

REDACTED – FOR PUBLIC INSPECTION

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

In the Matter of)	
)	
Technology Transitions)	GN Docket No. 13-5
)	
Windstream Petition For Declaratory Ruling)	WC Docket No. 15-1
Seeking to Confirm ILEC's Continued)	
Obligation To Provide DS1s and DS3s on)	
Unbundled Basis After Technology)	
Transitions)	

**REPLY COMMENTS OF WINDSTREAM SERVICES, LLC
WITH RESPECT TO ITS PETITION FOR A DECLARATORY RULING**

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Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	CONSUMER ORGANIZATIONS, STATE GOVERNMENT OFFICIALS, SMALL INCUMBENT CARRIERS, AND COMPETITIVE CARRIERS SUPPORT WINDSTREAM’S PETITION.....	5
III.	LARGE INCUMBENTS’ OPPOSITIONS EMPLOY A VARIETY OF FLAWED LEGAL ARGUMENTS.....	8
	A. The Incumbents Ignore the Plain Language of the Relevant Rules.....	9
	B. The Incumbents Mischaracterize the <i>TRO</i> ; in Fact, that Decision Provides Further Support for Windstream’s Petition.	10
	C. The Commission’s Orders Following the <i>TRO</i> Confirm the DS1 and DS3 Capacity Loop Unbundling Framework Set Forth in the <i>TRO</i>	13
	D. The <i>FTTC Reconsideration Order</i> Is Consistent with, Rather than Negates, Other Commission Decisions.....	16
	E. Judicial Precedent Supports Adoption of Windstream’s Petition.....	19
	F. The Large Incumbents’ Process Concerns Are Inapplicable, Because Windstream’s Petition Does Not Seek to Change Commission Rules.	23
IV.	POLICY CONCERNS ADVANCED BY THE LARGE INCUMBENTS ARE SIMILARLY UNAVAILING.	25
	A. Contrary to Large Incumbents’ Claims, Granting Windstream’s Petition Would <i>Not</i> Require Continuation of TDM Technologies.	26
	B. The Large Incumbents’ Policy Positions Would Discourage, Not Encourage, Further Network Investment.....	27
	C. CLECs’ Access to Unbundled Loops Has Enabled Retail Ethernet Competition Cited by the Large Incumbents.....	30
V.	CONCLUSION.....	32

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I. INTRODUCTION AND SUMMARY

Windstream Services, LLC, for itself and its affiliates (collectively “Windstream”), hereby replies to the comments filed with respect to its above-captioned petition for a declaratory ruling.¹ Windstream seeks this declaratory ruling to confirm that an incumbent local exchange carrier’s (“ILEC’s”) obligations to provide DS1 and DS3 capacity loops on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. §§ 51.319(a)(4) and (5) are not altered or eliminated either by replacement of copper with fiber or by the conversion of transmission from TDM to Internet Protocol (“IP”) format. Far from being instigated by Windstream, this petition was necessitated because large ILECs, most notably AT&T and Verizon, disclaimed any post-IP transition obligation to provide unbundled DS1 and DS3 capacity loops.² And contrary to

¹ Petition for Declaratory Ruling of Windstream Corporation, WC Docket No. 15-1 and GN Docket No.13-5 (filed December 29, 2014) (“Petition”). On February 28, 2015, Windstream Corporation was converted into Windstream Services, LLC, a Delaware limited liability company.

² See “Public Notice of Network Change Under Rule 51.333(a)” for Midlothian, VA, *available*

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AT&T’s suggestions, the Commission does not need to conduct a new rulemaking or an impairment analysis to grant this petition as to what *current* rules require.

Comments from consumer organizations and advocates, state public utility commissions, small incumbent carriers, and competitive carriers all make clear that grant of Windstream’s petition is necessary to carry through the Commission’s “mantra that technology transitions should not be used as an excuse to limit competition that exists.”³ These commenters confirm that the Commission was correct when it observed that, “[t]o provide choices to business and non-profit customers, competitive carriers often rely on a combination of their own facilities and the purchase of last-mile facilities and services from the incumbent carriers, such as unbundled copper loops and special access services,” and that “[a]s incumbents move to turn off legacy services, competitive carriers face the prospect of having no access to critical inputs, at least not on reasonable terms and conditions—preventing them from continuing to provide competitive alternatives to small- and medium-sized businesses and other institutions like schools, libraries, and health care facilities.”⁴ Grant of this petition, in combination with the steps proposed in the *Technology Transitions NPRM* to make certain that ILECs continue to provide equivalent wholesale services on at least equivalent rates, terms, and conditions, is necessary for the Commission to “ensure that no harm is done to competition in the interim.”⁵

at <http://www.verizon.com/about/networkdisclosures/> (last visited Mar. 6, 2015). See also Short Term Public Notice Under Rule 51.333(A) for Orchard Park, NY, Hummelstown, PA, Farmingdale, NJ, Lynnfield, MA, and Belle Harbor, NY; Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 13-5, *et al.*, attachment at 11 (filed May 30, 2014); Reply to Comments of AT&T Services, Inc., GN Docket Nos. 13-5, 12-353, at 40-41 (filed Apr. 10, 2014).

³ *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185, 29 FCC Rcd. 14,968, 14,972 ¶ 6 (2014) (“*Technology Transitions NPRM*”).

⁴ *Id.*

⁵ *Id.*

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The large ILECs—which stand alone—employ a welter of flawed legal arguments to try to defend their position. But none of them is successful:

- The large ILECs fail to acknowledge that the plain language of Sections 51.319(a)(4) and (5) does not define DS1 and DS3 unbundling obligations in terms of TDM versus IP or copper versus fiber, but solely in terms of capacity, i.e., “a digital local loop having a total digital signal speed of” 1.544 Mbps for DS1s and 44.736 Mbps for DS3s; instead, the large ILECs would apply unbundling limits applicable to mass market loops to DS1 and DS3 capacity loops.
- The large ILECs studiously ignore footnote 956 of the *Triennial Review Order*, which expressly states that DS1 fiber optic loops will be available, and that unbundling of DS1 loops was “in no way limited by” the rules exempting packet capabilities of mass-market loops from unbundling.⁶
- The mass market unbundling restrictions that the large ILECs attempt to import to DS1 and DS3 capacity loops were based on the application of “at a minimum” factors that the Commission in the *Triennial Review Remand Order* expressly disclaimed applying to DS1 and DS3 capacity loops, as such loops were already widely deployed by ILECs and would be utilized in conjunction with other competitor-owned facilities. Accordingly, it makes no sense to interpret the *TRRO* as having incorporated these mass market loop restrictions into the rules governing DS1 and DS3 capacity loops.⁷
- Far from undermining the separateness of the DS1 and DS3 capacity loop unbundling rules from the mass market rules, as AT&T asserts, the *MDU Reconsideration Order* actually supports Windstream’s interpretation, because the *MDU Reconsideration Order* would not have been necessary had the mass market hybrid and fiber loop rules already applied to all DS1 and DS3 capacity loops.⁸
- The *FTTC Reconsideration Order*, on which Verizon relies, extended “to incumbent LECs’ mass market FTTC deployments” the same regulatory treatment as was accorded

⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, 18 FCC Rcd. 16,978, 17,171 n.956 (2003) (“*Triennial Review Order*” or “*TRO*”).

⁷ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, FCC 04-290, 20 FCC Rcd. 2533, 2581-2582, 2625 nn.226 and 462 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”).

⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, Order on Reconsideration, FCC 04-191, 19 FCC Rcd. 15,856 (2004) (“*MDU Reconsideration Order*”).

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“mass market FTTH deployments”;⁹ that Order did not, as Verizon contends, establish a general rule with respect to all FTTP loops, including DS1 and DS3 capacity loops.

- No court has adopted the large ILECs’ reading of Sections 51.319(a)(2) and (3) to limit unbundling of all DS1 and DS3 capacity loops. *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission*—to which this Commission is not obligated to defer—at most only recognizes a limit on unbundling for “greenfield” fiber deployments of DS1 and DS3 capacity loops. This decision did not disrupt the underlying District Court’s holding that “an incumbent LEC is still obligated to unbundle DS1/DS3 loops . . . regardless of the loop medium employed” in all other areas.¹⁰ BellSouth, similarly, expressly conceded at the Sixth Circuit that “the greenfield exclusion does not swallow the general rule of DS1 and DS3 unbundling.”¹¹
- The Eighth Circuit’s decision in *Iowa Utilities Board* only precludes the Commission from mandating unbundling of functionalities that do not exist in the ILEC’s network at the time the request is made, not ones that the ILEC subsequently has implemented, even if those functionalities did not exist in 1996. Windstream’s interpretation of Sections 51.319(a)(4) and (5) in no way requires an ILEC to provide access to unbundled loops “at levels of quality that are superior to those levels at which the incumbent LECs provide these services to themselves,”¹² but only to IP and fiber-based transmission that the ILEC is already implementing for itself.

