or DS3 capacity,”³² and provide competitors intending to offer narrowband services access to “voice-grade service . . . using time division multiplexing technology,” or to “spare home-run copper loop[s].”³³ With respect to new fiber loops, ILECs are “not required” to provide unbundled access at all.³⁴ And finally, in the case of overbuilt fiber loops, ILECs are only required to provide access to the parallel copper loop, unless that copper loop has been retired.³⁵

In a transparent attempt to end run these rules — which expressly deny Windstream unbundled access to packet-based and certain fiber technologies — Windstream asks the Commission to “confirm” that ILECs are required to “provide DS1 and DS3 capacity loops on an unbundled basis” after the ILECs have “conver[ted] transmission from TDM to Internet Protocol format” or after the ILEC has replaced copper loops with fiber.³⁶ The purported basis of this “confirmation” is Windstream’s assertion that the unbundling language of the Commission’s rules is “technology neutral.”³⁷ Under paragraphs (a)(4) and (a)(5) of Section

³¹ *Id.* § 51.319(a)(2)(i).

³² *Id.* § 51.319(a)(2)(ii).

³³ *Id.* § 51.319(a)(2)(iii).

³⁴ *Id.* § 51.319(a)(3)(ii). Deployment of new fiber loops are known as “greenfield” scenarios.

³⁵ *Id.* § 51.319(a)(3)(iii). If the parallel copper loop has been retired, the ILEC “shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service” over the fiber loop. *Id.*

³⁶ *Petition* at 1 (parenthetical omitted).

³⁷ *Id.* at 12.

51.319, Windstream argues, ILECs are required to make DS1 and DS3 capacity available indefinitely, regardless of facility type.³⁸

Windstream’s characterization of the Commission’s unbundling rules is demonstrably incorrect. By narrowly focusing on paragraphs (a)(4) and (a)(5) of Section 51.319 — which only describe the digital signal speed capacities of DS1 and DS3 loops — Windstream ignores the entire context of Section 51.319 and the federal appeals courts’ consistent interpretation of the regulatory scheme.³⁹

Section 51.319 does not require ILECs to provide DS1 and DS3 loops after they transition from TDM to IP networks. ILECs are “not required” to provide unbundled access to “the packet switched features, functions and capabilities” of their networks.⁴⁰ If DS1 and DS3 unbundling applied after the transition to all-IP networks, as Windstream claims, then the Commission’s decision *not* to require unbundling of packet switched features would be a nullity. Similarly, the rule requiring ILECs to unbundle “the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity,” would be rendered superfluous if ILECs were also required to provide “DS1 or DS3 capacity” after they retire their TDM networks.⁴¹ The only plausible construction of Section 51.319 is that ILECs are no longer required to provide DS1 and DS3 loops after they transition from TDM to IP networks

³⁸ *Id.* at 13-14.

³⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ A court must therefore interpret the statute “as a symmetrical and coherent regulatory scheme,” and ‘fit, if possible, all parts into an harmonious whole.’”(citations omitted)).

⁴⁰ *Id.* § 51.319(a)(2)(i).

⁴¹ *Id.* § 51.319(a)(2)(ii); *cf. Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) (“[W]e must give effect to every word that Congress used in the statute.”).

because the ILECs' obligation to provide unbundled access to DS1 and DS3 loops is limited to those situations where TDM remains in place.

The unbundling framework for loops established in Section 51.319 also undermines Windstream's argument that it is entitled to DS1 and DS3 "capacity" even when an ILEC converts copper facilities to fiber. As noted previously, Section 51.319 expressly distinguishes between technologies by imposing varying unbundling requirements on "copper loops," "hybrid loops," "fiber loops," "DS1 loops," "DS3 loops" and "dark fiber loops."⁴² With regard to copper loops, the rule provides that "[t]he availability of DS1 and DS3 *copper* loops is subject to the requirements of paragraphs (a)(4) and (a)(5)" of Section 51.319.⁴³ In contrast, the rules for loop types other than copper — such as hybrid and fiber — do not refer to or incorporate those paragraphs.

Although DS1 and DS3 capacity traffic can be carried over transmission media other than copper, including "fiber optics, coaxial cable, or radio,"⁴⁴ the rules expressly state that ILECs are "not required" to provide unbundled access to all-fiber loops,⁴⁵ and foreclose CLEC access to the packet switching facilities, features, functions and capabilities of the ILEC's hybrid loops.⁴⁶ Thus, requiring ILECs to provide unbundled access to DS1 and DS3 "capacity" after the conversion to all fiber networks essentially would nullify the Commission's decisions and rules that do *not* require unbundling of fiber loops.⁴⁷

⁴² 47 C.F.R. § 51.319(a)(1) - (6).

⁴³ *Id.* § 51.319(a)(1) (emphasis added).

⁴⁴ *Triennial Review Order* ¶ 202 n.633, n.634.

⁴⁵ 47 C.F.R. § 51.319(a)(3)(ii)-(iii).

⁴⁶ *Id.* § 51.319(a)(2)(i).

