

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

In the Matter of	)	
	)	
Ensuring Customer Premises Equipment Backup Power for Continuity of Communications	)	PS Docket No. 14-174
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	
Windstream Corporation Petition for Declaratory Ruling	)	WC Docket No. 15-1
	)	

**COMMENTS OF  
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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## SUMMARY

The Commission's challenge in this proceeding is to assure that any cost savings and service efficiencies associated with the transition from copper and TDM to fiber and IP are realized by consumers. In addition, the Commission must prevent the ILECS from using this transition to stifle competition.

To accomplish the first of these goals, the Commission must assure that the transition is *transparent* to end users in terms of service availability and quality. In this regard, the Commission should take meaningful steps to protect end users who have historically relied on line power to provide continuity of telecommunications service during outages in the power grid, and should require the ILECs to provide backup power sources in a manner that approximates the pre-existing state of affairs as closely as possible.

The Commission should apply the same goal of transparency in its treatment of copper retirement and of service discontinuance. A facilities change should be deemed "retirement" rather than discontinuance of service *only* if the change is fully transparent to end users and only if following the change, end users receive, at no increased cost, service that is equivalent in all material respects to the service they received prior to the change. In particular, the ILECs should present the same standardized interface to end users at the network demarcation point and should bear all costs of facilities and equipment changes on their side of the demarcation point. Procedural protections should be strengthened and extended to end users to help prevent ILECs from evading this requirement. And the Commission should require ILECs to make retired copper

facilities available for sale to CLECs and end users at the lower of book value or fair market value.

The Commission should grant approval of ILEC requests under Section 214 to discontinue, reduce or impair service only when to do so would not harm users or impair competition. As to retail services, in determining whether an “adequate substitute” is available, the Commission should apply a functional test of the type described in the Declaratory Ruling issued along with the NPRM. The functional test should use the factors proposed by Public Knowledge, but the Commission should also consider evidence of other factors where they impact the real world function of the service.

With regard to wholesale services, the Commission should allow discontinuance of wholesale services only where ILECs commit to provide equivalent wholesale access on equivalent rates, terms, and conditions. In assessing equivalency here, the Commission should use the factors identified by Windstream, with particular regard to areas, such as special construction charges, where ILECS have shown a tendency to abuse in the past. Both retail and wholesale services should remain available to end users as well as CLECs.

Finally, the Commission should grant Windstream’s request for a declaratory ruling confirming that ILECs must continue to provide DS1 and DS3 capacity loops on an unbundled basis following the technology transition.

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**COMMENTS OF  
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (“Ad Hoc”) hereby submits its comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”

or “Notice”)<sup>1</sup> and the Windstream Corporation (“Windstream”) Petition for Declaratory Ruling in the dockets captioned above.

The natural migration of the nation’s telecommunications infrastructure from time division multiplexing (“TDM”) to Internet protocol (“IP”) creates the opportunity for major service advances and a more robust and reliable network for the twenty-first century. But without effective competition in local markets or appropriate Commission oversight, that migration also creates opportunities for serious disruption and hidden costs to end users. It also provides an opportunity for incumbent local exchange carriers (“ILECs”) to impede the emergence of competition, at massive cost to consumers and the public. The Commission’s challenge is to assure that the cost savings and service efficiencies which the new technology makes possible are realized by consumers and that the carriers, not consumers, bear the expense and effort of the transition.

## INTRODUCTION

Ad Hoc comprises a broad cross-section of enterprise users that together and separately use virtually the entire gamut of telecommunications products and services available to business users in the market today. Its members spend some \$2-3 billion annually in this sphere. Members represent a broad variety of industries, including automotive, banking, financial services, construction, insurance, information technology, paper products, package delivery, transportation/logistics, and medical, electronic, and manufacturing components. As such, they are well-positioned to stay abreast of and

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<sup>1</sup> *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174, *et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185 *et al.* (rel’d Nov. 25, 2014) (“NPRM”).

react quickly to technological and marketplace developments in telecommunications, particularly the ongoing transition of the telecommunications industry to IP-based services. Ad Hoc members are not “following” these developments; they are leaders in analyzing the ways in which this technological transformation can bring not only better, more robust services to market but also provide growing efficiencies and cost savings to consumers.