It is the large ILECs, and not Windstream, that seek to rewrite current rules. If the large ILECs believe that market conditions now warrant relief from DS1 and DS3 unbundling rules, they can file a petition for forbearance pursuant to Section 10 of the Communications Act, and show that unbundling of DS1 and DS3 capacity loops is “not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with” those services are reasonable, not “necessary for the protection of consumers,” and is “consistent with the public interest,” which includes consideration of the effect on competition.¹³

⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, Order on Reconsideration, FCC 04-248, 19 FCC Rcd. 20,293, 20,294, ¶ 2 (2004) (“*FTTC Reconsideration Order*”) (emphasis added).

¹⁰ *BellSouth Telecomms., Inc. v. Ky. Pub. Serv. Comm’n*, 693 F.Supp. 2d 703, 719 (2010).

¹¹ Brief of AT&T Kentucky, *BellSouth Telecomms., Inc. v. Ky. Pub. Serv. Comm’n*, Case Nos. 10-5310, 10-5311, at 29-30 (6th Cir. Aug. 4, 2010).

¹² *Iowa Util. Bd. v. F.C.C.*, 120 F.3d 753, 812 (1997).

¹³ 47 U.S.C. § 160(a).

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Accordingly, the Commission should end the controversy the large ILECs have created by reaffirming that Sections 51.319(a)(4) and (5) mean what they say: ILECs must unbundle DS1 and DS3 capacity loops irrespective of whether they are copper or fiber, or transmitting traffic in a TDM or IP format. This result is necessary to “ensure that no harm is done to competition in the interim”¹⁴ and should be adopted in short order.

II. CONSUMER ORGANIZATIONS, STATE GOVERNMENT OFFICIALS, SMALL INCUMBENT CARRIERS, AND COMPETITIVE CARRIERS SUPPORT WINDSTREAM’S PETITION.

A broad range of parties—including consumer groups, state government agencies, businesses, small incumbent carriers, and competitive carriers—support Windstream’s petition.¹⁵ Comments confirm the continued importance of unbundled DS1 and DS3 loops to small- and

¹⁴ *Technology Transitions NPRM* ¶ 6.

¹⁵ *See, e.g.*, Comments of Public Knowledge *et al.*, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 16 (filed Feb. 5, 2015) (“Public Interest Commenters”); Comments of XO Communications on the Tech Transitions Notice of Proposed Rulemaking and on the Petition for Declaratory Ruling of Windstream, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 27-28 (filed Feb. 5, 2015) (“XO Comments”); Comments of the Ad Hoc Telecommunications Users Committee, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 20 (filed Feb. 5, 2015) (“Ad Hoc Comments”); Comments of COMPTTEL, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 37-39 (filed Feb. 5, 2015) (“COMPTTEL Comments”); Comments of Birch, Integra, and Level 3, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 39-40 (filed Feb. 5, 2015); Joint Comments of Grande Communications Networks LLC and U.S. TelePacific Corp., WC Docket No. 15-1, GN Docket No. 13-5, at 2-4 (filed Feb. 5, 2015) (“Grande/TelePacific Comments”); Comments of Granite Telecommunications, LLC Supporting Windstream’s Petition for Declaratory Ruling, WC Docket No. 15-1, GN Docket No. 13-5, at 2-3 (filed Feb. 5, 2015) (“Granite Comments”); Comments of the Pennsylvania Public Utility Commission, WC Docket No. 15-1, GN Docket No. 13-5, at 3 (filed Feb. 5, 2015) (“PaPUC Comments”); Reply Comments of the Vermont Public Service Board and Vermont Public Service Department, WC Docket NO. 15-1 & GN Docket No. 13-5, at 2-3 (filed Feb. 27, 2015) (“Vermont PSB Reply Comments”); Comments of NTCA – The Rural Broadband Association, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 4 n.3 (filed Feb. 5, 2015) (“NTCA Comments”).

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medium-sized customers. For example, the Pennsylvania Public Utilities Commission finds that competitive carriers “continue to rely significantly on wholesale access to the last mile facilities of the ILECs. This is especially true in those cases where the potential return on investment from serving the needs of lower demand users, such as residences and small businesses, does not justify the cost of overbuilding a redundant network over that of an incumbent.”¹⁶ The Vermont Public Service Board and Public Service Department echo this concern.¹⁷ Grande and TelePacific similarly explain that unbundled loops enable carriers to bring “affordable broadband to small businesses, especially community and anchor institutions such as schools, libraries, and rural health care providers, who cannot afford higher-priced, and do not need higher-bandwidth, fiber-based broadband,” and thus “the continued availability of DS1/DS3 capacity loops has the potential to speed up broadband deployment by increasing broadband adoption rates where price is the primary reason for lack of adoption.”¹⁸

Moreover, the supporting comments confirm that the appropriate focus of the Commission’s review should be the DS1 and DS3 capacity loop unbundling rules in Sections 51.319(a)(4) and (5), and that the plain language of these rules prompts the Commission to grant Windstream’s petition.¹⁹ As the Public Interest Commenters observe, when citing Sections 51.319(a)(4) and (5), “[u]nder the Commission’s rules, an ILEC has an obligation to provide unbundled DS1 and DS3 capacity loops unless it establishes that the basis for a finding

¹⁶ PaPUC Comments at 3.

¹⁷ Vermont PSB Reply Comments at 2-3.

¹⁸ Grande/TelePacific Comments at 5-6.

¹⁹ *See, e.g.*, XO Comments at (noting that “[t]he obligation to provide UNEs is statutory, provided that the impairment trigger of Section 251(d)(3) is satisfied, and that obligation is technology neutral, limited neither to copper facilities nor to TDM networks”); COMPTTEL Comments at 38; PaPUC Comments at 3; Granite Comments at 2-3.

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of non-impairment has been met—short of any change in rule or forbearance decision by the Commission.”²⁰ Unilateral action by an ILEC to escape these obligations, absent express Commission approval, is prohibited. Though AT&T criticizes Windstream for not trying “to explain how this inchoate ‘capacity’ would be provided on an unbundled basis . . . ,”²¹ the meaning of these rules is straightforward: An ILEC is free to transition its loop facilities from copper to fiber or from TDM to IP transmissions within the Commission’s rules, but the availability of—and price paid to an ILEC for—DS1 and DS3 capacity as unbundled network elements (“UNEs”) do not change as a result of this transition.

Multiple comments underscore that the rationale underlying the current DS1 and DS3 unbundling regime, as set forth in the *Triennial Review Remand Order* (“*TRRO*”), holds true today.²² As recognized by NTCA, representing small ILECs, “the benefits of competitive access cannot be maintained if ILECs are allowed to cite the IP transition as a basis for subverting DS1 and DS3 capacity loop unbundling obligations.”²³ The consequences of permitting the large ILECs to use technology transitions to subvert this regime would be dire: “less innovation, less investment, and fewer choices to . . . small and medium sized businesses and multi-location

²⁰ Consumer Groups Comments at 17.

²¹ Opposition of AT&T Services, Inc., WC Docket No. 15-1, GN Docket No. 13-5, at 9 n.47 (filed Feb. 5, 2015) (“AT&T Opposition”).

²² Supporting commenters note that, to the extent any parties were confused about prior precedent, the Commission made its intent clear in the *TRRO* in 2005. See, e.g., PaPUC Comments at 3; XO Comments at 29-30. As the Pennsylvania PUC states, “[T]he FCC [in the *TRRO*] did not eliminate the requirement to unbundle DS1 and DS3 capacity local loops that are utilized for wholesale access purposes.” PaPUC Comments at 3. The Ad Hoc Telecommunications Users Committee adds that “the Commission correctly held in 2005 that ILECs are required to make these loops available on a UNE basis . . . [and] the availability of unbundled loops at these capacities remains essential today to permit CLECs to continue to compete.” Ad Hoc Comments at 20.

