

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Technology Transitions)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of)	RM-11358
Copper Loops by Incumbent Local Exchange)	
Carriers)	
)	
Special Access for Price Cap Local Exchange)	WC Docket No. 05-25
Carriers)	
)	
AT&T Corporation Petition for Rulemaking)	RM-10593
to Reform Regulation of Incumbent Local)	
Exchange Carrier Rates for Interstate Special)	
Access Services)	
)	
Windstream Petition For Declaratory Ruling)	WC Docket No. 15-1
Seeking to Confirm ILECs' Continued)	
Obligation To Provide DS1s and DS3s on)	
Unbundled Basis After Technology)	
Transitions)	

COMMENTS OF WINDSTREAM CORPORATION

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COMMENTS OF WINDSTREAM CORPORATION

Windstream Corporation (“Windstream”), on behalf of its affiliates and subsidiaries, supports the Commission’s plan to revise its Section 214 discontinuance and copper retirement processes to protect four “enduring,” “core statutory values” embodied in our communications laws—“public safety, universal service, competition and consumer protection”—as carriers transition their networks from TDM to IP and from copper to fiber.¹ The Commission has made clear: “[T]here is no choice between embracing technological transitions and protecting values. Rather, preserving network values advances the technological progress.”² And the Commission in its *Technology Transitions NPRM* rightly seeks to adopt rules “to ensure that these fundamental values are not lost merely because technology changes.”³

I. SUMMARY

As a company with interests nearly evenly weighted between incumbent and competitive local exchange carrier operations, Windstream brings a unique and balanced perspective to competitive access, technology transition, and deregulation debates. Windstream, the fifth largest incumbent local exchange carrier (“ILEC”) in the nation, provides broadband, voice, and video services to residential consumers across 18 states, as well as wholesale access to competing providers. Windstream also provides advanced communications and technology solutions, including managed services and cloud computing, to approximately 600,000 business

¹ *Technology Transitions et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, FCC 14-5, 29 FCC Rcd 1433, 1441, 1444-45, 46 ¶¶ 23, 33, 37 (2014) (“*Technology Transitions Order*”) (citation omitted).

² *Id.* at 1441-42 ¶ 24.

³ *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358 and RM 10593, FCC 14-185 at 2 ¶ 1 (2014) (“*Technology Transitions NPRM*”).

service locations nationwide—a growing part of Windstream’s operations.⁴ To enable its services, Windstream operates the nation’s sixth largest fiber network (spanning approximately 118,000 miles). However, that still leaves a vastly larger area of the country where Windstream is not the ILEC, and where it is not economically feasible to build last-mile facilities alongside the incumbents’ existing infrastructure, except to serve the very largest customers.⁵ For its small and medium-sized business customers, Windstream’s competitive operations typically must rely on the incumbent’s existing infrastructure in the last mile—a reality Congress anticipated and provided for when it enacted the Telecommunications Act of 1996.

Focusing on core values of competition and consumer protection, the *NPRM* seeks to “[p]rotect competition where it exists today, so that the mere change of a network facility or discontinuance of a legacy service does not deprive small- and medium-sized business[es] schools, libraries, and other enterprises of the ability to choose the kinds of innovative services that best suit their needs.”⁶ As the Commission stated, “Technology transitions must not harm or undermine competition.”⁷ Thus, the Commission identified its “present goal” as “to maintain established rules and decisions that provide for wholesale access to critical inputs as we continue our special access rulemaking proceeding, along with other initiatives such as technology trials, to determine how customers are affected and whether rules and policies need to be modified in the future.”⁸

⁴ Approximately 60 percent of Windstream’s total company revenues come from the provision of business services.

⁵ As discussed below, this is consistent with the Commission’s conclusions. *See* nn. 19-21, *infra*, and accompanying text.

⁶ *Technology Transitions NPRM* at 2 ¶ 2.

⁷ *Id.* at ¶ 110.

⁸ *Id.*

Windstream supports the standard the Commission proposes to fulfill this goal with respect to special access: a requirement that ILECs seeking Section 214 authority to discontinue legacy services used as wholesale inputs by competitive carriers provide, at a minimum, “equivalent wholesale access on equivalent rates, terms and conditions.”⁹ As Windstream has proposed, this standard can be further effectuated through six specific rules for replacement wholesale services: (1) Price per Mbps for services at or below 50 Mbps shall not increase; (2) A provider’s wholesale rates shall not exceed its retail rates; (3) Basic service pricing shall not increase; (4) Bandwidth options shall not be reduced as compared to those available to the ILEC’s retail business customers; (5) No backdoor price increases through charges for network-to-network interface or other rate elements, lock-up provisions, early termination fees (“ETFs”), special construction, or otherwise; (6) No impairment of service quality or delivery as compared, respectively, to TDM services today and to the incumbent’s own operations. If backed by mechanisms that allow them to be enforced in a timely manner, these rules will both prevent unreasonable discrimination against competitive carriers, and, pending completion of the special access rulemaking and competitive assessment, provide reasonable interim limits on pricing.

At the same time, Windstream also has filed a petition asking the Commission to reconfirm that an ILEC’s obligation 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) and (5) do not cease upon transition to IP or fiber, as some large ILECs have recently claimed. The Commission is simultaneously seeking comment on this petition, which is likewise necessary “to maintain established rules and decisions that provide for wholesale access to critical inputs”¹⁰ until such time as the Commission determines that market conditions warrant forbearance or a change in rules because

⁹ *Id.*

¹⁰ *Id.*

competitive local exchange carriers (“CLECs”) are no longer impaired without access to these loops. The Commission should grant this petition as a companion to adopting the equivalent access rule proposed in the *NPRM*.

Windstream and other competitors seek to speed the IP transition and look forward to the opportunities that it presents. TDM technologies would *not* need to be preserved with either the rule requiring at least equivalent wholesale access on equivalent rates, terms, and conditions, or reconfirmation that the obligations to unbundle DS1 and DS3 capacity loops do not terminate with the IP transition. But in the post-IP transition world, competitors still will need equivalent access to last-mile facilities and services to continue offering business services to millions of customers. Changing loop electronics from TDM to IP does not alter the fundamental economics of digging trenches, installing conduit, and establishing building entries. Such physical assets—and the rights of way they traverse—are still a competitive bottleneck, regardless of the type of signal they transmit. CLECs today continue to provide the greatest and most competitively significant alternative to ILEC business communications services. Unless CLECs can maintain wholesale access through and after the IP transition, many business, nonprofit, and government entities that have chosen competitive providers because of their superior service and value will be forced to transition back to the incumbent, with no recourse when incumbent service or pricing is unsatisfactory.

II. THE COMMISSION SHOULD ACT TO ENSURE COMPETITIVE CHOICE IS NOT REDUCED IN THE IP TRANSITION.

A. CLECs play a crucial role in providing competitive alternatives and competitive discipline on ILEC special access providers.

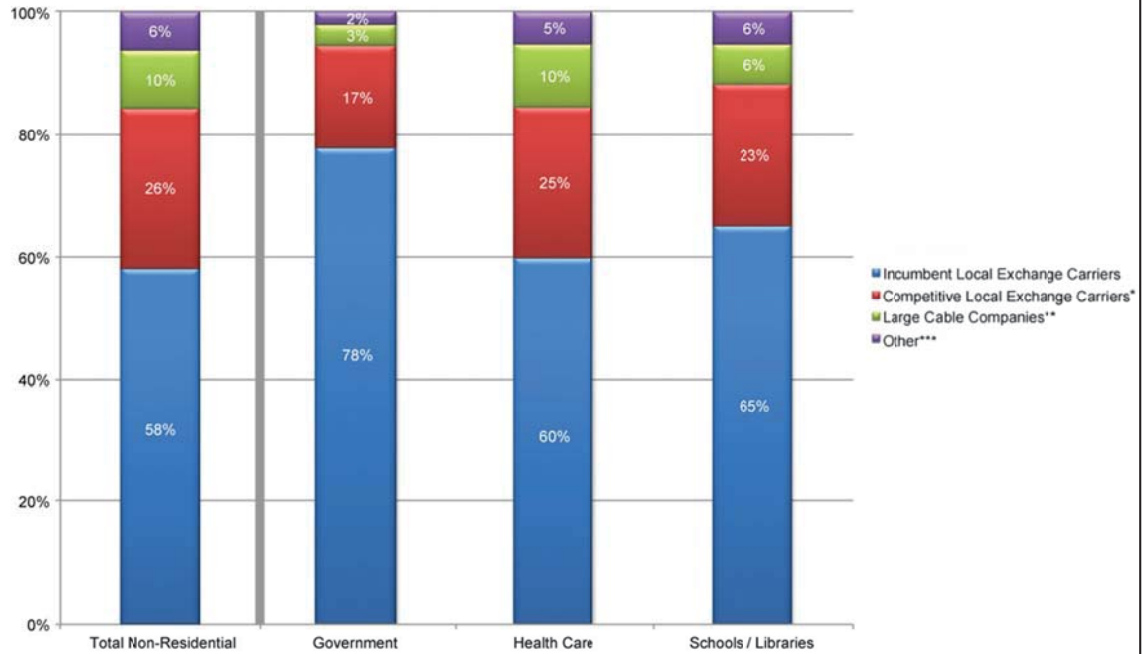
1. *CLECs are the primary source of competition for services purchased by non-residential customers, as well as for key verticals (government, health care, schools and libraries) and organizations of all sizes.*