To realize these benefits, the Commission must exercise appropriate regulatory oversight to accomplish two key objectives. First, the Commission must require ILECs to ensure that their deployment of new technologies is transparent to customers so that it does not disrupt their use of services or require them to invest in new equipment merely to “stay even.” In particular, the Commission should adopt measures to keep customers from being disadvantaged by the loss of line power to customer premises equipment (“CPE”) that has been provided with traditional services. In addition, the Commission should require that carriers carry out their transition plans in a way that is non-disruptive to users and passes through to customers the cost savings and increased efficiencies that carriers claim will result from their technology overhauls.

The second major objective of this proceeding must be to prevent ILECs from using the transition to further thwart competition from competitive local exchange carriers (“CLECs”) and information service providers (“ISPs”). Despite their volume-buying clout and technological savvy, Ad Hoc members cannot do the impossible – they cannot wish into existence competition where entry barriers and the ILECs’ market behavior have succeeded in suppressing it.

In this proceeding as in others, the ILECs have blown the trumpet of deregulation in urging the Commission to take a hands-off approach to the market. Ad Hoc agrees that deregulation is appropriate where competition is sufficient to obviate the need for regulation, and has consistently supported the Commission's exercise of its forbearance authority to deregulate where a market has become competitive. As high-volume purchasers of telecommunications services, Ad Hoc members have also historically been among the first beneficiaries of the FCC's deregulatory efforts in competitive markets. But Ad Hoc members are acutely aware of the areas in which competition is weak enough to allow ILECs to extract monopoly rents from consumers.

The technology transformation that is underway does not necessarily change this market reality. As Ad Hoc noted in the *Special Access* proceeding:

[T]he evolution of public and private networks from legacy services to packet-mode services does not change the underlying market characteristics or market power conditions for last mile transmission facilities. The "transition" ... is a change in the transmission protocol used to send information over special access transmission facilities; it is not a change in the facilities and marketplace forces that confer market power on the ILECs. Whether traffic is transmitted over copper or fiber, using legacy TDM transmission protocols or over those same facilities using packet-mode transmission protocols, the relevant metric for the Commission's analysis is competition for the provision of the facility. Change in the transmission protocol of traffic transmitted over a physical facility – or even a change in the transmission protocol demanded by customers – does not necessarily introduce additional "competition" into the market.<sup>2</sup>

It is incumbent on the Commission to prevent the ILECs from using this transition to exploit or further cement their market dominance.

Ad Hoc urges the Commission to adopt rules that protect customers and competition, as discussed in more detail below. In addition, the Commission should

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<sup>2</sup> Comments of the Ad Hoc Telecommunications Users Committee, filed February 11, 2013, in *Special Access for Price Cap Carriers*, WC Docket No. 05-25, at 10.

issue the declaratory ruling sought by Windstream in WC Docket No. 15-1 and GN Docket No. 13-5, to provide specifically that ILEC's obligations to provide DS1 and DS3 capacity loops on an unbundled basis survive the transition from TDM to IP.

## DISCUSSION

### I. THE COMMISSION MUST ENSURE THAT ALL CUSTOMERS HAVE THE ABILITY TO USE CRITICAL TELECOMMUNICATIONS SERVICES DURING POWER OUTAGES.

In the NPRM, the Commission rightly expresses concern over new technologies that do not provide line power to residential end users. During severe weather conditions or other circumstances leading to outages in the electrical power grid, even those lasting several days or longer, line power has enabled consumers to use the wireline network to make critical phone calls to emergency service providers, repair personnel, and family members.<sup>3</sup> Because new technologies may no longer provide line power, the Commission rightly notes: "As consumers transition from legacy copper loops to new technologies, it is important they continue to have reasonable CPE backup power alternatives to support minimally essential residential communications, particularly access to emergency communications, during power outages."<sup>4</sup>

Ad Hoc urges the Commission to ensure that both residential and business customers currently served by copper plant can still count on their CPE to work during power grid outages when that plant is retired. This capability is critical for customers' safety and well-being, essential elements in meeting any reasonable public interest test.