⁴⁷ Notably, Windstream does not try to explain how this inchoate "capacity" would be provided on an unbundled basis, especially when the TDM-to-IP conversion has been

Windstream seeks to avoid the unambiguous language of Section 51.319 and the *Triennial Review Order* by contending that the “bright line” distinction between legacy and newer technology applies solely with respect to facilities that serve mass market customers.⁴⁸ There is no merit to this argument. Although the Commission conducted its impairment analysis of fiber loops under the rubric of “mass market” customers, the Commission made clear that it did so for ease of analysis and that “the loop unbundling rules we adopt apply with equal force to every customer served by that loop type.”⁴⁹ Thus, neither the unbundling rules nor the limitations on those obligations for any loops “vary based on the customer to be served.”⁵⁰

The rules regarding hybrid loops vividly illustrate this point. The Commission conducted its impairment analysis for that loop type as part of its analysis of “mass market loops.”⁵¹ But in determining that ILECs are required to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information, including DS1 and DS3 capabilities, the Commission expressly relied on its discussion in the “Enterprise Loops” section of the *Triennial Review Order*.⁵² As a result, the rule prescribes the obligations and limitations of ILECs with respect to unbundling for competitors seeking to serve mass

accomplished. That is because the apparent “solution” would be to have the ILEC provide Windstream with an unbundled fiber loop served through the packetized switch capabilities of the ILEC’s next generation network. As has been explained, however, that result is directly consistent with the Commission’s rules.

⁴⁸ *Petition* at 13.

⁴⁹ *Triennial Review Order* ¶ 197 n.623 (emphasis added).

⁵⁰ *Id.* ¶ 210.

⁵¹ *See id.* ¶¶ 285-97.

⁵² *Id.* ¶ 289.

market customers and those seeking to obtain access to DS1 and DS3 capacity⁵³— capacity levels that Windstream does not contend are “mass market.” And, in applying this rule to both classes of customers, the Commission emphasized a common point: any unbundling obligation for those hybrid loops, including for the DS1 and DS3 capacity of those facilities, “was limited to a complete transmission path over [the ILEC’s] TDM networks.”⁵⁴ Tellingly, Windstream’s *Petition* completely ignores the Commission’s express decision to apply its unbundling decisions in both markets.

At least two federal courts of appeals have further confirmed that the Commission’s fiber loop unbundling rules are not limited to “mass market customers.”⁵⁵ For example, in reversing the Illinois Commerce Commission, the Seventh Circuit rejected the very same argument Windstream makes here, holding that “[t]he regulation as written is unqualified” and “[n]othing turns on the customer’s identity or the number of phone lines a given customer uses.”⁵⁶ Similarly, the Sixth Circuit rejected the contention of the Kentucky Public Service Commission that “subsections (a)(4)(i) and (a)(5)(i) obligate AT&T to provide access to DS1 and DS3 loops, regardless of whether they are located in greenfield areas or not.”⁵⁷ The court concluded that “the FCC intended the DS1/DS3 regulations to yield to” its exclusion of FTTP loops from unbundling in § 51.319, at least “in greenfield areas.”⁵⁸

⁵³ See 47 C.F.R. §51.319(a)(2)(ii).

⁵⁴ *Triennial Review Order* ¶ 289. See 47 C.F.R. § 51.319(a)(2)(ii).

⁵⁵ See *BellSouth Telecomms., Inc. v. Ky. Pub. Serv. Comm’n*, 669 F.3d 704 (6th Cir. 2012); *Ill. Bel Telephone Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008).

⁵⁶ *Illinois Bell*, 526 F.3d at 1073.

⁵⁷ *BellSouth Telecomms.*, 669 F.3d at 711.

⁵⁸ *Id.* at 711–12.

In sum, there is no support in the Commission’s unbundling rules and orders or in existing law for requiring ILECs to provide access to DS1 and DS3 loops after they convert from legacy technologies to next generation networks and facilities. The rules and their implementing orders, as well as the case law interpreting them, confirm that the ILECs’ unbundling obligations — with respect to fiber/hybrid loops and DS1/DS3 loops — are limited to the legacy TDM network and its capabilities. When that network and its capabilities eventually disappear with the conversion to all-IP networks, so too will the ILECs’ obligation to unbundle DS1 and DS3 loops.⁵⁹ Windstream’s Petition should be rejected because it is not seeking to “confirm” the unbundling rules, but to rewrite them.

B. Granting Windstream’s *Petition* Would Require Amending The Commission’s Unbundling Rules Through Notice-And-Comment Rulemaking.

Windstream’s *Petition* also is inconsistent with basic requirements of the Administrative Procedure Act (“APA”). The APA requires the Commission to provide notice and an opportunity for comment before adopting a legislative rule.⁶⁰ The Commission could not adopt Windstream’s proposal to require ILECs to provide DS1 and DS3 capacity after converting from copper to fiber or transitioning from TDM to all-IP networks without following the APA’s rulemaking procedures.

Windstream’s *Petition* nevertheless asks the Commission to adopt a new legislative rule without following the APA’s procedures under the guise of clarifying existing law.⁶¹ “It is well-

⁵⁹ The Commission has found that ILECs are under no obligation to build TDM functionality into new hybrid loops or into existing hybrid loops that never had it. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293, ¶ 20 (2004).