CLECs play a crucial role in providing competitive alternatives and competitive discipline on ILECs in the business services market. The following charts, which reference GeoResults data, show that—while ILECs predictably account for a majority of the wireline communications expenditures for both single- and multi-location businesses—CLECs are the primary source of competition for wireline communications services purchased by non-residential customers. This is true for customers in key verticals (government, health care, schools and libraries) and organizations of all sizes.

Figure 1

Competitive Carriers Are Ensuring Businesses, Government, and Nonprofits Have Cost-Effective Choices

Estimated Shares of Non-Residential Customer Expenditures on Wireline Communications



Source: Estimated monthly spending for wireline communications during 2nd 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 incumbent LECs.

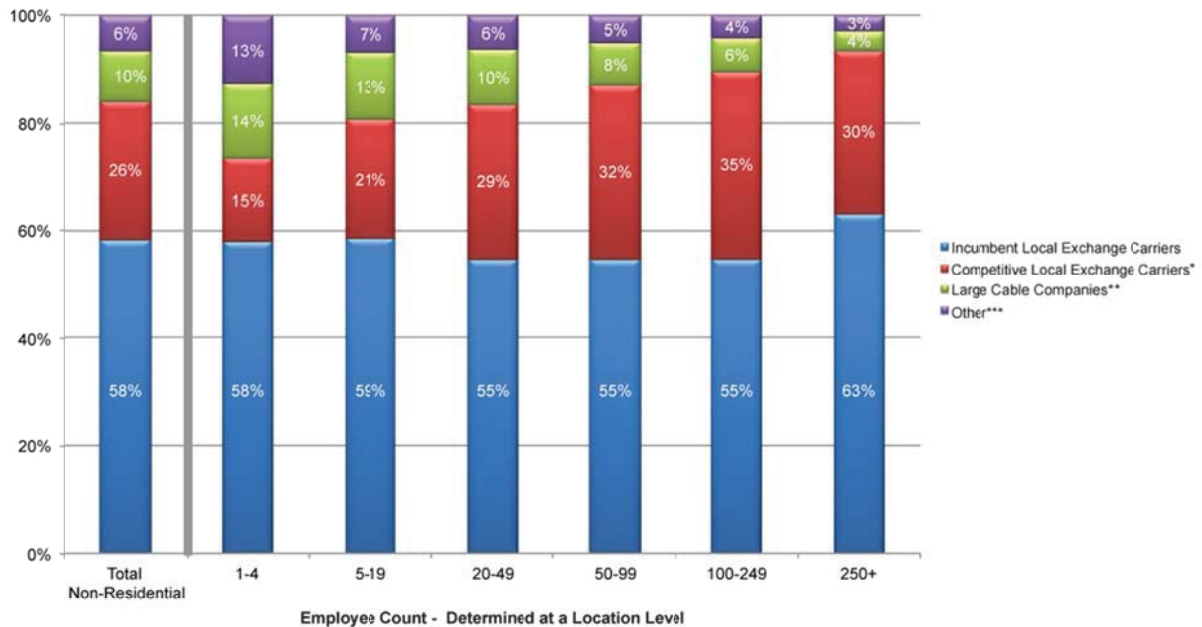
** "Large Cable Companies" are the top 15 cable providers, which together address more than 90% of non-residential locations in cable service areas. A de minimis market share is held by smaller cable companies, and the data source groups these into the "Competitive Local Exchange Carriers" category.

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

Figure 2

Organizations of All Sizes Are Selecting Competitive Carriers to Meet Their Communications Needs

Estimated Shares of Non-Residential Customer Expenditures on Wireline Communications



Source: Estimated monthly spending for wireline communications during 2nd 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 incumbent LECs.

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

As Chairman Wheeler stated in a speech last year, competition benefits consumers and the economy by “driv[ing] deployment and network innovation.”¹¹ The United States Department of Justice likewise has noted that “[m]arket power can lead directly to consumers paying higher prices, can insulate a carrier from the competitive pressures to expand service or

¹¹ Tom Wheeler, Chairman, Fed. Comm’n’s Comm’n, “The Facts and Future of Broadband Competition,” 1776 Headquarters, Washington, D.C. (Sept. 4, 2014) https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf.

improve quality, and can diminish innovation.”¹² Competition, however, prevents this consumer harm.

2. *CLECs have invested significant sums to offer differentiated, personalized product and service offerings that are distinct from the more generic offerings of the incumbent telephone and cable providers.*

To compete effectively, CLECs have invested significant sums to offer differentiated, personalized product and service offerings that are distinct from the more generic offerings of the incumbent telephone and cable providers. In particular, Windstream’s integrated, advanced services approach to mid-market customers includes customizing service offerings with input from a variety of product experts, such as sales engineers and data center and equipment specialists, and dedicated account representatives and a VIP network operations center, rather than call center representatives who lack awareness of a customer’s individual needs.

As Windstream’s experience demonstrates, many small and medium-sized business customers appreciate the innovative options and personalized service that competition has bred. Some examples of customers choosing Windstream over the incumbent include the following:

- Risk Metrics, based in Boca Raton, Florida, and the nation’s leading database supplier of Workers’ Compensation prospect information, uses T1 Internet service and Dynamic IP from Windstream, which allows for dynamic bandwidth allocation between voice, Internet and WAN; has a dedicated account manager; and is moving toward a hosted data solution as well. Said John McCarthy, CEO: “In order to meet our vision, I’m going to need a trusted provider, who’s capable of delivering the complete infrastructure I need to succeed. And that provider is Windstream.”¹³
- Greenfiber, headquartered in Charlotte, North Carolina, and the world’s largest manufacturer of natural fiber insulation, fire and sound products, uses T1s at its 11 plants and bonded T1s at its headquarters, as well as managed router support, network firewall, dynamic IP and Ethernet. Said Tom Moran, Greenfiber’s IT manager: “Customer

¹² Ex Parte Submission of the Department of Justice at 7, WT Docket No. 12-269 (filed Apr. 11, 2013) (“Dept. of Justice Apr. 11, 2013 Ex Parte”).

¹³ Windstream Business, *Risk Metrics*, Case Study, available at <http://www.windstreambusiness.com/resources/case-studies/risk-metrics> (last visited Feb. 3, 2015).

service drives every dollar in and out of this place. . . . If we can't support the phone calls and emails coming in, and our infrastructure is not large enough to handle it, we lose business. It's a proven fact."¹⁴

- Professional Travel, Inc., which has seven locations and manages corporate travel for businesses, utilizes dedicated Internet as well as network firewall and managed router support from Windstream. Said Todd Stoneman, vice president of information systems: "It's not always a cost factor. Obviously that's a big part of it, but more importantly it was about the customer service and the planning. In our business, we can't afford to alienate any of our customers at any given point, so we need to make sure we've got a good working relationship with the telecom company, even in the planning stages, so that's why we chose Windstream."¹⁵

The migration of business service customers from the ILEC to competitive providers affirms that these examples are just a few of the many customers that value the ability to purchase their business communications services from a competitive provider.