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<sup>3</sup> NPRM at ¶ 11.

<sup>4</sup> NPRM at ¶ 12. Indeed, as the Commission acknowledges, since millions of consumers have already transitioned, action in this area is overdue. *Id.* at ¶ 13.

Moreover, as the immediate beneficiaries of the costs savings and economic efficiencies that supposedly justify their copper retirement plans, carriers should be responsible for maintaining this state of affairs. While consumer education as proposed in the NPRM is necessary and appropriate,<sup>5</sup> it should not be used as a means of shifting this burden to consumers. In this regard, the Commission's tentative proposal to limit carrier obligations to eight hours of backup power, with the burden on customers to arrange for longer outages,<sup>6</sup> is insufficient. Power outages routinely exceed eight hours in ice or wind storms and similar severe conditions. Power outages also often occur at night so that customers may not discover them until more than eight hours have passed. The Commission should adopt a standard that obligates carriers to provide backup power for at least 24 hours.

Regardless of the specific metrics the Commission adopts, it must make clear that business users served by copper facilities are entitled to at least the same protections with regard to backup power that are at least as strong as those the Commission is proposing to put in place for residential customers, since continuity of communications capability is crucial to them and to their customers as well.<sup>7</sup> The notion that business customers use only fiber-based, high capacity facilities is simply a misconception. Many enterprise customers, including Ad Hoc's members, maintain a substantial number of low-volume locations served via traditional copper plant. They –

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<sup>5</sup> NPRM at ¶ 39.

<sup>6</sup> NPRM at ¶ 38.

<sup>7</sup> Business users should be free, of course, to negotiate for more protections, but the residential standard should be available as a baseline.

and their customers –are entitled to continuity of service just as residential consumers are.

## **II. THE COMMISSION SHOULD ADOPT COPPER RETIREMENT RULES THAT PROTECT COMPETITION AND PREVENT DISRUPTION AND ADDED COST FOR USERS**

The Commission proposes a number of changes to its policies for addressing copper retirement. Any rules adopted by the Commission must ensure that copper retirement occurs in a manner that is transparent to consumers, as to both cost and functionality. In addition, the rules must ensure that existing competition is not undermined and emerging competition is not impeded by the retirement of copper facilities.

### **A. Carriers Should Not Be Permitted to Materially Change or Discontinue, Reduce or Impair Services in the Guise of a Copper Retirement.**

The Commission's rules must not allow carriers to blur the distinction between the mere retirement of copper facilities (while the carrier continues to offer the same service(s) using other facilities), on the one hand, and the discontinuance, reduction, or impairment of service on the other. The Commission has, as the NPRM explains, historically made this distinction in applying only a notice requirement if copper is being retired, while requiring approval under Section 214 of the Communications Act for discontinuance, reduction or impairment of service. The Commission cannot permit carriers to blur the distinction by using copper retirement as a means to discontinue, reduce or impair the delivery of existing services. Carrier choices for managing their networks – to multiplex up or down, convert from TDM to IP and vice versa, or use fiber, copper, or wireless transmission technologies – have not in the past and should not in

the future change the carrier's obligation to provide the services it agrees to provide via contract or tariff.

To protect customers, it is essential that the carriers' technological transitions be fully transparent to users as to functionality. The Commission should clarify that, to qualify a network change as the mere retirement of copper facilities, a carrier must present the same standardized interface to the end user as it did when it used copper. Therefore, if a carrier's decision to retire copper plant requires it to use new or upgraded terminating equipment to convert traffic on the new facility into a format compatible with the installed base of network interface devices, CPE, or inside wire, then the carrier should install that terminating equipment on its own side of the network demarcation point defined by the Commission's rules<sup>8</sup> and absorb the costs of doing so as part of its network modernization costs. The Commission cannot permit carriers to unilaterally force costly CPE changes or upgrades upon customers simply because of network changes that benefit the carrier. It is therefore not only equitable but fully consistent with past Commission practice that the carrier, not the end user, bear the costs of these changes.