²³ NTCA Comments at 4 n.3 (internal quotation omitted).

businesses.”²⁴ Therefore, as the Pennsylvania PUC states, “retention of the unbundling requirement is necessary to protect competitive carriers, the competitive market, and, ultimately, consumers,”²⁵ and as the Vermont Public Service Board and Public Service Department warn, “[f]ailure to maintain and unbundling requirement for DS1 and DS3 capacity loops or a functional equivalent will undermine the competition that both state and federal regulators have sought to encourage.”²⁶

III. LARGE INCUMBENTS’ OPPOSITIONS EMPLOY A VARIETY OF FLAWED LEGAL ARGUMENTS.

The largest ILECs and ITTA, which represents large and mid-sized ILECs, are the only commenters who request the denial of Windstream’s petition. As the record demonstrates, there exists a dispute between the large ILECs and everyone else as to what is required under Sections 51.319(a)(4) and (5). This controversy concerning current law is appropriate for resolution through a petition for declaratory ruling.²⁷

The large ILECs throw out a variety of arguments—which are notable for divergence in their focus—but in the end fail to persuade on any front. In cobbling together arguments, the large ILECs ignore the text of the unbundling rules, express language of the *Triennial Review Order* and *TRRO*, and impairment findings in the *TRRO*, which remain the standing impairment

²⁴ Granite Comments at 9.

²⁵ PaPUC Comments at 3.

²⁶ Vermont PSB Reply Comments at 3.

²⁷ See 47 C.F.R. § 1.2 (noting that declaratory rulings are appropriate to “terminat[e] a controversy or remov[e] uncertainty”). Contrary to AT&T’s puzzling claim, see AT&T Opposition at 1, the controversy here was instigated not by Windstream but by the large ILECs. As Windstream detailed in its petition, Verizon and AT&T had previously asserted that they lacked any obligation to provide unbundled DS1 and DS3 capacity loops when they retire copper or transition from TDM-based to IP-based services. See Petition at 10 and nn.24-25. Now in this proceeding all three of the largest ILECs voice their support for the elimination of DS1 and DS3 capacity loop unbundling.

findings by the Commission. Their comments also misrepresent judicial precedent that actually supports the grant of Windstream’s petition. Finally, the large ILECs raise process concerns that are inapplicable, because Windstream is not seeking a change in Commission rules.

A. The Incumbents Ignore the Plain Language of the Relevant Rules.

The large ILECs’ interpretation of the Commission’s unbundling requirements, set forth in Sections 51.319(a)(4) and (5), is inconsistent with the rule’s plain language. Essentially, the large ILECs argue that the rule provides that once an ILEC retires TDM-based equipment and/or copper, it has no obligation to unbundle any loop transmission facilities (with the limited exception of providing a 64 kbps voice channel in certain circumstances).²⁸ AT&T even goes so far to allege that “paragraphs (a)(4) and (a)(5) of Section 51.319 . . . only describe the digital speed capacities of DS1 and DS3 loops.”²⁹ These claims, however, are directly contradicted by the plain language of paragraphs (a)(4) and (a)(5) of Section 51.319: The rules expressly set forth independent, technology-neutral obligations establishing that ILECs “shall provide a requesting carrier with nondiscriminatory access” to both DS1 and DS3 capacity loops.³⁰

²⁸ See AT&T Opposition at 8-9; Comments of ITTA—The Voice of Mid-Size Communications Companies, WC Docket No. 15-1, GN Docket No. 13-5, at 4 (filed Feb. 5, 2015) (“ITTA Opposition”); Verizon’s Opposition to Windstream’s Petition for Declaratory Ruling, WC Docket No. 15-1, GN Docket No. 13-5, at 2-3 (filed Feb. 5, 2015) (“Verizon Opposition”).

²⁹ See AT&T Opposition at 8.

³⁰ The cross-references to the DS1 and DS3 capacity loop rules in other Commission unbundling rules provide further support for Windstream’s petition. In each such instance, the other rules affirm the independent obligations set forth in (a)(4) and (a)(5), and are consistent with the reading espoused by Windstream’s petition. See 47 C.F.R. § 51.319(a)(1) (noting that “[t]he availability of DS1 and DS3 copper loops is subject to the requirements of paragraphs (a)(4) and (5) of this section”); 47 C.F.R. § 51.319(a)(2)(ii) (reaffirming that when “a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to . . . DS1 or DS3 capacity (where impairment has been found to exist)”) (emphasis added).

B. The Incumbents Mischaracterize the *TRO*; in Fact, that Decision Provides Further Support for Windstream’s Petition.

The large ILECs’ argument that Sections 51.319(a)(2) and (3) limit the scope of the DS1 and DS3 requirements in Sections 51.319(a)(4) and (5) is both unsupported by the plain text of the rules, and inconsistent with the express language of the *TRO*. The *TRO*, in fact, provides additional support for Windstream’s petition.

The *TRO* established the basic structure of loop unbundling rules. This structure provides one set of rules for loops “generally provisioned to mass market customers” (including analog loops, DS0 loops, and loops using xDSL-based technologies) growing out of an impairment analysis of the mass market. It designates another set of rules for “high-capacity” loops (DS1, DS3, and OCn) growing out of an impairment analysis of the enterprise market.³¹

When issuing the unbundling rules, the Commission in footnote 956 of the *TRO* expressly distinguished its enterprise rules from mass market loop provisions, noting that “DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops,” and “[t]he unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass

³¹ *TRO* ¶ 209. The Commission also made clear that “[b]ecause a competitive carrier faces the same economic characteristics to serve these customers at their remote locations with a DS0 loop that it faces to serve residential customers served by the same loop type, our customer class distinctions are not intended to preclude a competitive LEC from obtaining an unbundled DS0 loop to serve these business customers.” *TRO* ¶ 210. The Commission continued, “Thus, while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served.” *Id.* See also *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. S 160(c) in the Phoenix, Arizona Metro. Statistical Area*, Memorandum Opinion and Order, FCC 10-113, 25 FCC Rcd. 8622, 8647 ¶ 44 (2010) (“[I]f there were evidence of sufficient competition for residential voice service, the Commission would need to consider whether, or how, forbearance from unbundling obligations could be tailored given that unbundled DS0 loops are used to serve not only residential customers but also businesses”).

market customers.”³² Those hybrid loop rules include the still-existing provision—on which the large ILECs rely heavily, and erroneously, here—that relieves ILECs of any obligation to unbundle the packetized capabilities of mass-market loops.³³ The large ILECs never explain how the packet-capabilities provisions of Section 51.319(a)(2)(i) can apply to DS1 capacity loops, when footnote 956 expressly states to the contrary.

The large ILECs’ comments also studiously ignore footnote 956 in arguing that a transition from copper to fiber removes any obligation to unbundle DS1 capacity loops. Instead, the ILECs assert, without qualification, that Section 51.319(a)(3) applies to all fiber-based DS1 capacity loops.³⁴ By this logic, there would be no instance in which ILECs would ever be required to unbundle a fiber-based DS1 capacity loop. However, footnote 956 expressly states that “DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, e.g., . . . fiber optics” Thus, the large ILECs’ reading of the *TRO* cannot be correct. And while footnote 956 addresses DS1 capacity loops, the Commission gave no reason why a different construction would apply to DS3 capacity loops under Section 51.319(a)(5), which is structured the same as the DS1 loop provision in Section 51.319(a)(4). The most logical view of this ambiguity in the *TRO* is that the parameters of footnote 956 apply equally to DS3s as to DS1s. Indeed, the Commission reaffirmed the delineation between the treatment of mass market loops and high-capacity loops in its brief

³² *TRO* ¶ 325 n.956. In footnote 956 the Commission erroneously cited to Part VI.A.4.a.(v)(b)(i), which discusses fiber to the home loops, rather than (ii), which discusses hybrid loops, but by its language the footnote clearly was intending to cite to the hybrid loops section.

³³ *See id.* at 17,480, Appendix B § 51.319(a)(2). *See also* AT&T Opposition at 8-9; ITTA Opposition at 4.

³⁴ *See* AT&T Opposition at 8-9; ITTA Opposition at 4.