3. *Other non-incumbent providers face significant limits in their ability to compete for non-residential customers.*

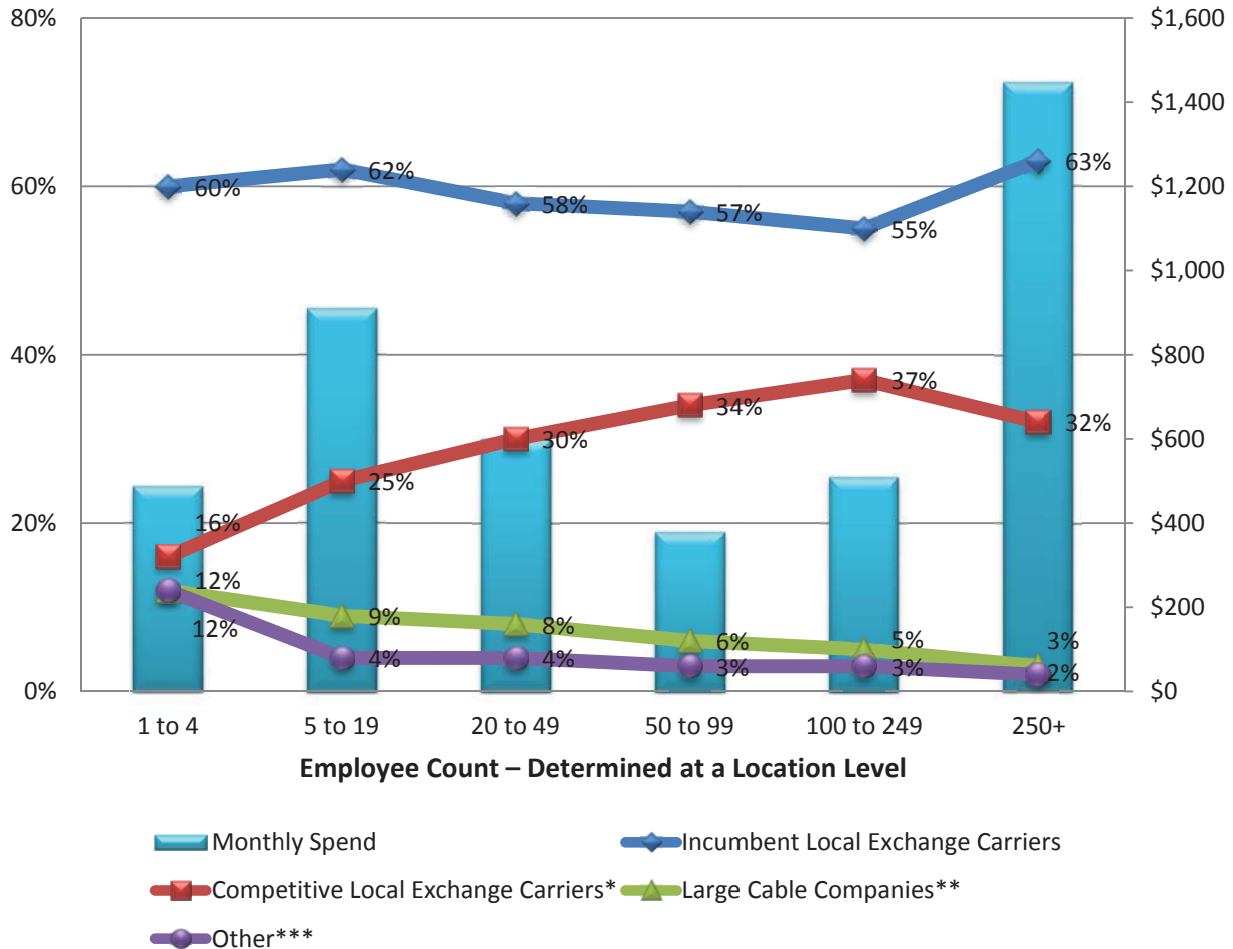
As the charts below demonstrate, CLECs serve as an especially effective competitive choice in the "mid-market"—single-location businesses with 20 or more employees and multi-location customer sites with more than five employees. Other non-incumbent providers, in contrast, face significant limits in their ability to compete for non-residential consumers. As the charts below indicate, while cable serves nearly as many very small, single-location customers as do CLECs, cable usually is not an effective market competitor for multi-location customer sites and larger single-location customers. Cable providers typically do not provide the differentiated product offerings and personalized service that mid-market and large single-location customers demand.

¹⁴ Windstream Business, *GreenFiber*, Case Study, available at <http://www.windstreambusiness.com/resources/case-studies/greenfiber> (last visited Feb. 3, 2015).

¹⁵ Windstream Business, Professional Travel, Inc., Case Study, available at <http://www.windstreambusiness.com/resources/case-studies/professional-travel> (last visited Feb. 3, 2015).

Figure 3

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.

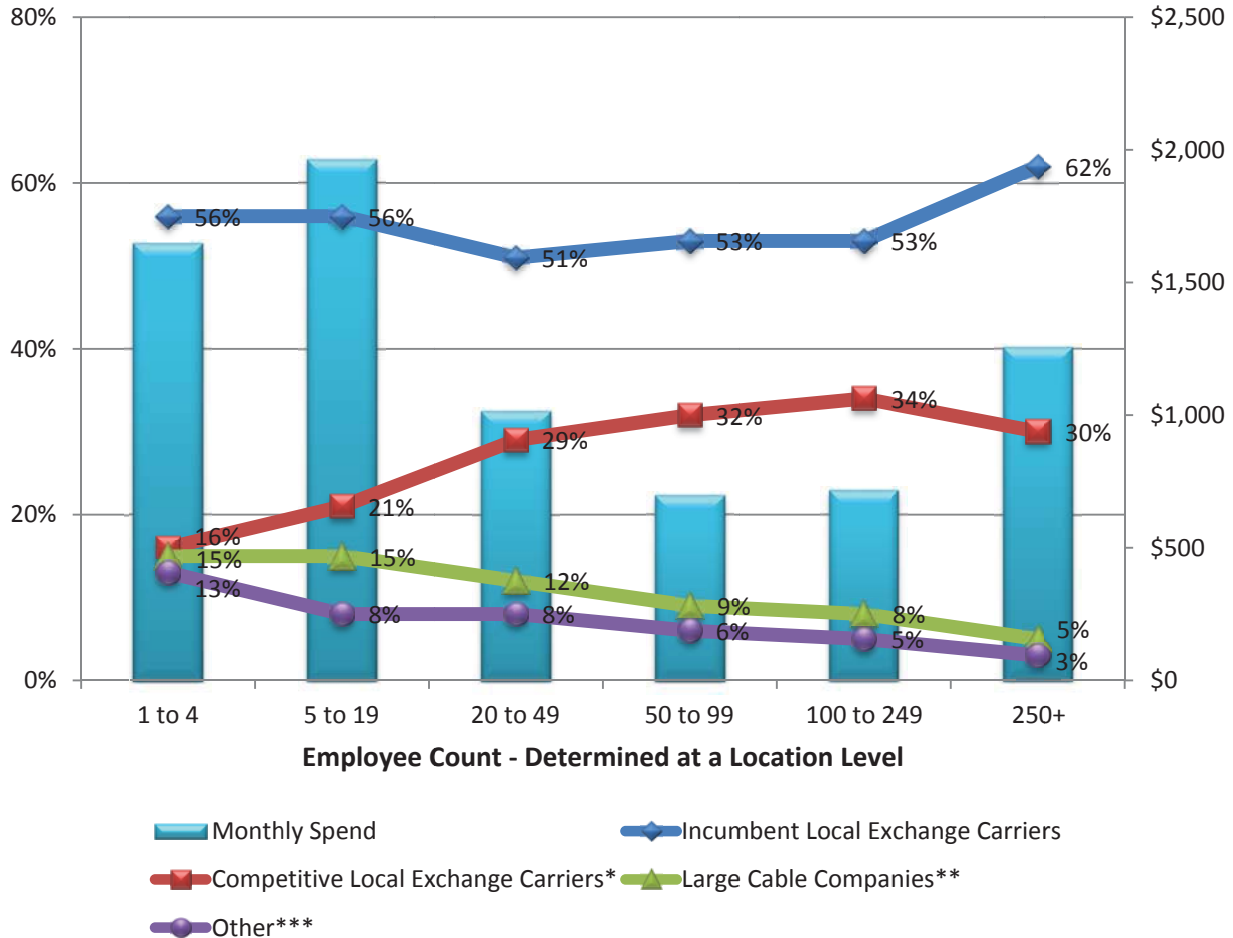
* “Competitive Local Exchange Carriers” includes revenues from services both over CLECs’ network facilities as well as last-mile facilities leased from incumbent LECs.