⁶⁰ 5 U.S.C. § 553.

⁶¹ *Petition* at 11.

established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”⁶² A legislative rule — which has “the force and effect of law”⁶³ — is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁶⁴ Expanding the ILECs’ unbundling obligations by requiring them to provide high-capacity loops after converting from copper to fiber or transitioning from TDM to all-IP networks would be a legislative rule of general applicability that “has *only* future effect.”⁶⁵ Although Windstream attempts to evade this precedent by characterizing its *Petition* simply as seeking to confirm the Commission’s existing unbundling rules, granting the requested relief in fact would amount to a significant expansion of the ILECs’ unbundling obligations that could only be accomplished by following notice-and-comment procedures.

Windstream’s *Petition* also invites the Commission to repudiate the decision not to require unbundled access to fiber loops⁶⁶ or “packet switched features, functions and capabilities.”⁶⁷ “If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule

⁶² *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (citing *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993)).

⁶³ *Am. Mining Congress*, 995 F.2d at 1109 (citing Attorney General’s Manual on the Administrative Procedure Act (1947)).

⁶⁴ 5 U.S.C. § 551(4).

⁶⁵ *Verizon v. FCC*, 770 F.3d 961, 967 (D.C. Cir. 2014) (emphasis in original).

⁶⁶ 47 C.F.R. § 51.319(a)(3)(ii), (iii).

⁶⁷ *Id.* § 51.319(a)(2)(i).

must itself be legislative.”⁶⁸ Repudiating these unbundling rules—as Windstream urges—could be accomplished only in a rulemaking proceeding after notice and comment.

The D.C. Circuit’s decision in *USTA II* confirms that the Commission could only reverse its decision not to require unbundling of fiber and packet-based technologies in a rulemaking proceeding. The D.C. Circuit upheld the Commission’s rule declining to require unbundling of call-related databases and signaling systems,⁶⁹ but the court noted that “[i]f subsequent developments alter this situation, affected parties may petition the Commission to amend its rule” not to require unbundling of call-related databases and signaling systems.⁷⁰ As Windstream itself put it, the only way to expand the ILECs’ unbundling obligations is “through Commission-approved routes, such as seeking a rule change . . . rather than asserting . . . [a] misguided interpretation[] of the law.”⁷¹ Windstream should have followed the D.C. Circuit’s guidance — and its own advice — by filing a petition for rulemaking to amend the Commission’s rules instead of a petition for declaratory ruling under the ruse of a mere confirmation of existing law.

Finally, it bears emphasis that amending the Commission’s unbundling rules — whether in this proceeding or another — would be fraught with legal peril. The Commission’s current

⁶⁸ *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (citation omitted); *see also Am. Mining Cong.*, 995 F.2d at 1112 (stating that a rule that “effectively amends a prior legislative rule” is “a legislative, not an interpretative rule”); *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (“[I]f an agency adopts ‘a new position inconsistent with’ an existing regulation, or effects ‘a substantive change in the regulation,’ notice and comment are required.”) (citations omitted); *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“[N]ew rules that work substantive changes in prior regulations are subject to the APA’s procedures.”).

⁶⁹ *Triennial Review Order* ¶¶ 551-54

⁷⁰ *USTA II*, 359 F.3d at 587.

⁷¹ *Petition* at 3.

unbundling regime was only finalized after a decade of contentious litigation.⁷² That history shows that the courts consistently rejected past attempts to inappropriately expand the ILECs' unbundling obligations and would undoubtedly view efforts to undo the current judicially approved unbundling regime with similar skepticism. Altering this framework could mire the Commission and the industry in more litigation for years to come, with deleterious effects on broadband investment and the transition to next generation networks. For that reason alone, the Commission should proceed with caution before altering its unbundling regime, particularly in the procedurally and substantively flawed manner proposed by Windstream.

C. Forcing ILECs to Maintain TDM-Capability in Their Networks Would Be Unlawful .

Windstream's effort to require AT&T and other ILECs to maintain legacy and increasingly obsolete TDM capabilities in their networks for its benefit not only is directly contrary to the Commission's unbundling requirements, but also the Eighth Circuit's holding in *Iowa Utilities Board v. FCC*.⁷³ In that case, the court of appeals struck down the Commission's superior network access rules, holding that Section 251(c)(3) "implicitly requires unbundled access only to an incumbent LEC's *existing* network — not to a yet unbuilt superior one."⁷⁴ The Eighth Circuit reached that conclusion notwithstanding a CLEC argument that any "burden" on ILECs from a requirement to provide superior network facilities would be alleviated because a requesting carrier would have to pay for any such facility.⁷⁵

⁷² See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006); *U.S. Telecom Association v. FCC*, 290 F.3d 415, 430 (D.C. Cir. 2002) ("*USTA I*"); *USTA II*, 359 F.3d at 585.

⁷³ 120 F.3d 753 (8th Cir. 1997).

⁷⁴ *Id.* at 813.