REDACTED – FOR PUBLIC INSPECTION

opposing the motion of Allegiance Telecom et al. for a stay of the *TRO* rules. According to the Commission, limits on fiber-to-the-home (“FTTH”) loop unbundling “in the residential and very small business context” did not extend to DS1 and DS3 capacity loop rules, which “*preserved* access to incumbents’ fiber loops” for “larger business customers.”³⁵

Having ignored the direct language of footnote 956, AT&T and Verizon attempt to prop up their legal theories by referring to sections of the *TRO* that discuss limits on unbundling obligations for DS0 loops and packet switching for those loops.³⁶ The large ILECs suggest that citing from the “Mass Market Loops” section is valid by characterizing the limits on unbundling of mass market loops as pertaining to “fiber-to-the-premises” or “fiber” loops generally.³⁷ However, in the Commission’s rules and in the accompanying *TRO* discussion, loops subject to unbundling limits are specified as *FTTH* loops.³⁸ The Commission makes clear that these FTTH loops are not limited to loops used for residential purposes,³⁹ but the point remains that the type

³⁵ Opposition of the Federal Communications Commission to Allegiance Telecom’s Motion for Stay pending Review, *Allegiance Telecom, Inc., et al. v. F.C.C.*, No. 03-1316, at 2 (D.C. Cir. 2003) (“FCC *Allegiance* Opposition”) (emphasis in original). *See also id.* at 13 (criticizing Allegiance for expressing concern that “the FTTH rule” could be construed to “‘collide head-on’ with other rules” and reiterating that “the *Order* and the associated rules require unbundling of DS1 and above loops”). The brief served as a basis for the D.C. Circuit’s finding that CLECs retain unbundled access to loop alternatives in the ILEC network that allow them to compete in the broadband market. *See U.S. Telecom Ass’n v. F.C.C.*, 359 F.3d 554, 580 (D.C. Cir. 2004) (“*USTA II*”).

³⁶ *See* AT&T Opposition at 2-3, 4-6, 9-11, 19-20, 26, 29 (citing *TRO* ¶¶ 197, 200, 202, 210, 220, 273, 275, 285-97 in “Mass Market Loops” section, ¶¶ 537-38 in “Packet Switching” section); Verizon Opposition at 2 (citing ¶ 272 in “Mass Market Loops” section). While also citing text in the “Mass Market Loop” section, CenturyLink at least concedes that the *TRO* analysis underlying the fiber-based limits placed on unbundling “focused on loops used to serve mass market customers.” Comments of CenturyLink, WC Docket No. 15-1, GN Docket No. 13-5, at 7 (filed Feb. 5, 2015) (“CenturyLink Opposition”).

³⁷ *See, e.g.*, Verizon Opposition at 2-4; AT&T Opposition at 9-10.

³⁸ *See* 47 C.F.R. § 51.319(a)(3); *TRO* ¶¶ 273-285.

³⁹ *See supra* note 9.

of loop targeted for the additional unbundling limits was one commonly used for service to the home. Such use has never been the case for DS1 or DS3 capacity loops, which are addressed by a different portion of the *TRO*. Both carriers disregard the “Enterprise Market Loops” section that focuses on DS1 and DS3 capacity loops.⁴⁰

Moreover, AT&T misquotes the Commission’s discussion of hybrid loop unbundling in the “Mass Market Loops” section. Specifically, AT&T quotes paragraph 289 of the *TRO* as stating that DS1 and DS3 capacity loop unbundling ““was *limited* to a complete transmission path over [the ILEC’s] TDM networks.””⁴¹ However, the actual text of the *TRO* never says unbundling for DS1 and DS3 capacity loops “was limited to” TDM connectivity. Instead, the *TRO* merely declares that the Commission expected “a complete transmission path” would be enabled by combining TDM-only hybrid loops with DS1 and DS3 capacity loops, which can be used to provision TDM-based services.⁴²

C. The Commission’s Orders Following the *TRO* Confirm the DS1 and DS3 Capacity Loop Unbundling Framework Set Forth in the *TRO*.

Contrary to assertions of the large ILECs, the Commission’s orders following the *TRO* confirm that the technology-based exceptions to mass market loop unbundling do not extend to rules concerning DS1 and DS3 capacity loops. The Commission in the *Section 271 Forbearance Order* observed that it had “relieved incumbent LECs from the requirement to unbundling the

⁴⁰ AT&T makes one reference to a portion of the *TRO* “Enterprise Market Loops” section discussing OCn loops. See AT&T Opposition at 19 (citing *TRO* ¶ 315). Verizon never cites any text from the “Enterprise Market Loops” section.

⁴¹ AT&T Opposition at 11 (emphasis added).

⁴² See *TRO* ¶ 289. AT&T also trims the same sentence in the *TRO* without any ellipses marking the omission. AT&T Opposition at 11 (emphasis added). The omitted text explains that the complete transmission path enabled by DS1 and DS3 capacity loops is needed “to address the impairment we find that requesting carriers currently face.” *TRO* ¶ 289.

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next generation, packetized capabilities of their hybrid loops for the provision of broadband services *to the mass market*.⁴³ Likewise, the Commission in the *MDU Reconsideration Order* affirmed that the FTTH unbundling relief in the *TRO* only extended to “loops serving mass market customers.”⁴⁴ The Commission in that Order merely shifted predominantly residential multiple dwelling units (“MDUs”) from being governed by the high-capacity loop rules to being governed by the mass market loop rules, without altering the essential framework of the *TRO* and Section 51.319. If, as the large ILECs have claimed, the FTTH unbundling restrictions adopted in the *TRO* apply to all fiber loops and not just mass market loops,⁴⁵ the Commission would have had no need to issue a *reconsideration order* to apply FTTH rules to fiber high-capacity loops serving MDUs that are predominantly residential.

As recognized by ITTA, the *Section 271 Forbearance Order* “later forbore from enforcing the requirements of Section 271 with regard to broadband elements, including FTTH and FTTC loops, the packetized functionality of hybrid loops, and packet switching, that it had relieved from unbundling in the *Triennial Review Order* and subsequent orders.”⁴⁶ ITTA, however, failed to mention that the *Section 271 Forbearance Order* also recognized that CLECs could “still obtain access to network elements under section 251 to serve business customers”—including “network elements to compete in the broadband market.”⁴⁷

⁴³ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, FCC 04-254, 19 FCC Rcd. 21,496, 21,500, ¶ 6 n.24 (2004) (“*Section 271 Forbearance Order*”) (emphasis added).

⁴⁴ *MDU Reconsideration Order* ¶ 2.

⁴⁵ See, e.g., AT&T Opposition at 10-11.

⁴⁶ ITTA Opposition at 4 n.12.

⁴⁷ *Section 271 Forbearance Order* ¶ 22 n.68; *id.* at ¶ 26.

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Nor did the *TRRO* alter the fundamental structure of the unbundling rules.⁴⁸ In the *TRRO*, the Commission reviewed its high capacity loop impairment determinations from the *TRO* in light of the D.C. Circuit’s decision in *USTA II*.⁴⁹ The Commission instituted new impairment determinations with respect to DS1 and DS3 capacity loops and dark fiber—setting wire center-based business line and collocator thresholds for DS1 and DS3 impairment, limiting the quantities of unbundled DS1 and DS3 capacity loops that could be requested to a single building, and holding that competitive providers were not impaired without access to dark fiber.⁵⁰ The Commission emphasized that the availability of unbundled DS1 and DS3 capacity loops ameliorated any impairment due to lack of access to dark fiber;⁵¹ this analysis would have made little sense if those DS1 and DS3 capacity loops were to become unavailable when provided over lit fiber.

Furthermore, in the *TRRO*, the Commission made clear that it was not applying the “at a minimum” factors that led to its decisions in the *TRO* to exclude packetized and fiber mass-market loops (other than a 64 kbps voice channel in some circumstances) from mandatory unbundling requirements.⁵² Had the Commission wanted to apply Sections 51.319(a)(2) and (3)

⁴⁸ *TRRO* ¶ 184.

⁴⁹ *USTA II*, 359 F.3d at 565-68.

⁵⁰ *TRRO* ¶¶ 178-181 (DS1 capacity loops), ¶¶ 174-177 (DS3 capacity loops), ¶¶ 182-185 (declining to require unbundling of dark fiber loops).

⁵¹ *See TRRO* ¶ 184 (noting that “where self-deployment and/or competitive wholesale procurement of DS1- and DS3-capacity loops is not economic, such facilities remain available to requesting carriers on an unbundled basis, greatly diminishing the burdens placed on requesting carriers in the absence of unbundled dark fiber loops”).

⁵² *Compare TRRO* ¶¶ 166, 79 nn.462 and 226 (stating that the Commission “did not undertake an ‘at a minimum’ analysis of factors other than impairment with respect to high-capacity loops” for reasons similar to unbundled transport, which the Commission found “were already widely deployed by incumbent LECs and will necessarily . . . be utilized in conjunction with . . . other competitor-owned facilities”) *with TRO* ¶ 286 (setting out the

to DS1 and DS3 loops, it clearly could have done so—but to do so it would have had to apply the additional factors that it expressly said it was not applying. Thus, the *TRRO* expressly reaffirms that the Commission intended for unbundled DS1 and DS3 capacity loops to continue to be available to competitors in places where the ILEC has deployed fiber facilities and/or IP services, and did not intend Sections 51.319(a)(4) and (5) to be modified by the restrictions in Sections 51.319(a)(2) and (3).