** “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 4

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 incumbent LECs.

** “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.

Moreover, a major cable provider often cannot provide a single network solution for a business customer with multiple locations over a wide geographic area, because the cable

provider generally only offers service within the confines of its incumbent cable service territory. On a conference call with reporters last fall, Comcast executive David Cohen acknowledged that these facts are unlikely to change. According to Cohen, “the cable part of this industry has never competed against each other [G]iven the expense to build in any particular community, I think no cable company, or only rarely would a cable company choose to compete against another cable company.”¹⁶ In light of these conditions, the cable industry, at best, offers only one alternative to the ILEC in a market—and usually no alternative for a multi-location customer seeking fully unified network connectivity crossing cable service area boundaries.

Service reliability and network availability are additional elements that often distinguish CLECs from other non-ILEC providers. Small and medium businesses greatly value service reliability and network availability, which means the dedicated services provided by CLECs often are a more effective solution than “best efforts” products typically offered by cable and wireless providers. The following graphs, portraying data from International Data Corporation (“IDC”), demonstrate that service reliability is a major factor influencing small and medium-sized businesses’ choice of broadband providers, and provide a breakdown of surveyed businesses’ responses, by size segments, for why they choose to stay with a broadband provider.

¹⁶ Jon Brodtkin, *Comcast Says It’s Too Expensive to Compete Against Other Cable Companies*, ARS Technica (Sept. 24, 2014, 2:50 PM EDT), <http://arstechnica.com/business/2014/09/comcast-says-its-too-expensive-to-compete-against-other-cable-companies/>. Cohen also noted that the Commission and U.S. Department of Justice “have addressed this question of what they would call potential competition on multiple occasions before” and likewise “have concluded on multiple occasions that not only do cable companies like Comcast and Time Warner Cable not compete against each other but that they are also not potential competitors to each other.” *Id.*

Figure 5

Q: Of the following reasons for not switching broadband providers, please select the top 3:

Number of respondents: 431



Source: IDC, Market Analysis Perspective: U.S. SMB Telecom and Broadband, Dec. 2013.

Figure 6

A further breakdown, by number of employees per SMB location:

	Home Office	1 to 19	20 to 49	50 to 99	100 to 999
Best Service available	41.3	52.4	25.5	42.9	42.9
Reliability	37.0	43.5	29.8	42.9	27.0
Nothing comparable	45.7	40.3	29.8	14.3	21.4
In a bundle	30.6	40.2	30.6	23.4	26.2
Trusts current provider	18.5	28.2	38.3	35.7	32.5
N=	92	124	47	42	126

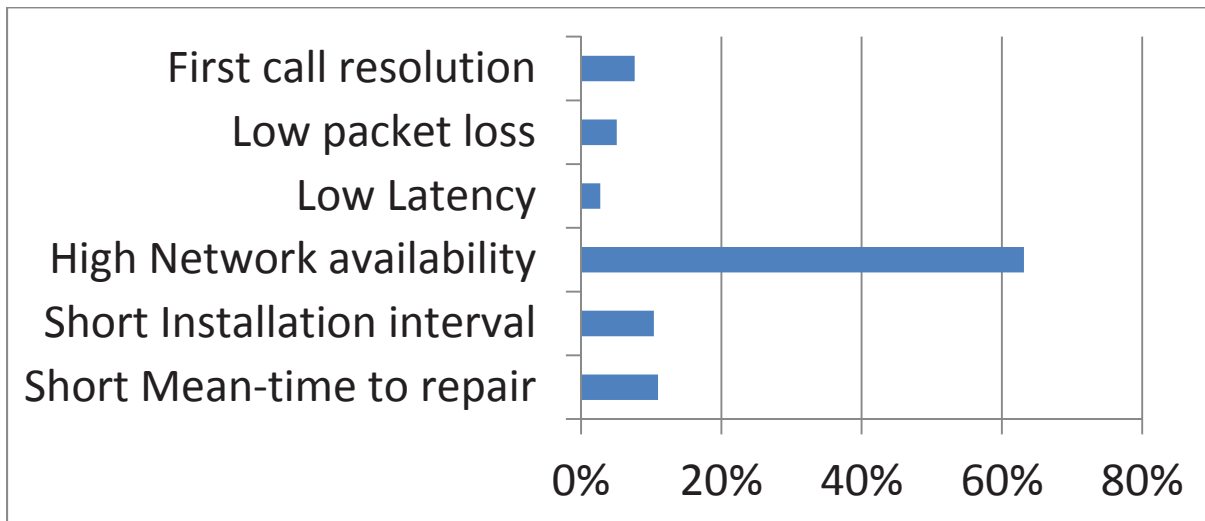
Source: IDC, Market Analysis Perspective: U.S. SMB Telecom and Broadband, Dec. 2013.

Further reinforcing the importance of reliability, the IDC data show that network availability is the feature that small and medium-sized businesses, in all size segments, value most in existing or potential service level agreements.

Figure 7

Q: Either in your existing Service Level Agreement or if potentially receiving a Service Level Agreement in the future what is the feature your company values the most?

Number of respondents: 510



Source: IDC, Market Analysis Perspective: U.S. SMB Telecom and Broadband, Dec. 2013.

Consistent with the IDC data, Windstream repeatedly hears from small and medium-sized business customers that service reliability is a top priority. For example, Serenity Hospice, which is owned and operated by a veteran oncology field nurse, switched to Windstream service provided on T1s when it moved back into its New Orleans office after Hurricane Katrina.

Serenity Hospice President Jackie Diamond explained this decision as follows:

In my business, reliability and uptime are critical. When a family member passes away, a relative must be able to get in touch with a nurse If the phones aren't working, there goes your business. And as the owner, any kind of disconnect is not acceptable, not only for me but for the families we serve. That's

why communications are so important . . . Everything Windstream promised it delivered and followed through.¹⁷

Similarly, Todd Stoneman from Professional Travel, Inc., the corporate travel management company noted above, recounted that “It’s critical that we have one hundred percent up time and a stable carrier behind us. Without that, we’re not in business long.”¹⁸

B. Replacing TDM special access services with Ethernet services at “market-based” rates would effect a significant price increase for many small and medium-sized enterprises—and might force competitive providers to exit the market.

1. The last mile is an enduring competitive bottleneck for serving multi-location and smaller enterprises.

Competitive providers, such as Windstream, have invested and continue to invest billions in their own networks. For example, Windstream serves approximately 600,000 business customers in 48 states and has deployed a national IP backbone, including 118,000 fiber miles. Nevertheless, CLECs also must continue to use last-mile inputs from ILECs, because there often is no viable economic case for competitors to build their own last-mile facilities to address the relatively low level of demand for bandwidth from small, medium-sized, and multi-location customers. In the *TRRO*, the Commission explained that “competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.”¹⁹ In particular, “[t]he most significant portion of the costs

¹⁷ Windstream Business, *Serenity Hospice*, Case Study, available at <http://www.windstreambusiness.com/media/54990/serenity-hospice.pdf> (last visited Jan. 28, 2015).

¹⁸ Windstream Business, *Professional Travel, Inc.*, Case Study, available at <http://www.windstreambusiness.com/resources/case-studies/professional-travel> (last visited Feb. 3, 2015).

¹⁹ *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, 2616 ¶ 150 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”). See also n.419 (explaining that “these costs include the costs of obtaining rights of way and other necessary

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.”²⁰

Competitors face considerable challenges in addressing these physical plant costs: A competitor lacks legacy infrastructure underwritten by monopoly rents, and does not possess a massive customer base like the first-to-market ILEC, which can spread network costs over a large number of locations.

The economics of competitive self-provisioning last-mile connections have not changed significantly over time. In its 2010 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 regulatory framework for DS1 and DS3 UNEs and special access.²¹ And as the United States Department of Justice noted to the Commission in 2010, “The enormous sunk cost of wireline broadband networks makes it unlikely that additional wired broadband competitors will enter many geographic areas.”²²

The reason for this enduring last-mile bottleneck is that large fixed and sunk costs do not stem from the difference between TDM and IP electronics, but from construction and rights-of-

legal permissions, the cost of the actual fiber-optic facilities, and the costs of physical deployment itself”).

²⁰ *Id.*

²¹ *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*”).

