



March 10, 2015

Errata

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *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 Petition for Declaratory Ruling Seeking to Confirm ILECs' Continued Obligation to Provide DS1s and DS3s on Unbundled Basis After Technology Transitions, WC Docket No. 15-1*

Dear Ms. Dortch:

On March 9, 2015, Reply Comments were filed by Windstream Services, LLC in the above matters. The filing inadvertently failed to include an attachment referenced in the Reply Comments. The only change is to include the referenced attachment, which contains no Confidential or Highly Confidential information. The corrected version is attached and replaces, in its entirety, the version that was filed previously.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata
Counsel to Windstream Services, LLC

Attachments

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Marlene H. Dortch
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Dear Ms. Dortch:

Windstream Services, LLC (“Windstream”) hereby seeks confidential and highly confidential treatment of marked portions of the attached document pursuant to the Protective Order and Second Protective Order in GN Docket Nos. 13-5 and 12-353 and the Modified Protective Order and Second Protective Order in WC Docket No. 05-25 and RM-10593;¹ the

¹ *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket Nos. 13-5 and 12-353, Protective Order, DA 14-272 (rel. Feb. 27, 2014) (IP Transition Protective Order); *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket Nos. 13-5 and 12-353, Second Protective Order, DA 14-273 (rel. Feb. 27, 2014) (IP Transition Second Protective Order); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Modified Protective Order, 25 FCC Rcd. 15168 (2010) (Special Access Modified Protective Order); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, 25 FCC Rcd. 17725 (2010) (Special Access Second Protective Order); *See also Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, DA 12-199 (dated Feb. 13, 2012) (Letter to Donna Epps) (further supplementing the *Second Protective Order*).

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redacted version for public inspection is being filed on ECFS. Highly confidential treatment is required to protect information about Windstream’s wholesale purchases, costs, and expenses and information about Windstream’s future procurement strategies.² Confidential treatment is needed to protect market data attained from proprietary Atlantic ACM research that is not available for public use.³

In addition, pursuant to Sections 0.457 and 0.459(b) of the Commission’s rules, Windstream requests confidential and highly confidential treatment, respectively, for the marked portions of the enclosed submission with respect to RM-11358 and WC Docket No. 15-1.⁴ Windstream asserts the following in support of this request, which concerns materials that are already covered by protective orders in other dockets:

1. Identification of the specific information for which confidential treatment is sought.

Windstream requests confidential treatment of text marked as “confidential” and “highly confidential” in the enclosed submission.

2. Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.

Confidential treatment is requested in conjunction with Windstream’s reply comments in GN Docket No. 13-5, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1, and RM-11358.

3. Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.

The information for which Windstream is seeking confidential treatment includes commercially sensitive information relating to Windstream’s wholesale purchases, costs, and expenses, as well as information about Windstream’s procurement strategies. Windstream also seeks confidential treatment for market data attained from proprietary Atlantic ACM research that is not available for public use. None of this information is available to the general public

² See IP Transition Second Protective Order at Appendix A, numbers 2-3 (declaring eligible for highly confidential treatment “information that discusses in detail . . . future procurement strategies” and “information that provides granular information about a Submitting Party’s current or future costs, revenues, marginal revenues or market share” and “information”); Letter to Donna Epps at 2 (declaring eligible for highly confidential treatment “expenditures, including dollar volumes of purchases of intrastate and interstate DS1 and DS3 services, and expenditures under certain rate structures and discount plans” and “Request for Proposals (‘RFPs’) including responses received to RFPs parties have issued”).

³ See IP Transition Protective Order at 2 (defining “Confidential Information” as information that is not otherwise available from publicly available sources and that is subject to protection under the Freedom of Information Act); Special Access Modified Protective Order at 2 (defining “Confidential Information” as information contained in a Stamped Confidential Document or derived therefrom that is not otherwise available from publicly available sources); 5 U.S.C. § 552(b)(4) (exempting from release under FOIA “trade secrets or commercial or financial information obtained from a person and privileged or confidential”).

⁴ 47 C.F.R. §§ 0.457, 0.459(b).

and disclosure could affect competitive standing in the marketplace. The Commission has recognized that disclosure of information relating to market plans and business strategies can cause substantial competitive harm.⁵

4. Explanation of the degree to which the information concerns a service that is subject to competition.

The information for which Windstream is seeking confidential treatment includes information about its wholesale expenditures, purchases, and procurement strategies, and market data attained from proprietary Atlantic ACM research that is not available for public use.