⁷⁵ *Id.* at 812.

The Eighth Circuit’s decision involved rules that would have required ILECs to provide “access to [network] elements at levels of quality that are superior to those levels at which the incumbent LECs provide the services to themselves,”⁷⁶ while Windstream here seeks to force ILECs to *maintain* network elements they would otherwise retire. But that difference is immaterial: the core principle of the Eighth Circuit’s holding — that Section 251(c)(3) “requires unbundled access only to an incumbent LEC’s *existing* network” and thus that CLECs take ILECs’ networks as they find them — applies fully in each circumstance. It is one thing to require ILECs to provide piece parts of their existing networks to competitors at regulated wholesale rates. It is another thing entirely to require ILECs to *build* new network elements or to *maintain* elements that ILECs no longer want or need simply for the sake of CLECs and their particular business plans. As the Eighth Circuit recognized, nothing in Section 251(c) suggests that ILECs have any such duty.

The principle that ILECs cannot be required to engineer their networks solely to benefit a CLEC applies equally to the ILEC’s decision to retire network facilities — including copper loops and TDM transport electronics. Indeed, just as the Commission recognized in the *Triennial Review Order* that ILECs cannot be required to modify their networks to accommodate CLEC demands for access to UNEs except to the extent they otherwise would do so for themselves or their retail customers,⁷⁷ it is clear that an ILEC also cannot be required to *maintain* legacy facilities in its network except to the extent it otherwise would maintain them for itself or its retail customers.

This principle is reflected in the Commission’s network modification rules. Those rules impose certain obligations on ILECs to provide interconnecting carriers with notice of proposed

⁷⁶ *Id.*

⁷⁷ *Triennial Review Order*, ¶¶632-33.

changes to their networks, including the retirement of copper loops in cases in which they are being replaced by fiber.⁷⁸ Significantly, although the rules permit affected interconnecting providers to object to the proposed timing of such a network change, they do not contemplate any objections to the fact of the change.⁷⁹ And even in the limited case in which a CLEC does object to the timing, the rules do not subject the network change to Commission review, much less approval.⁸⁰ Stated another way, the rules only affect *when*, not *if*, an ILEC may implement a network modification.

These rules properly implement Section 251 of the Act. Indeed, Section 251(c)(5) provides only that an ILEC must provide reasonable public notice of network changes. Nothing in that section (or any other provision in Title II) contemplates, much less requires, that an ILEC (or any other telecommunications carrier) must obtain Commission approval for network modifications. In that respect, the 1996 Act did not alter the fundamental principle that carriers are free to engineer their networks however they choose, provided they comply with any requirements relating to the initiation or retirement of particular facilities or services. In short, the Commission's network modification rules recognize that it ultimately is up to the ILEC – and certainly not the ILEC's competitors – to decide how best to operate and manage its network.

⁷⁸ 47 C.F.R. §51.325.

⁷⁹ 47 C.F.R. §51.333(c).

⁸⁰ 47 C.F.R. §51.333(e),(f). The Commission has proposed revisions to the existing network modifications rules that, while significantly expanding the scope of the ILEC's notification obligations, would not provide interconnecting providers with a veto over the proposed change or subject the change to Commission approval. *See* Notice of Proposed Rulemaking and Declaratory Order, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174 GN Docket No. 13-5, RM-11358, WC Docket No. 05-25 and RM-10593 (rel. Nov. 25, 2014) (“*NPRM*”), ¶56. AT&T is filing comments in response to the *NPRM* explaining why the proposed new notification requirements are unnecessary, unreasonable and unsupported in applicable law.

II. THE COMMISSION COULD ONLY IMPOSE NEW UNBUNDLING RULES BASED ON A NEW IMPAIRMENT ANALYSIS, WHICH WINDSTREAM HAS NEITHER REQUESTED NOR COULD SUPPORT.

Because Windstream seeks a fundamental change in the ILECs' existing unbundling obligations, its petition is procedurally defective. The only way the Commission could even consider the changes advocated by Windstream is by conducting a new rulemaking and impairment analysis, neither of which has been undertaken.

When Congress enacted Section 251, it “made ‘impairment’ the touchstone” of any unbundling decision.⁸¹ Without substantial evidence of impairment, the Commission may not require unbundling.⁸² “Congress did not authorize [an] open-ended . . . judgment” because the Commission “must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.”⁸³ “After all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition — preferably genuine, facilities-based competition.”⁸⁴ Under the Commission’s rules, a CLEC is not impaired unless “lack of access to [a network] element poses a barrier or barriers to entry . . . that are likely to make entry into a market by a reasonably efficient competitor uneconomic.”⁸⁵

⁸¹ *USTA I*, 290 F.3d at 425.

⁸² *See* 47 U.S.C. § 251(d)(2) (“In determining what network elements should be made available . . . the Commission shall consider, at a minimum, 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.”); *USTA II*, 359 F.3d at 582 (requiring substantial evidence).

⁸³ *USTA I*, 290 F.3d at 425.

⁸⁴ *USTA II*, 359 F.3d at 576.