²² Ex Parte Submission of the United States Department of Justice at 13, GN Docket No. 09-51 (filed Jan. 4, 2010). *See also* Dept. of Justice Apr. 11, 2013 Ex Parte at 17 (noting that “the economies of scale often present in wireless networks are significantly tempered compared to those the Department has encountered when analyzing competition among wireline networks, since it is easier and less costly to expand capacity over a fixed amount of spectrum than it is, for example, to reduce the cost of constructing the physical ‘last-mile’ link to each premises”).

way costs for the loop that are the same irrespective of the nature of the electronics. Migrating merely from TDM electronics to IP electronics does not change the lack of competitive alternatives or meaningfully alter the economics of self-deployment of the loop for lower capacity customers. Self-deployment economics are primarily driven by the costs of digging up streets, digging trenches, attaining building entry, and obtaining fiber, conduit, and rights-of-way access.

Competitors, therefore, must continue to lease significant amounts of incumbent LEC UNEs and special access services to provide cost-effective, reliable offerings to business services customers with lower bandwidth demands. For example, Windstream in prior filings noted that in one month (August 2014) it purchased **** BEGIN HIGHLY CONFIDENTIAL **** [REDACTED]

[REDACTED]

[REDACTED] **** END HIGHLY CONFIDENTIAL ****²³ ****BEGIN HIGHLY CONFIDENTIAL **** [REDACTED]

[REDACTED] **** END HIGHLY CONFIDENTIAL ****²⁴

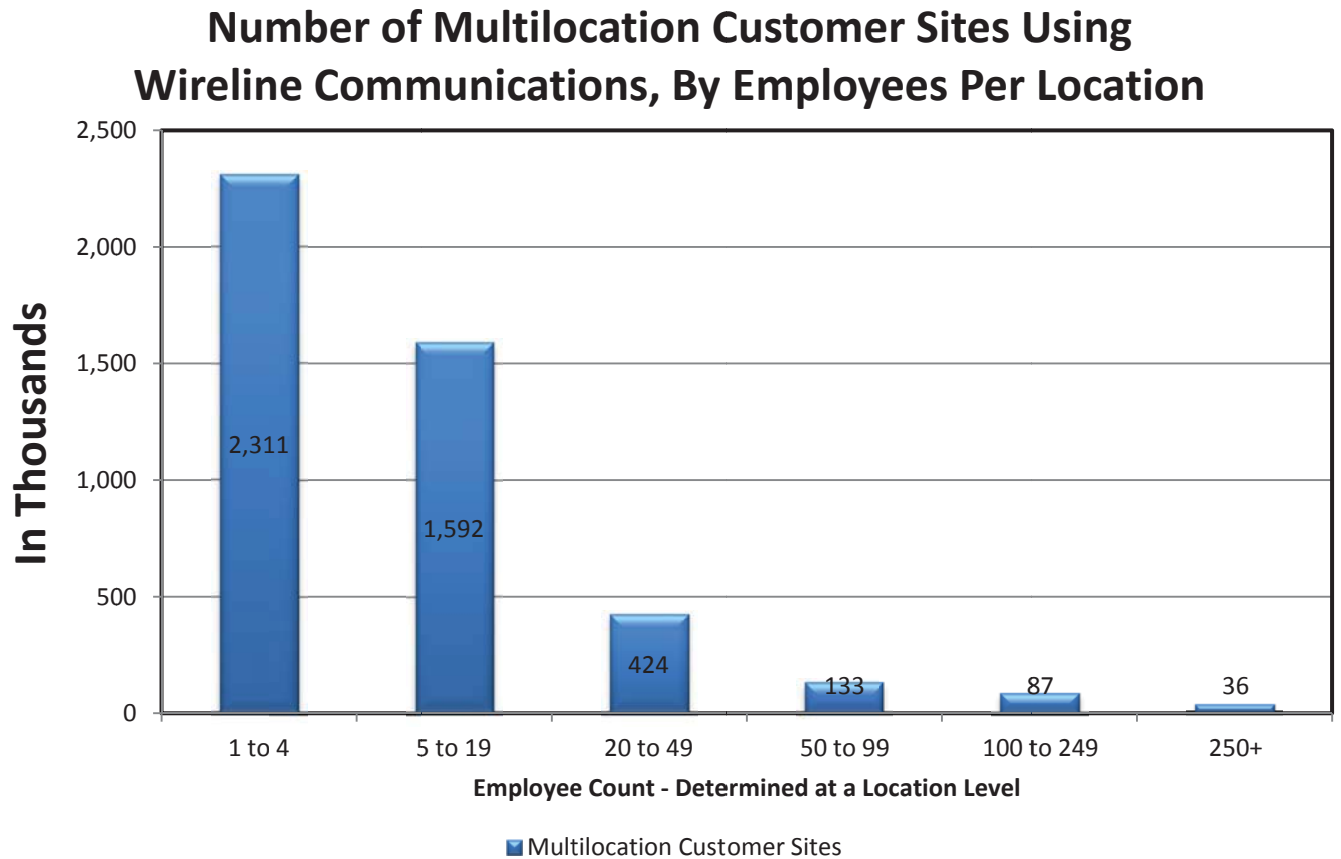
The beneficiaries of these wholesale arrangements largely are small, medium-sized, and multi-location enterprises. Such customers constitute a significant portion of the business services market. As illustrated in the charts below, GeoResults data show that the vast majority of both single-location and multi-location customer sites using wireline communications have

²³ Letter from Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 and WC Docket Nos. 12-353, 05-25, RM-10593, at 2 (filed Oct. 9, 2014).

²⁴ Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 and WC Docket Nos. 12-353, 05-25, RM-10593, at 3 (filed Sept. 26, 2014).

fewer than five employees per location, and only a small percentage of sites have more than 20 employees.

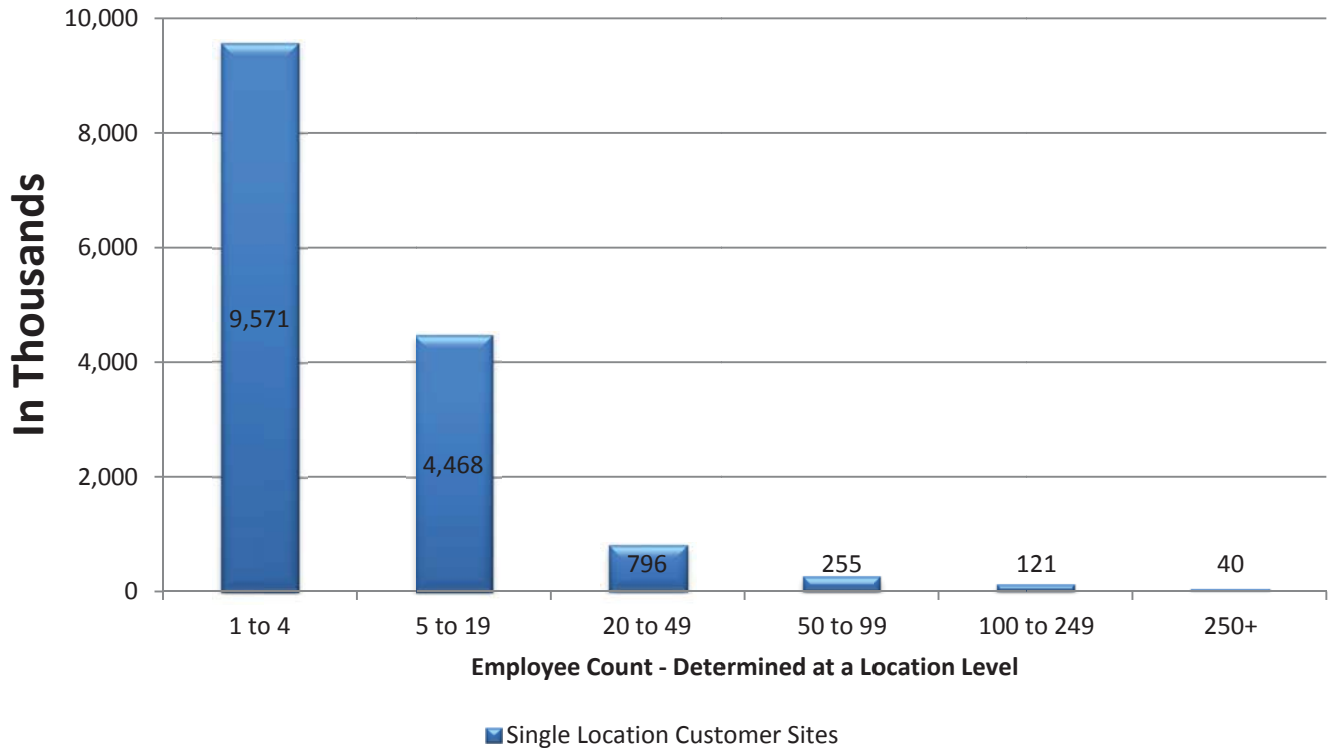
Figure 8



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

Figure 9

Number of Single Location Customer Sites Using Wireline Communications, By Employees Per Location