A carrier's retirement of its copper facilities may produce so material an impact on the services provided to end users that the retirement actually constitutes "discontinuance, reduction or impairment" of service, requiring a Section 214 discontinuance application by the carrier. Thus, upon notice of an ostensible retirement, the Commission must be prepared to determine whether in fact the impact of the retirement exceeds a materiality threshold. For purposes of that determination, the

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<sup>8</sup> 47 C.F.R. §§ 68.3 *et seq.*

Commission should consider using the factors suggested by Public Knowledge and Windstream for evaluating whether equivalent or adequate substitute services are available in the context of a Section 214 discontinuance application.<sup>9</sup> These factors are also useful for making the threshold determination of whether a service change is merely the non-material impact of a retirement of facilities or, because of its material impact on end users, rises to the level of a discontinuance. Thus, if commenters show or the Commission otherwise finds that a change in any of these factors will result from the retirement of copper plant, the Commission would make a *per se* determination that the purported “retirement” in fact constitutes discontinuance, reduction or impairment of service, and so requires a Section 214 application.<sup>10</sup>

**B. “Copper Retirement” Should Include Physical Removal, Disabling in Place, and De Facto Retirement Arising from Inadequate Maintenance.**

The Commission asks at paragraphs 52-53 of the NPRM whether it should treat as copper retirement both actual removal and the mere disabling of copper, as well as “de facto” retirement resulting from inadequate maintenance. Ad Hoc urges the Commission to treat all of these conditions as copper plant retirements. Copper is retired from use in a carrier’s network regardless of whether it is physically removed or continues to dangle from poles or sit in conduits. Inadequate maintenance, too, can constitute retirement when it amounts to neglect, since delayed or defective

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<sup>9</sup> NPRM at ¶ 94, *citing* Letter from Harold Feld et al., Public Knowledge, to Tom Wheeler, Chairman, FCC, GN Docket Nos. 12-353 and 13-5, at 3 (filed Jan. 13, 2014); NPRM at ¶ 111, *citing* Letter from Jennie B. Chandra, Windstream Commc’ns, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593, at 10 (filed Sept. 26, 2014).

<sup>10</sup> To be sure, these lists are not exclusive, and if there is some other material change in services, that too would be sufficient to characterize the proposal as discontinuance of service rather than retirement of facilities.

maintenance that disrupts service forces consumers to use alternative fiber-based or wireless service just as effectively as a discontinuance.<sup>11</sup>

### **C. Procedural Protections Regarding Copper Retirement Should Be Strengthened and Extended to Retail Users.**

The NPRM asks at paragraph 57 whether carriers should be required to include in their copper retirement notices to interconnecting carriers specific information regarding the impact of the planned changes, “including but not limited to any changes in prices, terms, or conditions that will accompany the planned changes.” Ad Hoc agrees that such notice is appropriate. It will facilitate competitive carriers’ ability to continue providing their own services. Nor should this requirement pose a substantial burden to the ILEC; any rational planning process will have already included an internal assessment of such impact and it is unlikely that summarizing those changes in a form suitable for notifying interconnecting carriers will be unduly burdensome.

The Commission also asks at paragraph 59 whether 90 days provides sufficient notice of network changes and, at paragraphs 60 *et seq.*, asks whether the carriers should be required to provide notice of copper retirement to affected retail customers as they must to affected interconnecting carriers. As discussed above, if a carrier’s copper retirement were transparent to users and did not constitute *de facto* service discontinuance, no notice to users would be needed. In the real world, however, unanticipated consequences can arise and the actual impact of copper retirement can be overlooked or misrepresented. In such circumstances, notice to retail customers will

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<sup>11</sup> In an extreme case, indeed, inadequate maintenance can amount to out-and-out service discontinuance.

enable them to respond to such contingencies and should be required.<sup>12</sup> Moreover, disputes may arise over whether a proposed change really is mere “retirement” or actually amounts to discontinuance, reduction or impairment of service, and end users have a stake in the outcome of such disputes.