⁸⁵ 47 C.F.R. § 51.317(b) (“Standards for requiring the unbundling of network elements.”).

In its effort to expand the ILEC's unbundling obligations to the packetized switch capabilities of next generation networks, Windstream does not even attempt to meet this standard. Nor could it. The Commission has repeatedly concluded that providers are not impaired without unbundled access to broadband elements of incumbent LECs' networks.⁸⁶ As discussed further below, competition among incumbents and new entrants in the broadband marketplace belies any claim that market entry is uneconomic. The same incentives and opportunities that spurred the surge in competitive investment remain available to Windstream and other providers. Providers of all types — including CLECs, cable companies, and fixed and mobile wireless providers — are fully capable of deploying their own fiber facilities and using them to compete without unbundled access to ILEC fiber loops. Indeed, AT&T itself is deploying fiber loop facilities outside its ILEC wireline footprint in order to compete with the ILEC in those areas. The IP transition has strengthened these incentives by underscoring the importance of investing in next generation, packet-switched facilities and equipment that will be required in the emerging IP ecosystem.

Contrary to Windstream's assertion,⁸⁷ the Commission's decision not to force unbundling on next-generation networks will have no detrimental effect on wholesale customers or their end users. CLECs that currently are utilizing unbundled copper loops to provide service to their customers are not left without recourse. Insofar as the ILECs maintain copper loops in their networks during and after the transition, those facilities would remain available to CLECs under the existing rules. The CLECs will thus continue to have access to the ILEC's home run copper loops (whether as an unbundled element, to the extent the copper facility has not been retired in

⁸⁶ See, e.g., *Triennial Review Order* ¶¶ 200, 273, 275, 315, 537; *Triennial Review Remand Order* ¶¶ 133, 182.

⁸⁷ *Petition* at 14-19.

accordance with the Commission's rules, or perhaps as a commercial offering if it has), as well as subloops to which they can attach their own electronics.⁸⁸ CLECs will also continue to have access under the existing rules to ILEC collocation space, poles, conduit and rights of way to deploy their own transmission facilities.

Neither Windstream nor other CLECs could seriously contend that they suffer disadvantage relative to the ILECs in purchasing and deploying their own electronics. The Commission found more than a decade ago that CLECs were "actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets" and that those facilities were "much cheaper to deploy than circuit switches."⁸⁹ The CLECs are no less capable of obtaining the necessary TDM electronics to attach to copper loops. There is even a strong secondary market for that equipment.⁹⁰

⁸⁸ See 47 C.F.R. § 51.319(a)(1), (b)(1). As an example of potential commercial opportunities for CLECs to obtain retired copper facilities, AT&T has indicated that insofar as it ultimately determines to retire copper facilities, it is prepared to offer those retired loops to CLECs for purchase on commercial terms. See Letter from Robert C. Barber to Marlene Dortch, *Re: Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Docket No. 09-223; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, RM-11358*, dated May 30, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521154231>. The Commission has invited comments on that proposal, indicating that it considers the sale of retired copper facilities could be a "win-win proposition that permits incumbent LECs to manage their networks as they see fit while ensuring that copper remains available as a vehicle for competition." *NPRM*, ¶87.

⁸⁹ *Triennial Review Order* ¶ 538.

⁹⁰ For example, the electronics necessary for activating DS1s at both ends of the loop not only are widely available, but relatively inexpensive. One website lists the transceiver unit that would be installed at the central office at just \$89. See Adtran 118113L1 H2TUC Tscan Card Total Access 3000 listed on dotcom computers, *available at* <http://dcomcomputers.com/i-15304264-adtran-11811311-h2tuc-tscan-card-total-access-3000.html>. *The unit that would be installed at the customer premises is listed as being available for \$119*. See Adtran 1223026L9 T1 HDSL2 Transceiver Unit-RT listed on

CLECs have been on notice for more than 10 years of the need to move forward and invest in their own next-generation facilities. The evidence in the marketplace shows that many have, and there is still time for others to act. To the extent that the transition to fiber and IP encourages that action, it is a positive development in line with the Commission's goals because customers of all kinds will reap the rewards. But even if Windstream or other CLECs were at a cost disadvantage relative to the ILECs in deploying these new facilities, the D.C. Circuit has held that cost disparities standing alone are not enough: they must be "linked (in some degree) to natural monopoly . . . that would make genuinely competitive provision of an element's function wasteful."⁹¹ In short, Windstream has not offered any evidence of impairment, let alone the degree necessary to overturn the Commission's current rules rejecting unbundling requirements for packetized switch facilities and capabilities.

Zdtronic, available at <http://www.zdtronic.com/NETWORKING/ADTRAN-NETWORKING/ADTRAN-1223026L9-T1-HDSL2-TRANSCEIVER-UNIT-RT.html>.

⁹¹ *USTA I*, 290 F.3d at 427. *USTA II* further clarified that "the statutory structure [of the Act] suggests that 'impair' must reach a bit beyond natural monopoly." 359 F.3d at 572.