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

It is reasonable to infer that many of these sites with a small number of employees—which include pizza parlors, hardware stores, and other main-street businesses—have relatively low bandwidth needs that currently are being efficiently addressed with DS1 services. One such customer, for example, is McAlister-Smith Funeral Home, with a total of four locations in Charleston, South Carolina, and nearby Mt. Pleasant and Goose Creek. McAlister-Smith switched from DSL service to an MPLS Networking solution allowing office locations to connect to a bonded T1, which manages voice and Internet over a single pipe; this “any-to-any”

connectivity makes it possible for McAlister-Smith to access servers and databases from multiple office locations over Windstream's Virtual LAN service.²⁵

2. *The Bells' IP transition plans would erect a significant last-mile pricing barrier to competitive entry into the IP Era.*

If incumbents are allowed to persist in their plans to evade the existing last-mile access policies in the transition to IP, competition will be stifled in the IP Era. Market-based pricing for last-mile Ethernet special access services that would replace TDM special access services would effect a significant price increase last-mile connections to small and medium-sized business customer locations with limited bandwidth needs. Windstream previously submitted data showing ****BEGIN HIGHLY CONFIDENTIAL**** [REDACTED]

**** END HIGHLY CONFIDENTIAL ****²⁶ The pricing disparity is even more significant for purchasers that do not operate under commercial agreements or commitment plan discounts: \$126.00 for a DS1 circuit under the 36-month tariffed rate, versus \$1,075.00 for a 2 Mbps Ethernet circuit under AT&T's publicly available 36-month rate for Switched Ethernet, Interactive Class of Service.²⁷

²⁵ Windstream Business, *McAlister-Smith Funeral Home, Case Study*, available at <http://www.windstreambusiness.com/resources/case-studies/mcalister-smith-funeral-home> (last visited Feb. 3, 2015).

²⁶ Letter from Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, Attachment at 1 (filed June 10, 2014).

²⁷ *Id.*

3. *Increases in prices charged to CLECs for essential inputs would necessarily translate to higher prices for business services customers, including governments, schools, hospitals, and small and medium sized businesses.*

Increases in the prices charged to CLECs for essential last-mile inputs would necessarily translate to higher prices for enterprise consumers, including governments, schools, hospitals, and small and medium-sized businesses. This is a classic illustration of raising rivals' costs. The Commission has long recognized that by raising competitors' costs, the seller of an input with market power can raise the market price for all consumers, to their detriment.²⁸

Allowing large incumbents to use the IP transition as cover for unjustified price increases would set off a harmful chain reaction for business services customers of competitors *and* incumbents. Customers of competitive carriers will have to pay more due to IP price increases for lower bandwidth connections, even though the large incumbents allege that IP connectivity is

²⁸ See *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8369-41 ¶ 34 and n.102. See also *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 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, 15,802-803 ¶ 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 DirecTV Grp., Inc., Transferors, & Liberty Media Corp., Transferee*, FCC 08-66, 23 FCC Rcd. 3265, 3295 ¶ 66 (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 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).

more efficient.²⁹ Incumbents then can raise their own retail prices, as the incumbents no longer will be disciplined by their primary competitors' pricing. Some competitive carriers may be driven out of business. The end result will be a sharp decline in competition, investment, and service innovation, and a heightened need for government regulation of wholesale and retail rates, terms, and conditions.

C. The Commission should act now to designate the fundamental criteria that will need to be shown in a Section 214 discontinuance request.

1. *CLECs and ILECs are competing today on contracts to deliver services to consumers three to five years from now—which means failure to act will result in harm to business service competition today, not merely after the IP transition occurs.*

The need for the Commission to set ground rules on last-mile access during and after the IP transition is critical and urgent, and failure to act in the near term would be detrimental to business services customers. Waiting to address these issues in a process in which discontinuance is deemed granted 30 or 60 days following release of a public notice seeking comment, as would occur under the current Section 214 rules, would not sufficiently address competitive concerns. Competitors today must make service commitments to retail customers that often establish obligations for three to five years, through 2018 or beyond. This is because customers want certainty and will seek out other providers (i.e., incumbents) if competitors do not offer long-term arrangements, and because competitive providers sometimes require a longer commitment term to recover expenses like special construction costs.

Competitors must make these multi-year contractual commitments to retail business customers in the absence of commensurate commercial assurances from wholesale providers that

²⁹ See, e.g., Comments of AT&T, GN Docket No. 12-353, at 2 (Jan. 28, 2013) (“IP networks are far more versatile and efficient than single-purpose networks”); Reply Comments of Verizon and Verizon Wireless, GN Docket No. 12-353, at 5 (Feb. 25, 2013) (noting “efficiency of modern day IP networks”).

last-mile access to comparable services at equivalent rates will be available to deliver on the full term of those obligations. This “hope-for-the-best” approach to business planning produces increasingly greater risk for competitive providers. It also impairs competitors’ ability to engage in meaningful strategic planning and investment initiatives. And if CLECs, the most important source of competition to incumbents in the business services market, ultimately are rendered unable to compete, business, government and nonprofit customers will have access to fewer innovative service offerings and will be more vulnerable to ILEC price increases.

2. *To clear the TDM-to-IP migration path, the Commission’s competition policy should ensure business services customers, at a minimum, have continued access to equivalent last-mile facilities at equivalent rates, terms, and conditions.*

To clear the path for a smooth transition from TDM-based to IP-based products, the Commission’s competition policy should ensure that business services customers, at a minimum, have continued access to comparable last-mile facilities at equivalent rates, terms, and conditions. Thus, Windstream supports the Commission’s tentative conclusion, with the clarification that “equivalent wholesale access” should be deemed to be only a floor, not a ceiling, as to what would constitute a reasonable alternative.³⁰

This equivalency standard does not mean the Commission should preserve TDM technologies. To the contrary, the Commission’s adoption of this rule would *advance* the IP transition, because it would ensure IP options are affordable for small, medium-sized, and multi-location customers. Currently large incumbent carriers are charging competitors far more for last-mile, lower-bandwidth capacity in an IP format, even though the incumbents note that IP is more efficient than TDM.³¹ While Windstream would prefer to migrate more of its customers to

³⁰ *Technology Transitions NPRM* at 45-46 ¶ 110.

³¹ *See, e.g., supra* n. 29.

Ethernet, the significant price differentials between regulated and deregulated last-mile products have impaired Windstream’s ability to migrate smaller and multi-location customer to IP connectivity.³² For example, as noted in a filing last year, Windstream generally does not purchase Ethernet from AT&T at levels below ****BEGIN HIGHLY CONFIDENTIAL**** [REDACTED] **** END HIGHLY CONFIDENTIAL **** capacity.³³

In addition, preserving the availability of tariffed DS1 and DS3 special access services is particularly legally justified because 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.³⁴ AT&T itself relied on the continued 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.³⁵ And in its pending petition for Ethernet

³² See Brodtkin and *TRRO*, *supra* nn. 16 and 19 and accompanying text.

³³ Letter from Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 and WC Docket Nos. 12-353, 05-25, RM-10593, at 2 (filed May 20, 2014).

³⁴ *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. 18,705, 18,717 ¶ 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 section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.”).

³⁵ 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

forbearance, CenturyLink asserts that forbearance would not harm competition, because “potential providers also can rely on CenturyLink’s special access services and [UNEs] to provide enterprise broadband services.”³⁶ If incumbents are allowed to eliminate TDM-based products without providing equivalent access to comparable IP products, a critical condition for granted and proposed Ethernet forbearance evaporates.