5. Explanation of how disclosure of the information could result in substantial competitive harm.

Disclosure of this information could hinder Windstream's ability to negotiate commercial agreements and purchase wholesale products and inputs, and could hinder Atlantic ACM's ability to perform its proprietary market research.

6. Identification of any measures taken by the submitting party to prevent unauthorized disclosure.

The information provided includes confidential business information and is treated as such. The information is not ordinarily shared with unauthorized individuals, entities, or other third parties. The market data obtained from proprietary Atlantic ACM research was provided to Windstream with a no-public-use proviso.

7. Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

To the best of Windstream's knowledge, the information for which Windstream is seeking confidential treatment has not been disclosed to the general public or to any particular third parties, unless subject to confidentiality protections.

8. Justification of the period during which the submitting party asserts material should not be available for public disclosure.

Windstream requests that the information remain confidential indefinitely, because its disclosure would negatively affect Windstream's future wholesale purchasing and commercial agreements, and Atlantic ACM's research activity.

9. Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Data subject to this request also would qualify for Exemption 4 of the Freedom of Information Act. Exemption 4 protects information that is (i) commercial or financial; (ii) obtained by a person outside of the government; and (iii) privileged or confidential.⁶

⁵ See *Southwestern Bell Telephone Company, Cost Support Filed Under Request for Confidential Treatment*, CC Docket No. 93-162, 14 FCC Rcd. 987, 990 ¶ 7 (1999).

⁶ See 5 U.S.C. § 552(b)(4); *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979).

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Pursuant to the four Protective Orders, this redacted version of the document is being filed electronically via ECFS. Windstream also is sending two copies each of the confidential version and highly confidential version and a cover letter to the Wireline Competition Bureau's Jonathan Reel (Competition Policy Division) and Marvin Sacks (Pricing Policy Division).

Please contact me if you have any questions or require any additional information.

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

cc: Matthew DelNero
Daniel Kahn

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

In the Matter of)	
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Technology Transitions)	GN Docket No. 13-5
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Carriers)	
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Seeking to Confirm ILEC's Continued)	
Obligation To Provide DS1s and DS3s on)	
Unbundled Basis After Technology)	
Transitions)	

REPLY COMMENTS OF WINDSTREAM SERVICES, LLC

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Transitions)	

REPLY COMMENTS OF WINDSTREAM SERVICES, LLC

I. INTRODUCTION AND SUMMARY

Windstream Services, LLC, for itself and its affiliates (collectively “Windstream”), replies to the comments filed with respect to the Commission’s *Technology Transitions NPRM*.¹ The Commission correctly determined that it must take steps to ensure that the Communications Act’s fundamental core values, including competition and consumer protection, are preserved

¹ *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*” or “*NPRM*”). On February 28, 2015, Windstream Corporation was converted into Windstream Services, LLC, a Delaware limited liability company.

during the transition. As the Commission observed in the *NPRM*, “the Commission’s statutory obligations are not lost or mooted merely because legacy services are discontinued.”²

Yet that is what the large ILECs would have occur. Having obtained forbearance from tariffing and ex ante price regulations for packet-switched special access services—including Ethernet—on the condition that they continue to offer tariffed DS1 and DS3 special access services and unbundled network elements (“UNEs”), the large ILECs now seek to strip retail business service consumers and wholesale purchasers of these alternate options for last-mile connectivity while retaining packet forbearance.³ This bait and switch would leave the ILECs in the position of deregulated monopolists for service to the vast majority of business locations.

Effectively the large ILECs’ plans would unilaterally expand the scope of the prior Commission’s forbearance orders, without filing a petition for forbearance from or waiver of the Commission’s rules. In the large ILECs’ view, the elimination of competition policies automatically flows from their substitution of IP for TDM—without even a pretense of following the statutory forbearance requirements pursuant to Section 10 of the Communications Act. In the post-transition marketplace that the large ILECs envision, they would have an unfettered ability to raise the prices of both wholesale and retail last-mile connections far beyond what is paid today. By raising their competitive local exchange carrier (“CLEC”) rivals’ wholesale costs for all locations at which the CLEC lacks a viable alternative, and thereby forcing the CLECs (as the ILECs’ primary competitors) to increase their retail prices, ILECs can then significantly raise their own retail prices, which no longer would be effectively constrained by the CLECs’ pricing.