Large enterprise users like the members of Ad Hoc will typically need substantially more than 90 days lead time in preparing for changes. In Ad Hoc’s experience, planning and carrying out the migration of a large enterprise network from one service to another often takes a year or more. Again, a fully transparent copper retirement should not require user action, but to help users with large complex networks analyze the proposed change and prepare for contingencies, at least 180 days notice of copper retirement would be appropriate. Ad Hoc also does not believe that such a lengthened requirement would be burdensome to carriers; their planning cycles are well in excess of 180 days.

As to the form of notice,<sup>13</sup> many enterprise user contracts typically contain specific notice requirements. The Commission should require that carriers follow such procedures and, if no such procedures are contractually specified, the Commission should require notice in the same form as it requires to other recipients.

Ad Hoc agrees that the right to comment on and object to copper retirement should be expanded and facilitated in the manner described in paragraphs 77 and 78 of the NPRM. The Commission is correct that the public at large, and not just connecting carriers and ISPs, may in any given case have valuable information to provide as to the

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<sup>12</sup> To the extent that carriers must send technicians to customer premises to effectuate changes on the carrier side of the demarcation point, advance notice would be needed in any case.

<sup>13</sup> NPRM at ¶ 63.

costs and benefits of proposed retirement. Most pertinently, as the Commission points out, it

will be able to use the comments [it] receive[s] to monitor for circumstances in which an incumbent LEC's proposed copper retirement is accompanied by or is the cause of a discontinuance, reduction, or impairment of service provided over that copper—but the incumbent LEC has failed to seek the necessary authority, contrary to the requirements of section 214(a) and our rules thereunder.<sup>14</sup>

For example, had Verizon taken the position that its proposed discontinuance of wireline service on Fire Island was merely the retirement of copper and the provision of the same service using wireless technology, a process would have been needed to allow the public to demonstrate that the proposed substitute was so inferior to the original service that it constituted a discontinuance.

#### **D. ILECS Should Be Required to Make Retired Copper Available for Sale to Competitive Carriers and End Users.**

The Commission asks whether ILECs should be required to make retired copper facilities available for competitors to purchase. At least one ILEC, AT&T, has expressed some willingness to do so. Ad Hoc supports the implementation of such a requirement. The Commission is correct that the sale of retired copper “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.”<sup>15</sup> Such a sale process should *not*, however, be voluntary with the ILEC, as the NPRM suggests at paragraph 89. If competitors can use the copper to provide competitive services, then the copper is *de facto* a valuable resource for the public, and in most cases, ratepayers

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<sup>14</sup> NPRM at ¶ 78.

<sup>15</sup> NPRM at ¶ 87.

will already have paid the full cost of these facilities. To allow ILECs to refuse to sell them to competitors would merely allow ILECs to waste these resources in order to thwart competition.

Where competitors are interested in purchasing plant designated for retirement, ILECs should be required to accept the *lower* of book value or fair market value to prevent a windfall for the ILEC.<sup>16</sup> In the event more than one CLEC is interested, they should be permitted to buy allocated shares or form purchase consortiums. If the CLECs cannot agree, then an auction would be appropriate.

In addition, end users should be permitted to bid for these facilities. Where copper plant serves a large corporate location, an enterprise user may find it economically advantageous to own and operate its own facilities. Allowing users to buy these facilities would be consistent with long-standing Commission precedent. Nearly thirty years ago, ruling on a dispute arising from Pacific Bell's refusal to provide an interstate access service to First Data Resources, the Common Carrier Bureau required Pacific Bell to provide the service, citing the principle that "interstate access services should be made available on a non-discriminatory basis and, as far as possible, *without distinction between end user and [interexchange carrier] customers.*"<sup>17</sup>

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<sup>16</sup> If book value is lower, then the ILEC will have already recovered the difference between purchase price and its original cost through amortization, so will be made whole. If fair market value is lower, the ILEC would take a write-down just as it would if it sent the plant to a salvage yard or left it unused on the pole or in the conduit.