Given the separate regulatory treatment of mass market loops, which has been consistent throughout the Commission’s orders since the *TRO*, Windstream’s petition would not make “the Commission’s decision not to require unbundling of packet switched features . . . a nullity” as AT&T alleges.⁵³ This limit would still apply, as it always has, to mass market loops, but not to high-capacity DS1 and DS3 loops.

D. The *FTTC Reconsideration Order* Is Consistent with, Rather than Negates, Other Commission Decisions.

Verizon relies heavily on the Commission’s 2004 *Fiber to the Curb* (“*FTTC*”) *Reconsideration Order* when attempting to support its assertion that ILECs are not required to unbundle DS1 and DS3 capacity loops over their next-generation networks that lack TDM capabilities.⁵⁴ The large ILEC claims the decision altered the *TRO*’s fundamental distinction between mass market loop rules and high-capacity loop rules. But that is not the case.

The *FTTC Reconsideration Order* actually reaffirmed the delineation between mass market and high-capacity loop rules. In that decision, the Commission recognized that the *TRO* adopted the “greatest unbundling relief for dark or lit fiber loops serving mass market customers

additional factors considered with respect to mass-market loop unbundling).

⁵³ AT&T Opposition at 8.

⁵⁴ See Verizon Opposition at 3-4. See also CenturyLink Opposition at 7 n.16.

that extend to the customer’s premises (known as fiber-to-the-home or FTTH loops).”⁵⁵ The Commission also made clear that its only change to this regime was to extend limits on unbundling for mass market FTTH deployments to “*mass market* FTTC deployments.”⁵⁶ Indeed, the *FTTC Reconsideration Order* qualified its unbundling limitation by referencing the term “mass market” a total of 15 different times in the 12 pages comprising the *Order*.⁵⁷ The words “DS1” and “DS3,” in contrast, never appear in the decision text.

Verizon rests its strained legal theory on two paragraphs describing when an ILEC must make routine network modifications to comply with unbundling rules.⁵⁸ In particular, Verizon places great weight on footnote 69 text observing that network modification rules “do not apply to FTTH or to FTTC loops,” because these rules “only apply where the loop transmission facilities are subject to unbundling.”⁵⁹ Footnote 69 and the two paragraphs accompanying this footnote, however, do not speak to DS1 and DS3 capacity loops. This text only addresses FTTH and FTTC loops, and pursuant to the basic framework established in the *TRO* (which the *FTTC Reconsideration Order* affirms), FTTH and FTTC loops are mass market loops.⁶⁰ Nothing in the

⁵⁵ *FTTC Reconsideration Order* ¶ 6.

⁵⁶ *Id.* ¶ 2 (“In the *Triennial Review Order*, the Commission limited the unbundling obligations imposed on *mass market* FTTH deployments to remove disincentives to the deployment of advanced telecommunications facilities in the mass market. We find here that these policy considerations are furthered by extending the same regulatory treatment to incumbent LECs’ *mass market* FTTC deployments.”) (emphasis added).

⁵⁷ *Id.* ¶¶ 2, 5, 6, 9, 12-17.

⁵⁸ See Verizon Opposition at 1, 4-5 (citing only ¶¶ 20-21 and accompanying n.69 from the *FTTC Reconsideration Order*).

⁵⁹ See *FTTC Reconsideration Order* ¶ 21 n.69.

⁶⁰ See generally *TRO* § VI.A.4.a.(v) (listing “FTTH Loops” and “Hybrid Loops” as “mass market loops” subject to “specific unbundling requirements”). See also *id.* ¶ 325 n.956 (noting that “DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops,” and “the unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops

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FTTC Reconsideration Order indicates that the decision intended to use its description of routine network modification obligations to expand the category of mass market loops to encompass DS1 and DS3 capacity loops. This omission may be why Verizon, in quoting the footnote 69, felt compelled to replace “FTTH or FTTC loops” in the Commission’s text with “FTT[P] loops”—a modification that suggests the Commission’s text is closer to Verizon’s desired reading than is actually the case.⁶¹

Verizon also attempts to bootstrap the *FTTC Reconsideration Order* to the Eighth Circuit’s 1997 decision in *Iowa Utilities Board v. FCC*.⁶² (AT&T cites the *Iowa Utilities Board* case in a similar way.)⁶³ However, the large ILECs’ analysis of the case transparently misapplies the Eighth Circuit’s opinion regarding the limitations of Section 251(c)(3). The decision is, in fact, consistent with Windstream’s petition. In stating that unbundling obligations apply only to an ILEC’s “existing network,” the Eighth Circuit was specifically addressing the Commission’s requirement at that time that ILECs provide “access to such elements at levels of quality that are superior to those levels at which the incumbent LECs provide these services to themselves, if requested to do so by competing carriers.”⁶⁴ In rejecting this rule, the Eighth Circuit reasoned that Section 251 does not compel an ILEC to provide access to elements on “a yet unbuilt superior” network *at the time that the request is made*, because the ILEC is not providing that level of quality “to itself.”⁶⁵ The Eighth Circuit’s analysis is consistent with Windstream’s

typically used to serve mass market customers.”).

⁶¹ See Verizon Opposition at 4.

⁶² See *id.* at 3.

⁶³ See AT&T Opposition at 15-17.

⁶⁴ *Iowa Utils. Bd.*, 120 F.3d at 812.

⁶⁵ *Id.* at 812 (“Because the Commission’s rule requires superior quality interconnection when requested, the rule is not supported by the Act’s language.”).

position and with the current DS1/DS3 capacity loop unbundling requirements, which *do not* obligate ILECs to upgrade their facilities at the request of competitive providers, and *do not* require ILECs to provide unbundled access to elements that perform at a level superior to those that the ILECs provide to themselves.⁶⁶ The rules do, however, require unbundling of these facilities once the ILEC is providing the facilities to itself.

E. Judicial Precedent Supports Adoption of Windstream’s Petition.

As with *Iowa Utilities Board*, the other judicial precedent cited by the large ILECs provides support for, rather than undermines, Windstream’s petition.⁶⁷ The Commission should subject the large ILECs’ characterizations of these decisions to close scrutiny.

The large ILECs’ review of *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission* includes misstatements and has material omissions.⁶⁸ In particular, Verizon describes the Sixth Circuit decision as “[holding] that § 51.319(a)(3) applies to *all* customers and, therefore, ILECs have no obligation to . . . ,”⁶⁹ but that simply is not the case. In fact, the Sixth Circuit only found that DS1 and DS3 capacity loop unbundling obligations are limited when fiber loops are deployed in greenfield areas. Verizon skirts around this significant qualification by selectively quoting from the decision; in each

⁶⁶ Windstream’s position also is consistent with the Commission rule defining the scope of ILECs’ obligation to perform routine network modifications for requesting carriers. Pursuant to 47 C.F.R. § 51.319(a)(7)(ii), “Routine network modifications include, but are not limited to, . . . attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer.” This rule does not require the ILEC to provision capacity over new IP electronics; a competitive carrier, instead, only has the right to access ILEC-provisioned capacity in the format selected by the ILEC “for its own customer.” Likewise, the rule provides that required routine network modifications “do not include the construction of a new loop.” 47 C.F.R. § 51.319(a)(7)(ii).

⁶⁷ See AT&T Opposition at 11; Verizon Opposition at 3.

⁶⁸ *BellSouth*, 669 F.3d 703 (6th Cir. 2010).

⁶⁹ Verizon Opposition at 3 n.4 (emphasis added). See also AT&T Opposition at 11.

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instance where it quotes the Sixth Circuit, Verizon cuts the portion of the sentence that qualifies the determination as only applying to “greenfield areas.”⁷⁰

And AT&T and Verizon both ignore the import of this decision for unbundling of fiber facilities in *non*-greenfield areas. Specifically the large ILECs fail to mention that the Sixth Circuit did not overturn the underlying District Court’s holding that “an incumbent LEC is still obligated to unbundle DS1/DS3 loops consistent with 47 C.F.R. § 51.319(a)(4) and (5), regardless of the loop medium employed” in all other areas.⁷¹ This far broader finding supports Windstream’s request that the Commission confirm that DS1 and DS3 capacity loop unbundling obligations are not affected by technology transitions.