² *Id.* ¶ 92.

³ *See, e.g.*, Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, FCC, at 28, GN Docket No. 13-5, et al., Attachment at 11 (filed May 30, 2014); AT&T Proposal for Wire Center Trials, GN Docket Nos. 13-5, 12-353 (filed Feb. 27, 2014).

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Consistent with its packet forbearance orders, the Commission here could simply take the position that, upon discontinuance of TDM-based DS1 and DS3 special access services, packet forbearance will cease. The large ILECs ignore this possibility, and fail to acknowledge that the *NPRM* charts a more moderate course pending the Commission’s overall review of special access pricing and practices. The *NPRM* merely proposes that as a condition of discontinuing the TDM special access facilities that were the precondition for packet forbearance, ILECs at least have to maintain “equivalent wholesale access on equivalent rates, terms and conditions.”⁴ This proposal reasonably seeks to maintain the competitive status quo ante while permitting ILECs to transition to IP services.

Windstream’s proposal for defining equivalent access—which Windstream developed considering the needs of both its ILEC and CLEC operations—remains the best and most workable approach to preserve the benefits of competition for enterprise users, including state and local governments, nonprofits, and small and medium-sized businesses, especially those with multiple locations. This proposal protects enterprise and wholesale purchasers of 50 Mbps or less capacity against large price hikes—potentially of more than 800 percent, based on comparing AT&T’s DS1 tariffs to its published 2 Mbps Ethernet rates in its proposed trial site of Kings Point, Florida⁵—by ensuring that the price per megabit of capacity does not increase, and that price for the lowest level of Ethernet capacity at or above a DS1 level must not exceed the prices of the pre-transition DS1. Windstream’s proposal also precludes unreasonably discriminatory schemes in which the ILEC would price its retail services below its wholesale service, or refuse to make some IP offerings available to wholesale users. This proposal in no

⁴ *NPRM* ¶ 110.

⁵ Comments of Windstream Corporation, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 20 (Feb. 5, 2015) (“Comments of Windstream”).

way precludes an ILEC from transitioning from TDM to IP—which as both an ILEC and a CLEC Windstream recognizes is desirable and inevitable.

Similarly, the Commission’s proposal to create a presumption of impact to the community when the ILEC discontinues a wholesale input is *not*, as the large ILECs would portray it, an illicit extension of Section 214 authorities to cover competitors. This measure is simply recognition that—after and in light of the 1996 Act’s embrace of local competition through, *inter alia*, the purchase of wholesale services—the discontinuance of a wholesale service is likely not only to affect the ILEC’s carrier competitor, but also to affect consumers that subscribe to the competitor’s offerings. These consumers have found that CLECs offer a superior, more tailored solution that better fits their overall needs.

It thus is not at all surprising that, in contrast to the large ILECs, purchasers of business service solutions support the Commission’s proposals to require an ILEC to provide at least equivalent access on equivalent rates, terms, and conditions when discontinuing a TDM service. Even the nation’s largest and most sophisticated business users—represented by the Ad Hoc Telecommunications Users Committee—recognize that they will be harmed if ILECs can discontinue enterprise TDM services without providing for, at a minimum, equivalent services at equivalent rates, terms, and conditions.⁶ The City of New York, likewise, adds that “[t]he cost of fiber-based services that replace copper-based services is a matter of great concern to the City—both in its role as a consumer advocate and in its role as a large consumer itself,” and urges the Commission ensure the City and consumers are not forced to incur additional costs in the IP

⁶ 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 17 (Feb. 5, 2015) (“Comments of Ad Hoc”).

Transition.⁷ Moreover, the Utilities Telecom Council, Competitive Carriers Association, and Public Knowledge—all representing business and nonprofit consumers from small to large—support the requirement to provide at least equivalent service at equivalent rates, terms, and conditions.⁸ None of these entities competes with the large ILECs to provide local exchange service. These stakeholders all know that if the large ILECs can use the technology transition to unmoor packet forbearance from the provision of a tariffed alternative or a successor service with equivalent terms, they will see fewer choices and higher prices. This will be true for state and local governments, nonprofits, and small and medium-sized businesses across the country.