An equivalency requirement does not harm ILECs, because it merely preserves the status quo where ILECs cannot demonstrate that the technological changes at issue—the replacement of copper loops with fiber or the conversion of transmission from TDM format to IP format—fundamentally alter the economics of last-mile deployment. To the extent they can establish that the existing requirements are not necessary in the IP context to protect purchasers and competition, ILECs are free to seek forbearance under the Commission’s rules.³⁷

Moreover, while an ultimate determination of how best to revise the competitive triggers for special access deregulation requires a comprehensive assessment of competitive market conditions, preserving the status quo does not. In preserving the status quo, the Commission is simply preserving the state of regulation under existing special access rules and other applicable rules, notwithstanding the shift from TDM- to IP-based network electronics or copper to fiber. This framework is not designed to enrich competitive providers, but simply to help ensure that they, and their customers, are not significantly worse off as a result of the technology transitions.

This equivalency requirement is an appropriate extension of the policy framework the Commission adopted in the context of service-based IP transition experiments. Specifically, the

omitted). Predictably, AT&T offers a different, creative view of the unbundling rules when it is seeking to avoid or reduce its regulatory burden.

³⁶ CenturyLink Petition for Forbearance, WC Docket No. 14-9, at 29 (filed Dec. 13, 2013).

³⁷ See 47 U.S.C. § 160(a) (setting forth criteria for forbearance).

Technology Transitions Order states that the Commission “expect[s]” that any valid wholesale trial would provide for the “replace[ment of] wholesale inputs with services that offer substantially similar wholesale access to the applicant’s network.”³⁸ The Commission should build on this framework and apply it to the benefit of all business, government and non-profit customers, rather than just those in sites designated for IP transition experiments.

3. *The Commission should adopt Windstream’s proposed guiding principles to provide consistent, efficient application of the equivalency standard in Section 214 reviews.*

As recognized in the Notice, the Commission also should “seek to establish important ground rules that would facilitate the IP transition by establishing objective standards and clear criteria” for applying an equivalency standard in advance of individual Section 214 applications and “narrowing the range of time-consuming individual disputes.”³⁹ This advance guidance would allow for consistent treatment of fundamental competition issues; speed consideration of proposed IP experiments and Section 214 discontinuance requests; and ensure that existing competitive options are not undermined by incumbents seeking to invoke the IP transition as a pretext to shed pro-competition requirements.

Rather than a series of ad hoc evaluations, the Section 214 process should be a review of incumbent LECs’ implementation of the Commission’s fundamental values and conditions against objective standards. To do this, the Commission will need to establish clear parameters for determining whether adequate and comparable wholesale alternatives proposed by an incumbent will, in fact, be provided with at least equivalent rates, terms, and conditions.

To that end, Windstream recommends that the Commission adopt as rules the six guiding principles that it proposed for the evaluation of whether the wholesale alternatives offered by an

³⁸ *Technology Transitions Order*, 29 FCC Rcd. at 1453 ¶ 59 (2014).

³⁹ *Technology Transitions NPRM* at 46-47 ¶ 111.

incumbent to replace discontinued legacy services are, at a minimum, comparable and provided at equivalent rates, terms, and conditions.⁴⁰ The principles are designed to protect competition in the wholesale market without unduly burdening incumbents. The “thou shall not” framework set forth in the principles merely provides bounds for permissible action, within which incumbents retain significant discretion to design IP service options that best meet business customers’ needs, and preserves the ability to continue engaging in individualized negotiations with competitive providers. In particular, an ILEC discontinuing a TDM input should commit to provide an IP replacement that meets all six of the following principles:

1. **Price per Mbps Shall Not Increase.** The price per Mbps of the IP replacement product shall not exceed the price per Mbps of the TDM product that otherwise would have been used to provide comparable service at 50 Mbps or below.⁴¹
2. **A Provider’s Wholesale Rates Shall Not Exceed Its Retail Rates.** An incumbent’s wholesale rates for the IP replacement product shall not exceed its retail rates for the equivalent offering.
3. **Basic Service Pricing Shall Not Increase.** The wholesale price of the lowest capacity level of special access service at or above the DS1 level shall not increase. For example, a 2 Mbps Ethernet price shall not exceed the DS1 price when 2 Mbps is the lowest-bandwidth Ethernet option available.
4. **Bandwidth Options Shall Not Be Reduced:** Wholesale bandwidth options shall not be reduced relative to what the incumbent is offering in the retail market. In other words, wholesale bandwidth options must include, at a minimum, the options that the incumbent offers to its retail business services customers.
5. **No Backdoor Price Increases:** The incumbent cannot engage in backdoor price increases (e.g., via network-to-network interface (“NNI”) charges, lock-up provisions, early termination fees, special construction charges) to circumvent the comparable rates at equivalent prices requirement.

⁴⁰ *Id.*

⁴¹ Specifically, the per-Mbps price for the IP replacement product shall not exceed the DS1 per-Mbps rate for service at/below 12 Mbps, or the DS3 per-Mbps rate for service above 12 Mbps. It is not technologically feasible to bond DS1 special access circuits to provide more than 12 Mbps in capacity, so if a wholesale purchaser seeks to deliver more than 12 Mbps service to a customer location, the only viable TDM special access option is DS3 service.

6. **No Impairment of Service Delivery or Quality:** Service functionality and quality, operational support systems (“OSS”) efficiency, and other elements affecting service quality shall be equivalent to, if not better than, what is provided for TDM inputs today. Installation intervals and other elements affecting service delivery shall be equivalent to, if not better than, what the incumbent delivers for its own or its affiliates’ operations.

Windstream’s intent in advancing this balanced approach is not to suggest a starting point for negotiations, but rather a reasonable end point for Section 214 ground rules. As a company with interests relatively evenly weighted between incumbent and competitive operations, Windstream’s proposal balances both ILEC and CLEC needs. Accordingly, Windstream’s proposal would provide certainty, while application of the guiding principles would provide flexibility without causing competitive harm. Incumbents would have significant discretion to design IP service options that best meet business service customers’ needs, and the ability to continue engaging in individualized negotiations with CLECs.

Windstream’s proposals should be adopted as specific rules, rather than just stated as principles to guide the interpretation of the requirement to provide at least equivalent wholesale access on equivalent rates, terms, and conditions. By establishing rules, the Commission provides ILECs with more specific guidance as to the minimum requirements, and provides CLECs with greater certainty as to the terms on which key last-mile services will be available after the transition. Adopting these requirements also will better facilitate enforcement, both during consideration of and after the grant of authorization to discontinue TDM services.

With regard to the appropriate term in which the guiding rules should apply,⁴² those principles that are focused on pricing—specifically No. 1 and No. 3—should be in place pending the completion of the special access data request and a subsequent rulemaking that addresses, in a data-driven fashion, the appropriate regulatory regime for special access pricing. The other

⁴² *Technology Transitions NPRM* at 46 ¶ 110.

four principles set forth by Windstream follow from, and are entirely consistent with, a common carrier's statutory duty not to engage in unreasonable discrimination and the Commission's longstanding determination that a carrier may not exclude wholesale customers from purchasing the same services as retail customers or provide lower-quality services to wholesale customers than to retail users.⁴³ As such, rules adopting these principles should not sunset or otherwise be viewed as interim.

Finally, the Commission should make clear that that the "retail rates" referenced in Principle No. 2 apply to any retail offering of equivalent capacity and reasonably comparable service quality even if the ILEC does not routinely sell this particular product to wholesale customers.⁴⁴ The Commission long ago held that the Section 202(a) prohibition against unreasonable discrimination precludes a carrier from refusing to make a service available for resale.⁴⁵ An ILEC cannot, consistent with Section 202(a), escape application of this

⁴³ See 47 U.S.C. sec. 202(a); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *modified*, 62 F.C.C.2d 588 (1977), *aff'd*, *Am. Tel. & Tel. Co. v. F.C.C.*, 572 F.2d 17 (2d Cir. 1978). Charging higher wholesale rates than for "like" retail services violates 202(a) unless the LEC can show that the difference is reasonable. See *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Nat'l Commc'ns Ass'n v. AT&T Corp.*, 238 F.3d 124, 129-130 (2d Cir. 2001). Differences in service quality can constitute unreasonable discrimination. See *Nat'l Commc'ns Ass'n*, 238 F.3d at 128-29.