The position taken by the Petitioner in *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission* also is striking. Notably, BellSouth expressly conceded at the Sixth Circuit that “the greenfield exclusion does not swallow the general rule of DS1 and DS3 unbundling.”⁷² A large ILEC predecessor to AT&T, therefore, expressly contradicted AT&T’s present claim that DS1 and DS3 capacity loop unbundling obligations do not apply when the ILEC merely migrates from TDM to IP.

Even in “greenfield” areas, the Sixth Circuit’s decision is not binding on the Commission. The Commission was not a party in that case, and was not asked to address

⁷⁰ Verizon Opposition at 3 n.4.

⁷¹ *BellSouth*, 693 F. Supp. 2d at 719 (defining greenfields as areas “where fiber facilities are the first and only telecommunications facilities to be deployed by the incumbent LEC”). It is particularly surprising that neither Opposition paid any mind to this aspect of the case, given the parties involved in the Sixth Circuit Court proceeding: BellSouth now is an AT&T operating entity, and the law firm representing BellSouth in the Sixth Circuit case was responsible for preparing Verizon’s Opposition to Windstream’s Petition.

⁷² See Brief of AT&T Kentucky, *BellSouth Telecomms., Inc. v. Ky. Pub. Serv. Comm’n*, Case Nos. 10-5310, 10-5311, at 29-30 (6th Cir. Aug. 4, 2010).

unbundling obligations with respect to greenfield fiber DS1 and DS3 capacity loops.⁷³ The Commission, not the Sixth Circuit, has the last word in interpreting the Commission’s rules.⁷⁴ And when reviewing the Court’s decision now, the Commission could observe that the Sixth Circuit’s holding placed inappropriate weight on select text of the *TRO*, while insufficiently heeding the plain language of the Commission’s rules and the Commission’s further elaboration on its intent in the text of the *TRRO*, the decision adopting the rules in place today.⁷⁵

⁷³ The Sixth Circuit asked the FCC to address the following questions as *amicus curiae*:

“Whether, upon request by a competitive LEC, a state regulatory commission may require a Bell operating company to commingle unbundled network elements provided under § 251 with elements provided under § 271. 47 C.F.R. § 51.309(e) requires incumbent LECs to ‘permit a requesting telecommunications carrier to commingle an unbundled network element . . . with wholesale services obtained from an incumbent LEC,’ and 47 C.F.R. § 51.309(f) requires incumbents to ‘perform the functions necessary to commingle an unbundled network element . . . with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.’ Are § 271 elements ‘wholesale services’ and ‘facilities or services . . . obtained at wholesale’ such that a state regulatory commission may require them to be commingled with § 251 elements? *See Nuvox Commc’ns, Inc. v. BellSouth Commc’ns, Inc.*, 530 F.3d 1330 (11th Cir. 2008).”

Brief of the Federal Communications Commission, 2011 WL 6146329, at 1-2.

⁷⁴ *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency’s “interpretation of [its own regulations] is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.”) (internal quotations omitted); *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 502 (3d Cir. 2008) (“Though *Brand X* addresses the deference owed to agencies’ statutory interpretations, there is “no reason why these principles should not apply equally to the interpretation of a regulation.”). *See also In re Lovin*, 652 F.3d 1349, 1354 (Fed. Cir. 2011) (“Thus, we are obligated to follow our earlier judicial decisions—in the face of a new agency interpretation [of its own regulation]—only if we had found that the language in that decision “unambiguously foreclose[d]” the Board’s interpretation”).

⁷⁵ *Compare BellSouth*, 669 F.3d at 712 (citing the Commission’s “rationale for exempting [mass market FTTH] greenfield loops from the unbundling requirement” as expressed in the *TRO* as “further evidence” of the Commission’s intent with respect to “DS1/DS3 regulations”) *with TRRO* ¶ 166 (explaining different rationale specifically for DS1/DS3 high-capacity loops unbundling test, which is based on whether an “area’s revenue opportunities and the presence of extensive competitive fiber deployment indicate the feasibility of competitive provision at the relevant capacity level”).

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Moreover, AT&T misconstrues the import of *United States Telecom Association v. FCC* (“*USTA II*”).⁷⁶ AT&T asserts that the D.C. Circuit upheld a “bright line” in which “newer technology” like fiber is broadly exempt from unbundling requirements.⁷⁷ But this characterization overlooks the Commission’s brief in the case and the Court’s findings in response, which show that what the Commission was addressing, and the Court upheld, were the limitations on unbundling of mass market loops. In its brief before the D.C. Circuit, the Commission criticized Petitioner Allegiance Telecom for expressing concern that “the FTTH rule could be construed to ‘collide head-on’ with other rules,” because “in fact, the Commission expressly preserved CLEC access to DS1 and DS3 loops at TELRIC rates.”⁷⁸ This brief, which was cited by the D.C. Circuit when rendering its decision, served as a basis for the Court’s finding that CLECs retain unbundled access to ILEC loop alternatives that allow CLECs to compete in the broadband market.⁷⁹ The D.C. Circuit decision thereby upheld the basic structure of the loop unbundling rules set forth in the *TRO*, which distinguished rules for mass market loop types from high-capacity loop types in all areas.⁸⁰

Finally, AT&T and Verizon lean on the Seventh Circuit’s decision in *Illinois Bell Telephone Company v. Box*,⁸¹ but this decision is irrelevant to the issues raised by Windstream’s petition.⁸² The Court in this case merely looked at unbundling limits for mass market loops

⁷⁶ See AT&T Opposition at 5 (citing *USTA II*).

⁷⁷ See AT&T Opposition at 4-5 (quoting *TRO* ¶ 293).

⁷⁸ FCC *Allegiance* Opposition at 13 (D.C. Cir. 2003).

⁷⁹ *USTA II*, 359 F.3d at 580.

⁸⁰ See *id.* at 583-85.

⁸¹ *Ill. Bell Tel. Col, Inc. v. Box*, 526 F.3d 1069 (7th Cir. 2008).

⁸² See AT&T Opposition at 11; Verizon Opposition at 3 n.4.

(specifically, those provided for in Sections 51.319(a)(2) and (3)), and found that these limits apply to all customers using mass market loops, not just mass market customers. While correctly noting that *Illinois Bell* states that Section 51.319(a)(3) “as written is unqualified,”⁸³ Verizon fails to mention that the question before the Court did not extend beyond treatment of mass market loops, and the words “DS1” and “DS3,” as well as the subsections of Section 51.319 that focus on DS1 and DS3 capacity loop unbundling obligations, are never mentioned in the decision. Thus, it is quite a leap for Verizon to cite *Illinois Bell* as holding that ILECs “have no obligation to unbundle DS1 and DS3 FTTP loops.”⁸⁴ In addition, Windstream—contrary to the suggestion of AT&T⁸⁵—is not claiming unbundling rules for DS1 and DS3 capacity loops are different for different classes of customers. Windstream’s view is that these unbundling obligations, consistent with the Seventh Circuit decision pertaining to mass market loops, apply to all customers served by DS1 and DS3 capacity loops.

F. The Large Incumbents’ Process Concerns Are Inapplicable, Because Windstream’s Petition Does Not Seek to Change Commission Rules.

Grasping for straws and apparently hoping to stall any Commission action, AT&T and Verizon raise a variety of process-related oppositions to Windstream’s Petition, none of which is applicable. Verizon asserts that the Commission could not now “amend its rules to impose new unbundling obligations on packet-switched networks without first making an impairment finding based on substantial evidence in a new record.”⁸⁶ AT&T makes similar points⁸⁷ and throws in an

⁸³ Verizon Opposition at 3 n.4 (*quoting Ill. Bell*, 526 F.3d at 1073).

⁸⁴ *See id.*

⁸⁵ *See* AT&T Opposition at 10 (implying that Windstream is denying that, as the Commission stated in ¶ 196 n.623 of the *TRO*, “the loop unbundling rules . . . apply with equal force to every customer served by that loop type”).

⁸⁶ Verizon Opposition at 6.

⁸⁷ *See* AT&T Opposition at 12-15 (asserting that Windstream’s Petition is inconsistent with the

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argument that granting Windstream’s Petition would effect a taking in violation of the Fifth Amendment.⁸⁸ All of these arguments are red herrings. Windstream is not asking the Commission to establish any new rules or obligations; it is merely seeking confirmation of ILECs’ existing obligations, as set forth in Section 251(c)(3) and Sections 51.319(a)(4) and (5), in light of the large ILECs’ claims that these obligations no longer apply with a change from copper to fiber or TDM-based to IP-based transmission.