Large ILECs counter by propagating the myth that they are the innovative carriers, and that CLECs operating in their areas are simply free-riders. This is nothing more than a poor attempt at a morality play. In fact, competitive carriers like Windstream are investing heavily in fiber networks. Windstream operates the nation’s sixth-largest fiber network (spanning approximately 118,000 miles). However, with respect to building fiber networks in the last mile, the fundamental economics have not changed since the Commission concluded in 2005 that CLECs were impaired without access to ILEC DS1 and DS3 capacity loops in most situations. CLECs still cannot feasibly build to the vast majority of business locations—and conversion from TDM to IP does not change that. Converting networks from TDM to IP simply requires changing transmission electronics, without necessarily converting loops from copper to fiber.

⁷ Comments of the City of New York, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 6 (“Comments of the City of New York”).

⁸ Comments of the Utilities Telecom Council, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 12 (Feb. 5, 2015) (“Comments of the Utilities Telecom Counsel”); Comments of the Competitive Carriers Association, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 7-9 (Feb. 5, 2015) (“Comments of the Competitive Carriers Association”); 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 (Feb. 5, 2015) (“Public Interest Commenters”).

Moreover, even when building out fiber networks, ILECs have insurmountable advantages in serving the vast majority of business locations, because as a legacy of their historical monopolies, they already possess facilities into every building, and they have the overwhelming majority of customers over which to amortize the costs of deploying fiber.

Finally, Windstream agrees with commenters indicating the Commission should reform its copper retirement rules to require ILECs to provide more meaningful notice to competitors and consumers and to give them enough time to plan for transition. Under the current regime, ILECs do not give enough information for affected competitive carriers to make the necessary adjustments to ensure that their customers do not experience service disruptions. The required notice period does not provide enough time either; even the most sophisticated enterprise customers can be forced to scramble for service alternatives. Measures to correct these deficiencies are needed, in addition to reforms ensuring that ILECs provide, at a minimum, equivalent wholesale services on the same rates, terms, and conditions.

II. EQUIVALENT ACCESS WITH AT LEAST EQUIVALENT RATES, TERMS, AND CONDITIONS IS THE KEY TO PRESERVING THE CORE VALUE OF COMPETITION FOR ENTERPRISE USERS DURING THE IP TRANSITION.

Market data and the experience of carriers and customers in the record continue to confirm what the Commission previously concluded: Competition in retail business markets continues to require access to the ILECs' last-mile facilities. There is no reason for embracing the dramatic shift in rates, terms, and conditions for last-mile access that the large ILECs would use the IP Transition to perpetrate without a thorough competitive evaluation. If ILECs were permitted to evade existing access requirements via a technology transition, competitors would be left without the necessary inputs for the solutions they currently provide to customers, who in turn would face fewer options at higher prices. Preserving last-mile access with at least the same rates, terms, and conditions offers a balanced approach that protects competition by maintaining

the status quo without restricting the ILECs' ability to decide when and to what extent to convert their networks from TDM to IP.

A. A Broad Range of Parties Supports the Commission's Tentative Conclusion and Windstream's Proposed Criteria for Implementation.

In response to the *NPRM*, a wide variety of commenters representing competitive carriers, business service customers, state utilities regulators, and public interest groups voice support for the Commission's tentative conclusion that it "should require incumbent LECs that seek Section 214 authority to discontinue, reduce, or impair a legacy service used as a wholesale input by competitive providers to commit to providing equivalent wholesale access on equivalent rates, terms, and conditions."⁹ These supporters understand that the last-mile access is "a necessary component for competitors to serve a significant portion of the end-user customers in the business market."¹⁰ As the Ad Hoc Telecommunications Users Committee observes,

⁹ *NPRM* ¶ 92; *See, e.g.*, Comments of Ad Hoc at 17; 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 5 (Feb. 5, 2015); Comments of the Competitive Carriers Association at 7-9; 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 9 (Feb. 5, 2015) Comments of Granite Telecommunications, LLC, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 3 (Feb. 5, 2015); Comments of the National Association of State Utility Consumer Advocates, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 24-25 (Feb. 5, 2015) ("NASUCA Comments"); Initial Comments of the New York Public Service Commission, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 12-13 (Feb. 5, 2015) ("Comments of NY PSC"); Comments of the Pennsylvania Public Utility Commission, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 16 (Feb. 5, 2015); Public Interest Commenters at 16; Comments of Sprint Corporation, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 3 (Feb. 5, 2015); Comments of the Utilities Telecom Council at 12; Comments of XO Communications, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 26 (Feb. 5, 2015) Comments of the Wholesale DS-0 Coalition, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 8-10 (Feb. 5, 2015).