III. WINDSTREAM’S PROPOSAL WOULD ADVERSELY AFFECT THE TRANSITION TO NEXT-GENERATION NETWORKS

Windstream attempts to support its misreading of the unbundling rules with claims of purported anti-competitive effects.⁹² These claims are contradicted by the resounding success of the Commission’s decision to establish a “bright line” between legacy technologies and next generation services. Far from promoting competition and consumer welfare, requiring ILECs to provide DS1 and DS3 loops after the conversion to all-IP networks would undermine this success.

A. The Commission’s Unbundling Rules Have Promoted Broadband Investment and Competition.

The Commission’s decision not to require ILECs to unbundle broadband facilities has been a resounding success. Investment in communications equipment in the United States increased by more than 40 percent after the Commission’s decision not to require unbundling for broadband infrastructure.⁹³ Between 2006 and 2008 alone, BOCs’ capital expenditures on broadband leapt 65% from \$7.2 billion to \$11.9 billion.⁹⁴ Capital expenditures by U.S. broadband providers topped \$75 billion in 2013 — the highest level in over a decade.⁹⁵ The surge in investment has been especially strong in new fiber deployments since the FCC settled on its decision not to require the unbundling of broadband services. ILECs have invested tens of billions of dollars in reliance on the Commission’s decision not to unbundle this capacity.

⁹² See *Petition* at 15-19.

⁹³ See Jeffrey A. Eisenach, The Progress & Freedom Foundation, *Broadband Policy: Does the U.S. Have It Right After All?* 9-10 & Fig. 2 (Sept. 2008).

⁹⁴ See Robert C. Atkinson & Ivy E. Schultz, Columbia Inst. For Tele-Info., *Broadband in America: Where it is and Where it is Going* 30, Table 5 (Nov. 11, 2009).

⁹⁵ See USTelecom, *Historical Broadband Provider Capex*, <http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (last visited Jan. 27, 2015).

Between 2003 and 2007, ILECs deployed more than 280,000 kilometers of fiber.⁹⁶ In 2003, there were just 110,000 fiber lines in the United States. By 2008 that figure had grown to 2.3 million.⁹⁷ By September 2009, 5.3 million homes were receiving broadband service over fiber loops, an increase of more than 40 percent in one year.⁹⁸ Today, that figure has almost doubled again: nearly 10 million homes are connected, and more than 22 million have fiber networks available.⁹⁹ AT&T alone undertook a multi-billion dollar program, known as Project Velocity IP (“Project VIP”), to expand the reach of its IP-based wireless and fiber wirelines services to consumers and businesses across the country. That project, which was essentially completed in 2014, expanded AT&T’s LTE wireless network to cover more than 300 million people nationwide and its wireline IP broadband network to 57 million customer locations within its 21 state footprint, as well as extended fiber to 725,000 business locations.¹⁰⁰

Competition has also exploded. This is well illustrated by the rapid shift from legacy TDM services to Ethernet. The domestic Ethernet services market has entered a very healthy growth period. “During the first half of 2014, more new Ethernet customer ports were installed than during any previous corresponding period.”¹⁰¹ Competitive providers were instrumental in that growth. The evidence shows that Ethernet market share remains fragmented among many

⁹⁶ See FCC, ARMIS Infrastructure Report, FCC Report 43-07, Table II.

⁹⁷ See Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2008*, Table 2 (July 2009).

⁹⁸ See Steven S. Ross, *908,000 New FTTH Customers! A Record Summer for Fiber*, *Broadband Properties* 22 (Oct. 2009).

⁹⁹ See FTTH Council, *Fiber to the Home FAQ*, available at <http://www.ftthcouncil.org/d/do/1209>, (last visited Jan. 27, 2015).

¹⁰⁰ See AT&T Investor Update, 4Q earnings Conference Call, at 4 (Jan. 27, 2015), available at http://www.att.com/Investor/Earnings/4q14/slides_4q14.pdf.

¹⁰¹ Vertical Systems Group, *Mid-Year 2014 U.S. Carrier Ethernet LEADERBOARD*, (Aug. 20, 2014), <http://www.verticalsystems.com/vsglb/mid-year-2014-u-s-carrier-ethernet-leaderboard/>.

providers: AT&T, Verizon, tw telecom, CenturyLink, Time Warner Cable, Comcast, Cox, Level 3, and XO all have more than 4 percent of the retail ports. Seven other providers — including Windstream — have between 1 and 4 percent.¹⁰² In 2013, Windstream grew its next-generation Ethernet services faster than both AT&T and Verizon.¹⁰³

Cable providers' special access operations have also resulted in increased competition. Comcast recently reported that its business services revenue increased 22 percent in the second quarter of 2014 to an annual run-rate of \$4 billion,¹⁰⁴ and Cablevision reported that its second quarter revenues increased 6.7 percent to \$88 million.¹⁰⁵ Time Warner Cable Business Class recently announced significant enhancements to its Ethernet Services portfolio to target mid-market and enterprise customers with business locations spread across the U.S., including a 150,000-fiber-route-mile network infrastructure that currently serves 31 major metro markets nationwide with more than 80,000 fiber-lit buildings, 835,000 DOCSIS-equipped buildings, and connectivity into 64 data centers across the nation.¹⁰⁶ Now more than ever, "intermodal competition from cable ensures the persistence of substantial competition in broadband."¹⁰⁷

¹⁰² *Id.* ("Customers shopping for Ethernet services have a broader choice of companies with substantial Ethernet assets, including the sixteen providers on the mid-2014 LEADERBOARD and Challenge Tier rosters.").