<sup>17</sup> *First Data Resources, Inc.*, Memorandum Opinion and Order, Mimeo No. 4732, released May 28, 1986, 1986 FCC LEXIS 3347, at ¶ 13.

### III. THE COMMISSION SHOULD DENY SERVICE DISCONTINUANCE WHEN IT WOULD HARM USERS OR REDUCE COMPETITION.

The Commission also seeks comment on certain key aspects of its rules and policies regarding the discontinuance of services under Section 214 of the Act. First, the Commission asks how to determine whether an “adequate substitute” exists for a retail service for which discontinuance approval is sought. Additionally, the Commission asks whether, when an ILEC seeks Section 214 authority to discontinue (or reduce or impair) a service relied on as a wholesale input by competitive carriers, such authority should be conditioned on the ILEC’s committing to provide “equivalent wholesale access on equivalent rates, terms, and conditions.”<sup>18</sup>

Both of these questions are raised as natural follow-ups to the Declaratory Ruling issued by the Commission along with the NPRM. In the Declaratory Ruling, the Commission clarified that “the analysis under section 214 of whether a change constitutes a discontinuance, reduction, or impairment of service is a *functional* test” in which the assessment is made under the totality of the circumstances, based on the actual use of the service by wholesale and retail customers “as inputs for a wide range of productive activities.”<sup>19</sup> The Commission observed that, while the tariffed description of a service provides some evidence of the nature of the service, it cannot be dispositive; tariffs are schedules setting forth rates and practices, not a Platonic definition of what the service is. The Commission pointed out that, when Verizon sought to discontinue wireline service on Fire Island after Hurricane Sandy and replace it with wireless services, consumers complained that many third party services and

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<sup>18</sup> NPRM at ¶ 92.

<sup>19</sup> NPRM at ¶ 114.

devices had been developed using the wireline network, such as “fax machines, DVR services, credit card machines, some medical alert devices, and some (but not all) other monitoring systems like alarm systems.” The proposed wireless services were likely to be incompatible with many or all of these services and devices. Though Verizon’s tariff did not mention these uses, it was clearly necessary to take them into account in judging the “practical impact” of the change, and hence the inquiry rightly incorporated evidence of such impact.<sup>20</sup>

Ad Hoc endorses the Commission’s Declaratory Ruling. Protecting consumers is the core purpose of the statutory requirement that approval be obtained in order to discontinue services. Thus, it is the impact on consumers that is relevant, not the limited set of service characteristics presented in a typical tariff. This same principle should be used in addressing the follow-up questions in the NPRM, as discussed below.

**A. The Commission Should Use the Factors Proposed by Public Knowledge to Evaluate “Adequate Substitutes” and Other Factors Where Appropriate.**

As discussed above, Public Knowledge proposed a list of ten factors for the Commission to use in determining whether an adequate substitute exists for a service a carrier seeks to discontinue. These factors were: (1) Network capacity, (2) Call quality, (3) Device interoperability, (4) Service for the deaf and disabled, (5) System availability, (6) PSAP and 9-1-1 service, (7) Cybersecurity, (8) Call persistence, (9) Call

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<sup>20</sup> NPRM at ¶¶ 114-117. Though in the Fire Island case, the problems arose from the proposed change in the underlying infrastructure from wireline to wireless, the test is in fact technologically neutral. Had the wireless platform been capable of delivering the same functionalities, the fact that it used a different technology would have been irrelevant.

functionality, and (10) Wireline coverage.<sup>21</sup> All these factors are relevant and probative for purposes of the “adequate substitute” issue and Ad Hoc urges the Commission to adopt them as a baseline. At the same time, in the context of a particular service, other factors may also be pertinent. For example, the factors identified by Windstream for use on the wholesale side (discussed above and below) may also be relevant to retail customers in some cases. And since uses of the network shift over time, still other factors may come to light in “real time” that cannot be listed in advance.