¹⁰ Comments of COMPTTEL at 9. *See also* 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 (Feb. 27, 2015) (stating that "competitive LECs [] continue to rely on wholesale access to the last-mile facilities of the ILECs"); Comments of Birch, Integra, and Level 3 at 5

enterprise customers that “have also historically been among the first beneficiaries of the FCC’s deregulatory efforts in competitive markets” nonetheless are “acutely aware of the areas in which competition is weak enough to allow ILECs to extract monopoly rents from consumers.”¹¹

These enterprise customers emphasize that “[c]ontinued access to such inputs is critical to the ability of competitive carriers to provide a check on the ILECs’ market dominance.”¹²

Government customers, according to New York City, share these significant concerns.¹³ And as the New York Public Service Commission explains, when legacy services are eliminated “without a similarly functional and priced alternative wholesale product being available, the cost of providing telecommunications services, including broadband, to small and medium size businesses by CLECs can become a significant hardship.”¹⁴

(noting that “competitive carriers continue to rely on incumbent LEC TDM-based DS1 and DS3 special access services to serve a large number of customer locations across the country. And in most of those locations, there are no viable alternatives to purchasing these legacy wholesale inputs from the incumbent LEC”).

¹¹ Comments of Ad Hoc at 4.

¹² Comments of Ad Hoc at 17. *See also* Comments of WorldNet Telecommunications, Inc., PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, RM-11358, RM-10593, at 10 (Feb. 5, 2015) (“The stakes involved in taking away a critical component of competitor networks are simply too great not to expressly and unequivocally confirm these basic requirements . . .”).

¹³ Comments of the City of New York at 6 (stating “cost of fiber-based services that replace copper-based services is a matter of great concern to the City – both in its role as a consumer advocate and in its role as a large consumer itself” and recommending that “any mandated service transitions not be permitted unless comparable services are available to the City and other consumers at comparable prices with appropriate offsets for new equipment and infrastructure costs imposed on customers”).

¹⁴ Comments of NY PSC at 12. *See also* Comments of Sprint at 1 (“As regulated services are replaced by technologically superior—but less regulated—alternative services, incumbents have the opportunity to leverage their market power, once again, to suppress competition and restrict innovation.”).

Numerous commenters also support application of the six principles proposed by Windstream to evaluate whether replacement offerings meet the equivalency standard.¹⁵ The Public Interest Commenters opine that “[t]hese standards are clear, objective, and designed to simply ensure that technology transitions are a step forward for competition, not a step backward.”¹⁶ The Ad Hoc Telecommunications Users Committee adds that “a service that fails to meet one or more of [the principles] 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.”¹⁷ As the enterprise customers observe, the underlying market characteristics—particularly in the last mile—do not change when transmission protocol migrates from TDM to IP, and therefore the Commission should act to “prevent the ILECs from using this transition to exploit or further cement their market dominance.”¹⁸ The Pennsylvania Public Utility Commission concludes that “competitors and the public will benefit from the articulation of clear, technologically neutral principles that define what constitutes an adequate and functionally equivalent substitute.”¹⁹

B. Incumbents Retain Substantial Historical Monopoly Advantages as They Transition Their Networks from Copper to Fiber and from TDM to IP.

The large ILECs argue that they are the innovators, and that CLECs are simply “not keeping up” and “prefer to maintain the entitlements they have enjoyed with respect to the

¹⁵ See, e.g., NASUCA Comments at 24-25 (“Windstream’s principles for evaluation of replacement offerings are well taken and should be incorporated in the Commission’s order.”); Comments of Sprint at 5 (“Windstream’s proposal, if properly understood and implemented, will prevent the special-access market from becoming even more disjointed in the short term as the technology transition continues.”).