¹⁰³ Vertical Systems Group, *CenturyLink, Windstream take bigger bite out of incumbent Ethernet market, says VSG* (March 24, 2014), <http://www.fiercetelecom.com/story/centurylink-windstream-take-bigger-bite-out-incumbent-ethernet-market-says/2014-03-24>.

¹⁰⁴ Comcast, Press Release, *Comcast Reports Second Quarter 2014 Results*, (July 22, 2014) available at <http://www.cmcsa.com/releasedetail.cfm?ReleaseID=861091>.

¹⁰⁵ Business Wire, *Cablevision Systems Corporation Reports Second Quarter 2014 Results*, (Aug. 5, 2014) <http://www.businesswire.com/news/home/20140805005727/en/Cablevision-Systems-Corporation-Reports-Quarter-2014-Results>.

¹⁰⁶ TWC: Business Class, Press Release, *Time Warner Cable Business Class Announces Major Enhancements to Its Ethernet Services Portfolio*, (Sept. 2014) available at [24](http://business.timewarnercable.com/content/twc/en/business-home/resource-</p></div><div data-bbox=)

Competition from CLECs has also jumped dramatically. As Windstream itself acknowledged in a submission to the Commission several years ago, “[t]he market for private line services is highly competitive. . . .”¹⁰⁸ In a recent filing with the Commission, XO touted the fact that it has deployed its own network “in more than three dozen large and mid-size metropolitan markets, which are connected by XO’s nationwide fiber backhaul facilities, and connect more than 3,300 buildings.”¹⁰⁹ XO also noted that it is in the midst of a \$500 million capital expansion project that will permit it to “light many more buildings.”¹¹⁰ Similarly, Level 3, which already possessed an extensive fiber backbone, explained that its “financially compelling and very strategic” acquisition of tw telecom this year will provide its global customers with the benefit of “tw telecom’s deep metropolitan footprint and buildings connected to the network, enabling a higher quality and more reliable on-net experience for customers doing business in North America.”¹¹¹ This competitive deployment is not restricted to Tier 1 cities. For example, the Zayo Group’s network reaches thousands of buildings in over 45 states, connecting not only large cities but also “many Tier 2-5 U.S. markets.”¹¹²

center/news/twcbc-announces-major-enhancements-to-its-ethernet-services-portfolio.html.

¹⁰⁷ *USTA II*, 359 F.3d at 585.

¹⁰⁸ Request for Review of PaeTec Communications, Inc. of Universal Service Administrator Decision, WC Docket No. 06-122 (Apr. 3, 2012), at 7, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021906600>.

¹⁰⁹ Comments of XO Communications, *Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 14-19 (Dec. 5, 2014), at 8.

¹¹⁰ *Id.*

¹¹¹ Level 3, Press Release, *Level 3 to Acquire tw telecom*, (June 2014) *available at* <http://www.twtelecom.com/investor-guide/level3>.

¹¹² Zayo, *About Zayo* <http://www.zayo.com/company/company-overview> (last visited Jan. 26, 2015).

Consumers are reaping the rewards of this new investment and competition. Between 2003 and 2013, the total number of fixed broadband connections grew from 23 million to 94 million—an annual compound rate of 15 percent.¹¹³ Residential connections alone grew from 21 million to 86 million.¹¹⁴ And mobile broadband connections have skyrocketed from just 380,000 mobile connections in 2005, to more 181 million connections in 2013—an annual compound rate in excess of 116 percent.¹¹⁵ Today, providers of all types — ILECs, MSOs, wireless providers, and many CLECs — are offering customers broadband services at speeds up to 1 Gbps, with CLECs and cable companies among the largest providers of next generation IP-based services.

B. Granting Windstream’s Petition Would Undermine Broadband Investment and Deployment.

The dramatic growth in investment and competition over the last 15 years is no happy accident. It is the deliberate result of years of Commission fact-finding that culminated in the adoption of the unbundling framework in place today. The goal of this framework has been to spur the development of next-generation networks and services through the creation of appropriate market incentives. In the *Triennial Review Order*, the Commission concluded that not unbundling fiber networks and IP transmission would promote the goals of Section 706 by maintaining incentives for *both* ILECs and CLECs to invest in and deploy broadband infrastructure.¹¹⁶ The D.C. Circuit expressly embraced this rationale, noting that “limiting access to the fiber portion of the hybrid loops . . . give[s] ILECs incentives to deploy fiber . . . [and]

¹¹³ FCC, Industry Analysis and Technology Division of the Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2013*, at 11 (June 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 24, tbl. 6; FCC, *Industry Analysis and Technology Division of the Wireline Competition Bureau, Internet Access Services: Status as of June 30, 2009*, at 6, tbl. 1 (Sept. 2010).