Given the functional nature of the inquiry, it is also appropriate to read these factors expansively rather than narrowly. In paragraph 97 of the NPRM, the Commission asks: “Should we consider only functionality related to voice calls (e.g., ability to use caller ID), or should we consider non-call functions as well? With regard to non-call functionality, should we consider, for instance, the functionality of third-party CPE and/or services such as home alarms, fax machines and medical alert monitors?” Ad Hoc submits that *all* functionalities of the service that are in substantial use by any class of customers should be considered; indeed, this is inherent in the Commission’s decision in the Declaratory Ruling to adopt a functional test.

One important use that deserves highlighting is the transmission of credit/debit card information and payment processing between point-of-sale (“PoS”) terminals at retail locations and banks or credit card processors. Such uses are ubiquitous in the US marketplace and fundamental to the efficient functioning of the American economy. Any service change that would hinder this use would seriously harm the flow of

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<sup>21</sup> NPRM at ¶ 94, citing Letter from Harold Feld et al., Public Knowledge, to Tom Wheeler, Chairman, FCC, GN Docket Nos. 12-353 and 13-5, at 3 (filed Jan. 13, 2014).

commerce. Thus, no service should be considered an adequate substitute unless it preserves this use as well.

**B. The Commission Should Use the Factors Identified By Windstream to Measure Equivalency for Wholesale Access.**

In paragraph 110 of the NPRM, the Commission tentatively concludes that it should require that ILECs seeking to “discontinue, reduce, or impair a legacy service that is used as a wholesale input by competitive carriers ... commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions.” Ad Hoc urges the Commission to adopt such a requirement. Continued access to such inputs is critical to the ability of competitive carriers to provide a check on the ILECs’ market dominance.

Windstream proposes a list of six criteria that replacement offerings must meet to count as “equivalent” for purposes of this analysis.<sup>22</sup> Ad Hoc agrees that all of these factors should be used in determining whether a proposed replacement service is genuinely equivalent to a service being discontinued. A service that fails to meet one or more of them will, by definition, materially disadvantage the wholesale customer – and indirectly its own retail customers – either by impairing the service or increasing its costs or both.

While all these factors are important, Ad Hoc wishes to call the Commission’s particular attention to one element of the fifth, “No Backdoor Price Increases.” The element in question is special construction charges. Special construction charges are

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<sup>22</sup> NPRM at ¶ 111, *citing* Letter from Jennie B. Chandra, Windstream Commc’ns, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593, at 10 (filed Sept. 26, 2014).

tariffed rate elements that enable a carrier to recover one-time costs arising from a customer's request for service in circumstances so extraordinary or beyond the norm that a carrier could not have anticipated those circumstances when it developed its rates. Under the terms of the carriers' tariffs, special construction charges cannot be imposed to recover general build-out costs of the network or to engage in new construction within an established service area especially for a particular customer. The "special" in "special construction" refers to circumstances that require carriers to deviate substantially from their routine construction practices.

Section 2.6.2 of Verizon's Tariff FCC No. 21 is a representative example of the tariffed limitations on application of special construction charges. It provides that special construction charges can be imposed only when (1) facilities are not already in place to serve a customer, (2) the carrier actually constructs the necessary facilities and (3) one or more of the following conditions exist:

- The Telephone Company has no other requirement for the facilities requested.
- It is requested that service be furnished using a type of facility, or via a route, other than that which the Telephone Company would normally utilize in furnishing the requested service.
- More facilities are requested than would normally be required to satisfy an order.
- It is requested that construction be expedited, resulting in added cost to the Telephone Company.
- The Telephone Company determines that alternative facilities must be used because the safety of customers or Telephone Company employees would be in jeopardy if standard facilities were placed, or if potential damage to both Telephone Company and customer-provided equipment could occur. If a high voltage or electrical hazard exists, standard conductive facilities will not be used, and special non-conductive facilities must be placed. For example, dangerous conditions would exist when providing standard copper facilities to high voltage transmission power

towers where potential “Ground Potential Rise” hazard exists, or where voltage could be conducted away from the tower.<sup>23</sup>

This provision as written is clear and unambiguous regarding the conditions that must exist before carriers can demand payment of special construction charges. But Ad Hoc members can attest first hand that ILECs have repeatedly demanded payment of special construction charges when none of the conditions required under the tariff are present. In the experience of Ad Hoc members, ILECs have claimed that special construction charges apply when any construction of new facilities occurs, even when the new facility construction is a mere expansion of capacity on existing routes to accommodate increased marketplace demand or is part of a network build-out that can serve a segment of the market at large and not only the customer being required to pay the charges. In most cases, the business need for the service is so pressing that customers do not have the luxury of delaying service so they can seek formal relief from the Commission.