It is the large ILECs that appear to be seeking a change in the existing unbundling rules, and as AT&T notes, the “only way the Commission could even consider” these changes “is by conducting a new rulemaking and impairment analysis”⁸⁹ To the extent AT&T believes a loss of unbundling “will have no detrimental effect on wholesale customers or their end users,”⁹⁰ AT&T is free to file a petition for forbearance of the existing rules or to request a new examination of impairment that would supersede the findings in the *TRO* and *TRRO*. Either move would require a separate proceeding, in which the burden of proof would fall on the large ILECs to demonstrate that modification of the rules is warranted.⁹¹

requirements of the Administrative Procedure Act, because it asks the Commission to adopt a new rule without a notice and comment procedure); 18-21 (claiming that “the only way the Commission could even consider the changes advocated by Windstream is by conducting a new rulemaking and impairment analysis”).

⁸⁸ *Id.* at 29-30.

⁸⁹ *Id.* at 18.

⁹⁰ *Id.* at 19.

⁹¹ *See* 47 U.S.C. § 251(d)(2)(B) (requiring the Commission, in determining what network elements should be unbundled, to consider, at a minimum, whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer”); 47 U.S.C. § 160(a) and (b) (requiring the Commission to forbear from a statutory provision or regulation if it determines that enforcement is not necessary to ensure that the telecommunications carrier’s charges, prices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; enforcement is not necessary to protect consumers; forbearance is consistent

IV. POLICY CONCERNS ADVANCED BY THE LARGE INCUMBENTS ARE SIMILARLY UNAVAILING.

Weak on the law, the large ILECs seek to pound on the policy table. But the Commission should set aside this rhetoric as well, as it is unfounded. First, the large ILECs argue that Windstream seeks to require them to continue to provide TDM services. That is simply incorrect: Windstream seeks to have the large ILECs continue to provide DS1 and DS3 capacity loops, irrespective of TDM or IP format. Second, it is the large ILECs' positions, not Windstream's straightforward reading of Sections 51.319(a)(4) and (5), that would suppress network investment and innovation. CLECs' ability to access UNEs to connect to some

with the public interest; and forbearance will promote competitive market conditions).

Thus far, the large ILECs have fallen far short of meeting these showings. In support of its position that sufficient alternatives exist, AT&T references (1) the availability of non-retired copper loops and sub-loops, (2) CLEC access to ILEC "collocation space, poles, conduits and rights of way," and (3) the possible sale of its retired copper loops to CLECs. *See* AT&T Opposition at 19-20 n.88. However, (1) AT&T has acknowledged it is seeking to retire copper with little notice, *see* Comments of AT&T Services, Inc. at 26-41, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, (filed Feb. 5, 2015) ("AT&T Comments"), (2) CLECs have to pay for access to collocation space and other network infrastructure, and usually have far fewer end user locations over which to spread their deployment costs, and (3) in its two paragraphs on copper sale in its *Technology Transitions NPRM* comments (*see* AT&T Comments at 41-42), AT&T still sheds no light on how its copper sale proposal could be made technically, operationally, or economically feasible. AT&T further notes that "[n]either Windstream nor other CLECs could seriously contend that they suffer disadvantage relative to the ILECs in purchasing and deploying their own electronics." AT&T Opposition at 20. Indeed, Windstream does not argue this point; Windstream has noted repeatedly that electronics have very little impact on overall network costs. These cost conditions help explain why Windstream and other CLECs remain impaired in building out connections to lower-bandwidth locations, whether in an IP or TDM format.

CenturyLink alleges that competitive overbuilding is a viable alternative in most instances, because "[a]ll competing providers face the same entry barriers" and "[a]ll competing providers have the same revenue opportunities." *See* CenturyLink Opposition at 8-17. However, these claims are belied by CenturyLink's own investment strategy—focusing fiber deployments in its ILEC footprint and leasing in its CLEC areas. *See id.* at 11 (noting that "outside its ILEC footprint . . . CenturyLink must rely on other wholesale providers to serve its customers . . .").

locations enables CLECs to build fiber to other locations, especially for serving multilocation customers. Third, CLECs' use of unbundled loops has significantly enabled retail Ethernet competition. Finally, the Commission expressly relied on the presence of UNEs in forbearing from ex ante price regulation of packet-switched special access services—reliance that would collapse if the large ILECs could eliminate DS1 and DS3 capacity loop unbundling whenever they transition from copper to fiber or from TDM to IP.

A. Contrary to Large Incumbents' Claims, Granting Windstream's Petition Would *Not* Require Continuation of TDM Technologies.

The large ILECs attempt to obscure the issue—and cast CLECs as opposed to progress—by asserting Windstream's petition is seeking that they be required “to maintain legacy and increasingly obsolete TDM capabilities.”⁹² On the contrary, Windstream is fully supportive of the IP transition, does not seek to require ILECs to retain copper or TDM-based technologies, and indeed agrees with Verizon that “the Commission's unbundling rules do not require ILECs to add TDM equipment to their packet-switched networks in order to unbundle TDM network elements”⁹³ As Windstream notes above, granting its petition only means that the ILEC would need to continue to provide DS1 and DS3 *capacity*, at current prices, absent forbearance or a finding of non-impairment. The format of that capacity is left to the ILEC's discretion; it may deploy fiber or IP-based technologies, or continue to provide copper or TDM-based technologies, or it may do both, as it sees fit. Likewise, in its accompanying response to the

⁹² AT&T Opposition at 15. *See also* Verizon Opposition at 6 (asserting that Windstream is asking the Commission to “declare that ILECs have an obligation to add TDM capabilities to their packet-switched networks in order to continue to unbundle DS1 or DS3 loops”); CenturyLink Opposition at 19 (claiming that “the unbundling mandate Windstream seeks would require CenturyLink and other ILECs to incorporate DSN functionality they would not otherwise include in their fiber facilities”).

⁹³ Verizon Opposition at 5-6.

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Commission's *Notice of Proposed Rulemaking*, Windstream does not oppose discontinuation of TDM-based services, and supports ground rules to facilitate the consideration of such discontinuation requests and transition of competitors and their customers to IP services.⁹⁴ The large ILECs' discussions of burdens to maintain TDM specifications of DS1 and DS3 services, therefore, are inapposite.⁹⁵

CenturyLink's analysis of alleged TELRIC cost increases resulting from the grant of Windstream's petition likewise is misguided, because it is based on the inaccurate assumption that granting the Petition would mean ILECs would have to add TDM-based equipment to their packet-based networks.⁹⁶ With this assumption corrected, a TELRIC cost analysis likely would produce the opposite result. Because the cost of electronics to provide DS1 and DS3 capacity has decreased over the past decade, and because it is generally believed that fiber networks are more resilient and less expensive to maintain than copper, Windstream's experience indicates there is good cause to believe that a reexamination of TELRIC pricing would result in a decrease in TELRIC rates for DS1 and DS3 capacity provisioned over fiber and/or IP.

B. The Large Incumbents' Policy Positions Would Discourage, Not Encourage, Further Network Investment.

The large ILECs correctly note that CLECs have made significant investments in their own network infrastructure.⁹⁷ However, this investment has occurred largely in the network backbone rather than in last-mile connections to the customer, because competitors cannot make an economic case for overbuilding the latter ILEC facilities in most instances. Indeed, the

⁹⁴ Comments of Windstream Corporation, GN Docket No. 13-5, WC Docket No. 05-25 and 15-1, RM-11358 and 10593 (filed Feb. 5, 2015).

⁹⁵ See AT&T Opposition at 5; Verizon Opposition at 5.

⁹⁶ See CenturyLink Opposition at 17-18.

⁹⁷ See AT&T Opposition at 23-25; CenturyLink Opposition at 9.