¹⁶ Public Interest Commenters at 16.

¹⁷ Comments of Ad Hoc at 17.

¹⁸ *Id.* at 4.

¹⁹ Comments of the Pennsylvania Public Utility Commission at 16.

legacy networks.”²⁰ The large ILECs assert that “the justification for those entitlements disappears along with the [legacy] network”²¹ and “there are no ‘incumbents’” in Ethernet.²² But these arguments ignore the substantial advantages that persist from having been the historical monopolist and thus the first mover in serving the vast majority of business locations.

In 2005, in the *Triennial Review Remand Order*, the Commission examined whether competitive LECs were impaired without access to DS1 and DS3 capacity unbundled loops.²³ At that time, the Commission reviewed “the costs associated with deploying such loops and the potential revenues that can be recouped from a particular customer location.”²⁴ The Commission found that “[c]ompetitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operation barriers in constructing their own facilities.”²⁵ According to the Commission, “[t]he most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location, rather than from lighting the fiber-optic cable.”²⁶ The Commission also observed that “the cost of construction does not vary significantly by loop capacity (*i.e.*, the per-mile cost of building a DS1 fiber loop does not differ significantly from the cost to construct a DS3 or high-capacity

²⁰ See, e.g., Comments of AT&T Services, Inc., PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 5 & 6 (Feb. 5, 2015) (Comments of AT&T).

²¹ *Id.* at 6.

²² Comments of CenturyLink, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 12 (Feb. 5, 2015) (Comments of CenturyLink).

²³ *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2614 ¶ 146 (2005) (“*Triennial Remand Review Order*” or “*TRRO*”).

²⁴ *Id.* ¶ 150

²⁵ *Id.*

²⁶ *Id.*

fiber loop).”²⁷ This means the ILECs’ far larger customer base enables far lower per-location deployment costs for the ILEC as compared to its competitors. In light of these facts, the Commission concluded that CLECs could not reasonably be expected to overbuild ILEC DS1 and DS3 capacity loops, except in select instances in some of the densest wire centers.²⁸ It also recognized that permitting large price increases for wholesale inputs would effectively reduce competition, which has a direct impact on the adequacy and quality of service provided to end users.²⁹ The Commission since has reaffirmed these findings. In 2010 the Commission, for example, noted in the *Qwest Phoenix Forbearance Order* that the “passage of time has [not] lowered these barriers,” nor lessened the danger of “downstream” customer impacts that can arise where a single party holds substantial market power in the upstream wholesale market.³⁰

The continuing need for ex ante price regulated wholesale inputs is underscored by the ILECs’ current pricing of deregulated wholesale last-mile inputs. With respect to potential ILEC-offered alternatives, Windstream has presented pricing data showing a large gap between prices for last-mile Ethernet access and current tariffed TDM-based special access—a more than eight-fold increase when moving from a TDM DS1 to a 2 Mbps Ethernet service³¹—and AT&T

²⁷ *Id.*

²⁸ *See id.* ¶ 166 (noting that “competitive deployment of stand-alone DS1-capacity loops is rarely if ever economic”). Moreover, the Commission recognized that overbuilding may be impossible for many locations in these wire centers, but was comforted by the availability of tariffed alternatives as a gap-filler for competitive LECs. *Id.* ¶ 163.

²⁹ *See, e.g., id.* ¶ 63 (noting that without the availability of UNEs and tariffed special access in combination, “incumbent carriers could strategically manipulate the price of their direct competitors’ wholesale inputs to prevent competition in the downstream retail market”).

³⁰ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 10-113, 25 FCC Rcd. 8622 ¶ 90, 8639 ¶ 34 (2010) (“*Qwest Phoenix Forbearance Order*”).