¹¹⁶ *Triennial Review Order* ¶ 538.

stimulates [CLECs] to seek innovative access options for broadband, including self-deployment.”¹¹⁷ As the court explained, the “[a]bsence of unbundling . . . will give all parties an incentive to take a shot at this potentially lucrative market.”¹¹⁸

Unfortunately, the reverse is also true. Unbundling obligations have the tendency to “skew investment incentives in undesirable ways.”¹¹⁹ As the Commission explained, “excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”¹²⁰ “The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.”¹²¹ As the D.C. Circuit put it, unbundling requirements are “likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [broadband-capable loops] and ILECs fearful that CLEC access would undermine the investments’ potential return.”¹²² “If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”¹²³

¹¹⁷ *USTA II*, 359 F.3d at 580.

¹¹⁸ *Id.* at 584.

¹¹⁹ *Id.* at 585.

¹²⁰ *Triennial Review Order* ¶ 3.

¹²¹ *Id.* ¶ 3.

¹²² *USTA II*, 359 F.3d at 584.

¹²³ *USTA I*, 290 F.3d at 424. This scenario has been realized in Europe, where data shows the adverse impact on broadband investment that unbundling requirements imposed on incumbent providers has had there. One recent analysis showed that these unbundling requirements gave new entrants “little incentive to invest in new technology or networks,” causing broadband investment in Europe (at \$244 per household) to lag

Yet this is precisely what Windstream seeks in its *Petition*. Under Windstream’s proposal, the ILECs would be forced to choose between retaining an increasingly costly and obsolescent technology solely to support the UNE demands of a small group of competitors, or giving those competitors unbundled access to next-generation facilities at highly regulated rates (presumably developed after long and costly proceedings before state commissions). Neither scenario is consistent with the public interest. The first creates inefficiencies that will lead to decreased capital available for investment or higher prices for consumers while the second discourages investment in new broadband infrastructure and encourages CLECs to take advantage of ILEC investment without incurring any of the risks.¹²⁴

Undermining broadband investment would be especially unfortunate in light of the national policy goals established by Congress in Section 706 and pursued by the Commission for nearly two decades. As the President recently observed, “21st century businesses need 21st century infrastructure” including “the fastest internet.”¹²⁵ Extending retrograde regulatory obligations to next-generation networks would threaten the progress that has been made and jeopardize future progress. “Because unbundling orders reduce return on investment, such orders would inhibit ILECs from making risky investments in next-generation technology” and

significantly behind investment in the United States (at \$562 per household). Christopher Yoo, “US v. European Broadband Deployment: What Do the Data Say?” (June 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510854.

¹²⁴ The economic literature is filled with research bearing this out. *See, e.g.*, J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 *J. Comp. L. & Econ.* 349, 357 (2006) (“Private investors will fund the construction of a broadband network only if they have a reasonable expectation that the company making that investment will recover the cost of its investment, including a competitive (risk-adjusted) return on capital.”).

¹²⁵ *Address Before a Joint Session of the Congress on the State of the Union*, Daily Comp. Pres. Doc. No. 00036, 5 (Jan. 20, 2015).

“deter CLECs themselves from investing in deploying their own facilities.”¹²⁶ The Commission should reject Windstream’s *Petition* to avoid this crippling result.

C. Windstream’s *Petition* Raises a Serious Constitutional Question.

Finally, reversing the Commission’s longstanding decision not to require ILECs to unbundle their fiber and packet-based technologies would raise a serious constitutional question. The Commission concluded that refraining from unbundling these technologies would stimulate the deployment of next generation broadband facilities and services by incumbents and competitors alike.¹²⁷ The Commission’s expectations have been more than met, as AT&T and other incumbent and competitive carriers have invested heavily in fiber with the expectation that such facilities would not be subject to unbundling. With its *Petition*, Windstream seeks a free ride on the ILECs’ massive investments without incurring any of the risks.

Subjecting next generation facilities and capabilities to unbundling would penalize AT&T and other ILECs for undertaking a massive investment in those technologies on their reasonable reliance on the Commission’s unbundling regime. The Fifth Amendment’s Takings Clause prohibits the federal government from imposing forced-sharing requirements on private property after inducing investments to improve the property based on assurances that the property would remain privately owned.¹²⁸ The Supreme Court has also held that “arbitrarily switch[ing] back and forth” between regulatory regimes “in a way which require[s] investors to bear the risk of bad investments at some times while denying them the benefits of good investments at others would raise serious constitutional questions.”¹²⁹ Such a bait and switch is

¹²⁶ *USTA II*, 359 F.3d at 580, 582.

¹²⁷ *Triennial Review Order* ¶¶ 290, 295.

¹²⁸ *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979).

¹²⁹ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989).

exactly what would occur if the Commission — after inducing ILECs to invest tens of billions of dollars in fiber infrastructure based on assurances of exclusive use of their own networks — were to deny ILECs the benefits of those investments by requiring them to share their fiber and packet-based technologies with Windstream and other CLECs.

CONCLUSION

For the foregoing reasons, the Commission should deny Windstream's *Petition*.

Respectfully Submitted,

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