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number of buildings where CLECs have been able to deploy their own last-mile connections is miniscule compared to the number served by the ILECs. For example, a Current Analysis report cited by CenturyLink shows that Level 3 has approximately 30,000 lit buildings, and XO has approximately 4,000;⁹⁸ in contrast, AT&T has extended fiber to 725,000 business locations and plans to extend fiber to one million businesses in multi-tenant office buildings by the end of 2015.⁹⁹ CenturyLink, while not providing a lit-building number, states that 233,000 businesses will be within 500 feet of its new fiber builds.¹⁰⁰ These conditions lead the Current Analysis report to conclude that “[b]usiness network services providers need access to survive, and there’s a real threat of getting squeezed on margins when reaching buildings through third-party providers.”¹⁰¹

CLECs are able to invest substantial sums in their own fiber networks only because they have a meaningful ability to connect to individual customers in the last mile, and continued CLEC investment will be thwarted if the Commission backs away from its longstanding last-mile policies designed to address this enduring bottleneck. As further detailed in Windstream’s reply comments regarding the *Technology Transitions NPRM*, it is no less true today than in the past that in most cases the ILEC offers the only economic means of accessing lower-bandwidth customers.¹⁰² *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

⁹⁸ Brian Washburn, Current Analysis, U.S. WAN Services Update: A Look at Access Fiber, SDN, NFV, APIs and Automation, at 2-3 (Jan. 22, 2015) (“Current Analysis Report”).

⁹⁹ See *id.*; AT&T Opposition at 23.

¹⁰⁰ See Current Analysis Report at 2-3.

¹⁰¹ *Id.* at 6.

¹⁰² Reply Comments of Windstream Services, LLC, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 14-16 (filed March 9, 2015) (“Windstream Reply Comments to the *Technology Transitions NPRM*”).

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[REDACTED] ***END HIGHLY CONFIDENTIAL***¹⁰³ Further, when Windstream actively sought to diversify its wholesale suppliers by ***BEGIN HIGHLY

CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***.

These fundamental difficulties in self-deploying last-mile facilities as a competitive provider are likely why even the large incumbents focus their last-mile fiber deployments in their ILEC service areas. As noted in their press releases, AT&T's much touted Project Velocity IP is focused on its 22-state ILEC footprint, while Verizon's FiOS network investments similarly are

¹⁰³ These Windstream-specific statistics ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** In 2013 ILECs and their affiliates made up nearly 82 percent of the local wholesale transport market, which includes last-mile connectivity for wireless cell towers, commercial building connections, and data center and aggregation point connections. ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report*, Sept. 2014 (estimating market share based on 2013 data). AT&T, Verizon, and CenturyLink alone hold 70 percent of this market. *Id.* Since commercial buildings usually are in brownfield areas where the ILEC has a pronounced first mover advantage, it follows that the ILEC share of last-mile access to just commercial buildings is even higher. Indeed, ILECs and their affiliates held ***BEGIN CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END CONFIDENTIAL*** ATLANTIC-ACM, *Local Wholesale Transport Analysis*, Second Quarter 2014, Executive Summary, Oct. 2014 (estimating market share based on 2013 data).

targeted inside its ILEC footprint.¹⁰⁴ Furthermore, CenturyLink, while asserting that “[t]here are no ‘incumbents’” in the carrier-and enterprise-grade Ethernet market,¹⁰⁵ admits that it must “rely on other wholesale providers” for last-mile access outside its ILEC footprint.¹⁰⁶ And if CLEC investments are further hindered, ILECs also will face less competitive pressure to invest in their ILEC networks, so investment across the communications ecosystem will suffer.¹⁰⁷

C. CLECs’ Access to Unbundled Loops Has Enabled Retail Ethernet Competition Cited by the Large Incumbents.

Despite large ILECs’ assertions to the contrary, access to unbundled DS1 and DS3 capacity loops continues to be important to CLECs and their customers and has enabled the retail Ethernet competition that is relied on by the large ILECs in their deregulatory advocacy. In particular, the large ILECs emphasize that business customers of all sizes are voluntarily trading in ILEC-provided DSx services for Ethernet, thus implicitly questioning the import of continued

¹⁰⁴ See, e.g., AT&T News Release, “AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services” (Nov. 7, 2012) (discussing deployments in “AT&T’s 22-state wireline service area”), available at <http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode> (last visited March 7, 2015); Verizon Public Policy Blog, “One Powerful Decade: FiOS Turns 10! (Sept. 5, 2014) (noting that FiOS deployments are limited to Verizon’s ILEC footprint of “12 states and the District of Columbia”), available at <http://publicpolicy.verizon.com/blog/entry/one-powerful-decade-fios-turns-10> (last visited March 7, 2015). See also AT&T Opposition at 23 (noting Project Velocity IP is focused on “its 21 state [ILEC] footprint”).

¹⁰⁵ CenturyLink Opposition at 14.

¹⁰⁶ *Id.* at 11.

¹⁰⁷ See Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Jan. 14, 2013) (“CLECs are leading providers of Ethernet services, and ILECs have ‘respond[ed] with further investments in their own Ethernet offerings.’”) (internal citation omitted).

competitive access to unbundled DS1 and DS3 capacity loops.¹⁰⁸ However, these arguments ignore the continued role of UNEs in the growth of the retail Ethernet market.

Windstream, like CenturyLink, “plans to gradually transition its TDM networks and services to an all-Ethernet network,”¹⁰⁹ but UNEs are an important part of the strategy in getting to this end point. First, Windstream and other CLECs leverage bonded DS1 connections to provide Ethernet service of up to 12 Mbps, so retail customer demand for Ethernet services is actually propelling additional wholesale demand for DS1s. This is a key reason why *wholesale* demand for DS1 connectivity remains substantial, even though retail demand for Ethernet services is growing significantly.¹¹⁰ DS1 inputs remain critical for locations where demand does not justify competitive overbuilding. Second, when a multilocation customer (e.g., a school district or chain stores) operates in some buildings where demand does not warrant overbuilding, CLECs supplement their own network connections with leased UNE inputs to offer the customer a comprehensive solution encompassing all its operations. UNE inputs thereby help unlock opportunities for CLEC investments to serve multilocation customers. Third, as Windstream has

¹⁰⁸ See, e.g., Verizon Opposition at 6-7; CenturyLink Opposition at 3-4, 12-13; AT&T Opposition at 23-25. If, as the large ILECs suggest, there is little demand for unbundled DS1 capacity loops, it begs the question why it is such a burden for the large ILECs to offer them.

¹⁰⁹ CenturyLink Opposition at 18.

¹¹⁰ According to Atlantic ACM, *****BEGIN CONFIDENTIAL***** [REDACTED]
[REDACTED] *****END CONFIDENTIAL*****

See ATLANTIC-ACM, Local Wholesale Transport Analysis, Second Quarter 2014, Executive Summary, Oct. 2014 (estimating market share based on 2013 data). Windstream-specific data similarly underscore the continuing importance of these inputs: DS1 and DS3 connectivity currently constitutes approximately *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY CONFIDENTIAL***** of Windstream’s total annual expense on last-mile access. See also TeleGeography Local Access Pricing Service, *2014 Local Access Market Summary*, at 1 (finding “[s]maller legacy TDM circuits, T-1s in the U.S. & Canada, and E-1s elsewhere in the world, remain the most prominent circuit types globally”).

noted in the past and as recognized by the Commission in the *TRRO*, the existence of DS1 and DS3 UNEs provides CLECs leverage in negotiating purchases of other last-mile inputs used for retail Ethernet services.¹¹¹

Finally, as discussed at more length in Windstream’s reply comments with respect to the *Technology Transitions NPRM*, the Commission’s existing forbearance for the large ILECs from tariffing and ex ante price regulation of certain packet-switched special access services was expressly premised on the availability of unbundled DS1 and DS3 capacity loops, in addition to DS1 and DS3 tariffed special access services.¹¹² The large ILECs now seek to vaporize those underlying safeguards—without any further forbearance analysis. There is simply no reason for the Commission to indulge such a shell game.

V. CONCLUSION

The Commission rightly has stated that it is determined to ensure that the Communications Act’s fundamental values of competition, consumer protection, universal service, and public safety “are not lost merely because technology changes.”¹¹³ Grant of Windstream’s petition is an essential component of protecting competition, and thereby consumers, as networks transition from copper to fiber and TDM to IP transmissions. The Commission’s existing unbundling rules for DS1 and DS3 capacity loops do not change as the underlying networks change transmission medium or protocol. The Commission should reaffirm

¹¹¹ See, e.g., Letter of Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, WC Docket No. 05-25, RM-10593, at 2 (filed Oct. 9, 2014) (citing *TRRO* at 2629 ¶ 173 n.475).

¹¹² See Windstream Reply Comments to the *Technology Transitions NPRM*, at 21-22.

¹¹³ *Technology Transitions NPRM* ¶ 1.

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this basic and straightforward reading of its rules, and terminate the uncertainty that the large ILECs have sought to inject.

Respectfully submitted,

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