³¹ *See* Comment of Windstream at 20. *See also* Letter from Jennie B. Chandra, Windstream Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593 (filed Sept. 26, 2014).

has acknowledged that such price increases “may usually be the case” when an ILEC discontinues a competitor’s access to wholesale inputs.³² Large price increases harm competitors’ ability to continue providing services to their business service customers, and constitute good evidence that the marketplace still is not capable of providing a sufficient check on wholesale pricing for lower bandwidth services used by CLECs and those customers.³³

The large ILECs’ claims of availability of alternative retail services do not provide a basis for concluding that customers would have adequate alternatives if regulated wholesale inputs were discontinued.³⁴ There is good reason for why Commission has preserved last-mile access policies: Without competitive presence enabled by these policies, many business customers would have little or no choice in alternatives to the incumbent provider. As the GeoResults data previously presented by Windstream show, cable does not serve a significant percentage of business customers, particularly as locations grow larger or for customers that have more than one location.³⁵ Cable’s comparative ubiquity in residential markets says nothing about its deployment to business locations, nor does it address the adequacy of cable’s services to meet the needs of those business users that need more integrated, personalized services or higher assured levels of service quality. Cable, at most, usually offers only one alternative to the ILEC in a given area.³⁶ And most fundamentally, the large ILECs continue to ignore the fact that much of the competition provided by CLECs must utilize the ILEC last-mile services and

These tariffs and price lists do not distinguish between a services used for last-mile substitutes and those used to provision entrance facilities.

³² See Comments of AT&T at 53.

³³ See *Qwest Phoenix Forbearance Order* ¶ 34 & n.102.

³⁴ See Comments of CenturyLink at 24; Comments of Corning at 11-12; Comments of ITTA at 6-7; Comments of Verizon at 27-28.

³⁵ See Comments of Windstream at 10-11, Figures 3 and 4.

³⁶ See Comments of Windstream at 12 n.16.

facilities to reach the customer location. CLEC last-mile fiber deployments to a small minority of business locations do not change this conclusion.³⁷

C. Incumbents’ “Marketplace Realities” Statistics Focus on the Wrong Markets.

Seeking to deny the Commission’s past findings of the economic infeasibility of widespread CLEC build out to business locations, the large ILECs attempt to portray enterprise markets as robustly competitive. To do this, the large ILECs rely on statistics that mislead in one of three ways: (1) they include residential markets to mask lack of competition in business markets,³⁸ (2) they fail to recognize differentiated retail business markets,³⁹ or (3) they ignore the fact that CLEC retail business service competition depends in large part on ILEC wholesale last-mile connections.⁴⁰ Although this docket is not the place to conduct a thorough market review—such a review is ongoing in the Commission’s special access docket—the ILECs’ use of these

³⁷ Other alternatives that the large ILECs may suggest—such as colocation, access to ILEC poles, and rights-of-way—are simply tools to help construct parallel fiber facilities, which the Commission has already concluded does not eliminate impairment of CLECs. *See TRRO* ¶ 150 n.419. Copper sales likewise are entirely speculative; Windstream does not know how they could be technically, operationally, or economically feasible. *See* Comments of Verizon, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 17 (Feb. 5, 2015) (acknowledging that “[s]elling these facilities would be easier said than done, due to the intertwined way that copper and fiber facilities often are deployed and the required ongoing engagement from ILECs that might be necessary to make such a sale work”).

³⁸ *See* Comments of Verizon at 4 (citing statistics for “residential customers nationwide”).

³⁹ *See* Comments of ITTA, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 7 (Feb. 5, 2015) (citing Local Telephone Competition: Status as of December 31, 2013, FCC, Wireline Competition Bureau, Industry Analysis and Technology Division at Figures 5 and 6 (Oct. 16, 2014), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1016/DOC-329975A1.pdf (“Local Telephone Competition Report”) (displaying retail data)).

⁴⁰ *See Qwest Phoenix Forbearance Order* ¶ 84 (“[T]he Commission, in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile facilities. . . . We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.”).

statistics is deceptive, and comprises “generalized claims about competition for enterprise customers” that the Commission found insufficient in the *Qwest Phoenix Forbearance Order*.⁴¹ The Commission has long recognized that residential competition does not bear on enterprise competition. And even within enterprise, as GeoResults data discussed above show, enterprise users themselves have differentiated needs. Cable, for example, rapidly declines in competitive significance with respect to multi-location customers and customers with greater numbers of employees at a site.⁴² While large ILECs assert that cable is growing as a provider of “Ethernet and other high capacity services,”⁴³ they wholly fail to show that cable providers offer adequate substitutes for the services and solutions offered by CLECs, in the locations where those services are provided—and do not contest the fact that, at most, cable usually offers only one alternative to the ILEC in a given area.⁴⁴ And, of course, a CLEC’s ability today to use ILEC wholesale last-mile inputs to offer a competitive service says nothing about the future ability of the CLEC to discipline ILEC retail price increases if the ILEC has the ability to increase dramatically the price the CLEC must pay for access to those wholesale last-mile inputs.