Finally, as discussed above in the case of mandatory sales for retired copper plant, the Commission must remind carriers that retail enterprise users are permitted to buy for their own use any new services rolled out by ILECs as equivalents to legacy wholesale services. The *First Data* precedent discussed above is directly relevant and the nondiscrimination principle enshrined in that case must continue to apply.

#### **IV. THE COMMISSION SHOULD GRANT THE DECLARATORY RULING REQUESTED BY WINDSTREAM.**

In two of the above-captioned dockets, Windstream has petitioned the Commission to issue a declaratory ruling expressly confirming that ILECs must continue

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<sup>23</sup> Verizon Telephone Companies Tariff F.C.C. No. 21, 2nd Revised Page 2-3, § 2.6.2.

to provide DS1 and DS3 loops on an unbundled basis following the transition from copper to fiber and from TDM to IP.<sup>24</sup> As the Windstream Petition demonstrates, the CLECs' ability to compete with ILECs is critically dependent on the availability of DS1 and DS3 loops from ILECs on an unbundled basis. Unbundled network elements ("UNEs") also provide an important check on special access pricing because the Communications Act mandates UNE prices that are far closer to economic cost than the inflated prices that have resulted from the Commission's ill-advised and premature deregulation of special access services pursuant to the so-called "pricing flexibility" rules.<sup>25</sup> Accordingly, the Commission correctly held in 2005 that ILECs are required to make these loops available on a UNE basis under section 251(c)(3) of the Communications Act.<sup>26</sup> As Windstream further shows, the Commission correctly found that this state of affairs still existed in 2010 when it denies Qwest's forbearance request.<sup>27</sup> Finally, Windstream demonstrates that the availability of unbundled loops at these capacities remains essential today to permit CLECs to continue to compete.<sup>28</sup> Nevertheless, Verizon and AT&T have indicated that they will provide only 64 kbps voice-grade channels to CLECs on fiber loops.<sup>29</sup> Windstream requests that the Commission quash

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<sup>24</sup> Petition for Declaratory Ruling of Windstream Corporation, filed December 29, 2014, in WC Docket No. 15-1 and GN Docket No. 13-5 ("Windstream Petition").

<sup>25</sup> See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012).

<sup>26</sup> Windstream Petition at 3-6.

<sup>27</sup> Windstream Petition at 6.

<sup>28</sup> Windstream Petition at 6-10.

<sup>29</sup> Windstream Petition at 10-11.

this anticompetitive threat by confirming that the ILECs still are and will be required to provide DS1 and DS3 loops.

Ad Hoc urges the Commission to grant the declaratory relief sought by Windstream on an expeditious basis. As discussed above, special access remains a market dominated by the ILECs. The only way to maintain the competitive check on this market provided by CLECs is to ensure their continued access to wholesale DS1 and DS3 capacity loops. It is obvious that 64 kbps channels are not an adequate substitute for these larger-capacity loops and Windstream has demonstrated that CLECs' ability to compete will be "impaired" unless they retain access to these UNEs. Accordingly, Section 251(c)(3) continues to require that these UNEs be made available, both to CLECs and (under the First Data precedent discussed above) to end users.

## **CONCLUSION**

As detailed above, the Commission should adopt rules to assure that the transition from copper to fiber and from TDM to IP is carried out in a manner that does

not harm consumers or stifle competition. The Commission should also grant the declaratory ruling requested by Windstream.

Respectfully submitted,

**AD HOC TELECOMMUNICATIONS  
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## Certificate of Service

I, Amanda Delgado, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecommunications Users Committee were filed this 5<sup>th</sup> day of February, 2015, via the FCC's ECFS system.



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