⁴⁴ To prevent gamesmanship, the Commission should find that the "retail rate" referenced is the lowest rate for equivalent retail service that is in effect for more than 90 days, and make clear that an ILEC cannot use promotional offerings to evade the wholesale obligations, e.g., with a series of 90-day promotions. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC 96-325, 11 FCC Rcd. 15499, 15970-71, ¶¶ 949-50 (1996) (finding that "retail rates," in the context of determining which rates must be offered at a discount to resellers, include "promotional offerings greater than 90 days in duration" and "an incumbent LEC may not use promotional offerings to evade the wholesale obligations, for example by consecutively offering a series of 90-day promotions").

⁴⁵ See *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 321 (1976).

comparability assessment by creating wholesale IP replacement products that are inferior to its retail-only offerings and then refusing to make the retail services available for wholesale use.

4. *Enforcement of competition policies should ensure a meaningful impact.*

Of course, to ensure at least equivalent wholesale access on equivalent rates, terms, and conditions, competition policies must be accompanied by mechanisms to permit their rapid enforcement. As an initial matter, the Commission should make clear that a complaint against an ILEC for failure to provide equivalent wholesale access on equivalent rates, terms, and conditions is a complaint with respect to the “lawfulness of a charge, classification, regulation, or practice,” as set forth in 47 U.S.C. § 201(b)(1), irrespective of whether that charge, classification, regulation or practice is set by tariff or off-tariff agreement. Such complaints must be adjudicated within 5 months of filing.

The ability to bring a complaint, however, will not be meaningful if competitors and the Commission lack sufficient information. Thus, when an ILEC is granted a Section 214 discontinuance to end TDM services, it should be required to post all of its TDM rates for the discontinued wholesale services on its website, including optional volume and term plans, in a uniform format set by the Wireline Competition Bureau (“the Bureau”). This provides all parties with a baseline against which to evaluate future prices for successor services, to ensure that the prices per Mbps at various volume and term levels do not increase, and that the price for the lowest capacity level does not increase.

The Commission also should ensure that it has a viable means of assessing the key attributes of ILECs’ replacement services. First, the Commission should establish an audit requirement to respond to the need for assurance that ILECs’ wholesale rates for capacity do not exceed retail rates (as the latter often are not transparent to competitors), while not prejudging issues that the Commission will consider in its special access rulemaking with respect to packet

service forbearance. Specifically an ILEC should have an independent, outside auditor audit its compliance with the equivalent wholesale access requirements every two years, beginning one year after TDM discontinuance is approved, unless the Commission opts to reverse Ethernet forbearance decisions. A public version of the audit report should be posted on the ILEC's website, and any confidential version must be produced pursuant to the 47 C.F.R. § 1.731's confidentiality protections in any formal or informal complaint proceeding. Such an audit report would not supplant a party's ability to bring a complaint based on survey or bid data, or direct market experience, or to seek related discovery, to the extent permitted under the formal complaint rules. Second, to monitor service quality and delivery, the Commission should direct the Bureau to adopt a set of key performance indicators—such as install time, repair time, and number of troubles and repeat troubles—that would be reported for ILEC replacement services in areas for which TDM discontinuance had been granted. This measure could readily be refined as the Commission and all parties gain experience with TDM discontinuances and successor services, and the Commission could permit state regulatory monitoring to supplant federal monitoring, provided that the state certified that it conducted at least as stringent service quality and delivery monitoring.

Finally, certain complaint process protections are needed, particularly given the lack of alternatives to the ILEC for last-mile transmission at most locations. The Commission should make clear that an ILEC cannot preclude a wholesale customer from disclosing rates, terms, and conditions to a regulator in the context of action before the Enforcement Bureau (including formal or informal complaints and any pre-complaint mediation), provided that the wholesale customer seeks confidential treatment for such information pursuant to 47 C.F.R. §§ 0.457 and 0.459. The Commission also should, as it has with pole attachment agreements, find that a

demand for a clause waiving the wholesale customer’s “right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation” and that a request for “a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.”⁴⁶ These steps, taken together with the measures above, at least will provide some basic tools with which to monitor and enforce compliance with the requirement to provide equivalent wholesale access at equivalent rates, terms, and conditions.

D. The Commission should not allow ILECs to evade a requirement for equivalent wholesale rates by eliminating their term discount plans serially prior to TDM discontinuance.

The Commission should ensure ILECs cannot evade the requirement for equivalent wholesale access on equivalent rates, terms, and conditions by selectively or serially terminating TDM term plans, while retaining term plans for successor IP-based services. Without Commission action, ILECs would be able to achieve through incremental steps what would otherwise not be permitted, and they could exploit the IP transition to effect substantial rate increases for TDM services just prior to the IP conversion.

Under existing Section 214 precedent, when the impact of a rate change on a carrier customer could lead to discontinuance or impairment to its end users, Section 214 review is required.⁴⁷ Given the substantial price differences between, for example, five-year terms and

⁴⁶ *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777 ¶ 21 (1998). See also *Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 26 FCC Rcd. 5240, 5245 ¶ 8 (2011) (declining to modify “sign and sue” rule).

⁴⁷ See *Southwestern Bell Telephone Company, US West Communications, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, Memorandum Opinion and Order, 8 FCC Rcd. 2589, 2599 ¶ 48 (1993); *BellSouth Tel. Companies Revisions to Tariff F.C.C. No. 4*, 7 FCC Rcd. 6322, 6323 ¶ 5 (1992) (“If, for example, a discontinuance, reduction, or impairment of service to the carrier-customer ultimately discontinues service to an end user, the Commission has found that § 214(a) requires the Commission to authorize such a discontinuance.”).

shorter terms or month-to-month arrangements, which are apparent from publicly available tariffs, the Commission reasonably could and should presume that discontinuance of a tariffed term plan for last-mile services would lead to a discontinuance of service to at least some of a carrier customer's end users. In particular, Windstream projects that the average rate that it pays AT&T for leasing a DS1 special access circuit would more than double if Windstream had to convert all of its AT&T long-term discount plan purchases to month-to-month arrangements.

Such a presumption should dovetail with the Commission's proposal to presume that discontinuance of a wholesale service will "discontinue, reduce or impair service to a community or part of a community such that approval is necessary pursuant to section 214(a)."⁴⁸ Elimination of ILEC wholesale services, particularly those for which there are not adequate facilities-based substitutes for the same retail end users, is likely to affect the adequacy or quality of services available to retail customers of the ILEC's competitors. With respect to services used by a competitor to provision last-mile services to its retail end user, these will always affect the retail end user in the community, and thus the need for Section 214 approval should be conclusive, not rebuttable. For other services, the Commission's presumption that Section 214 approval is required should be rebuttable.

In the context of the IP transition, the Commission also has the authority under Sections 201 and 4(i) to prevent evasions of its rules, which an "incremental" discontinuance of TDM service offerings would do. The Commission in other contexts has interpreted its authority to prevent "unfair . . . practices" to preclude practices that undermined the Act's pro-competitive

⁴⁸ *Technology Transitions NPRM* at 43 ¶ 103.

purposes.⁴⁹ The Commission similarly has the jurisdiction and authority here, given the similarity between the language of Section 201(b) and Section 628(b), to preclude ILECs from evading a requirement to provide equivalent wholesale services at equivalent rates, terms, and conditions before and after the conversion from TDM to IP transmission. The Commission thus should exercise its authority under Section 201(b) to require an ILEC, until it has converted its services to IP and pending any modifications as a result of the Commission's ongoing review of special access rates, terms, and conditions, to seek advance review of any proposal to discontinue TDM term discount plans, at least when the ILEC is not also discontinuing comparable IP-based services plans (whether or not offered pursuant to tariffs).

⁴⁹ See *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, FCC 10-17, 25 FCC Rcd. 746 (2010), *aff'd sub nom. Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

III. CONCLUSION

The Commission properly seeks to preserve the Communications Act’s core statutory values, including protecting consumers and competition, as carriers and their customers migrate from TDM to IP. Key to doing that is to ensure that, as TDM services are turned down, ILECs offer replacement wholesale services with, at a minimum, equivalent rates, terms, and conditions, and that the obligations to unbundle DS1 and DS3 capacity loops pursuant to Section 251(c)(3) continue. This can be done by adopting the proposed equivalent access rule and Windstream’s recommendations for guiding principles, and by granting Windstream’s Petition for Declaratory Ruling in WC Docket No. 15-1. Taking these steps will ensure that small- and medium-sized locations—of customers including state and local governments, schools, hospitals, non-profits and small- and medium-sized businesses—continue to have the choice of integrated enterprise solution providers that competition has delivered.

Respectfully submitted,

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