The unvarnished truth is that the market for wholesale special access service remains remarkably concentrated and in the control of the large ILECs. 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

⁴¹ *Id.* ¶ 28.

⁴² Comments of Windstream Corporation, at 11, Figures 3 and 4.

⁴³ Comments of Verizon at 28; Comments of CenturyLink at 3. Notably, CenturyLink’s reference to Ethernet revenues from all U.S. carriers topping \$10 billion by 2018 appears to undercut Verizon’s implication that cable already provides \$10 billion of such services.

⁴⁴ *See* Comments of Windstream at 12 n.16.

aggregation point connections.⁴⁵ AT&T, Verizon, and CenturyLink alone hold 70 percent of this market.⁴⁶ 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 commercial buildings alone is even higher. Indeed, *****BEGIN CONFIDENTIAL***** [REDACTED]

[REDACTED]

*****END CONFIDENTIAL*****.⁴⁷

For Windstream in particular, *****BEGIN HIGHLY CONFIDENTIAL*****

[REDACTED]

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*****END HIGHLY CONFIDENTIAL*****. Prospects

for changing these conditions are limited. When Windstream actively sought to diversify its

wholesale suppliers by *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁵ ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report*, September 2014 (estimating market share based on 2013 data). *See also* Letter from Tamar E. Finn, Counsel to TelePacific, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 09-51, 13-5, 12-353; WC Docket No. 10-188 (filed Feb. 27, 2015) (“TelePacific reiterated that its surveys of alternative fiber providers show *there is no alternative to the ILEC for more than 80% of TelePacific’s business customer locations.*” (emphasis added)).

⁴⁶ ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report*, September 2014 (estimating market share based on 2013 data).

⁴⁷ ATLANTIC-ACM, *Local Wholesale Transport Analysis, Second Quarter 2014, Executive Summary*, October 2014 (estimating market share based on 2013 data).

worldwide for 10 Mbps Ethernet, with a median city price of \$1,247.⁵¹ This U.S. and Canadian urban Ethernet pricing is higher than all regions other than Central and South America and Sub-Saharan Africa.⁵² The median 10 Mbps price for the rest of the country in the United States and Canada, \$1,466, exceeded that in all regions but East Asia, Central America, and Sub-Saharan Africa.⁵³ TeleGeography concludes that the market data show “less competitive countries are both lower in capacity and higher in price.”⁵⁴

D. Windstream’s Proposed Criteria for Evaluating Equivalent Rates, Terms, and Conditions Appropriately Balance Flexibility With All Parties’ Need for Clarity.

The large ILECs and their supporters overstate the scope and rigidity of the principles in asserting that the principles would mandate “strict equivalence,”⁵⁵ “preserve every aspect of the status quo,”⁵⁶ “lock carriers into maintaining legacy facilities,”⁵⁷ or require “ILECs to maintain two different network architectures.”⁵⁸ Windstream agrees that ILECs should not be forced to maintain two separate networks, and should have the discretion to decide when and to what extent to replace copper facilities with fiber. The principles thus do not require anything to the

⁵¹ See TeleGeography Local Access Pricing Service, 2014 Local Access Market Summary, at 2-4. See also *id.* at 3 (finding “Ethernet proved to be an attractive alternative to T-1/E-1 service, with costs much less than 5 times the price for 5 times the capacity,” but the United States and Canada are “relatively more expensive for 10 Mbps Ethernet than for T-1s, with a median city price of \$1,247”).

⁵² *Id.* at 4 (regions where pricing was lower than the United States and Canada include South Asia, Oceania, Western Europe, East Asia, the Middle East, Eastern Europe).

⁵³ *Id.* at 13-14 (regions where pricing was lower than the United States and Canada include Oceania, the Middle East, Western Europe, South America, Eastern Europe, and South Asia).

⁵⁴ *Id.* at 19.

⁵⁵ Comments of Verizon at 28.

⁵⁶ Comments of AT&T at 47.

⁵⁷ Comments of Corning Inc., PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 12 (Feb. 5, 2015).

⁵⁸ Comments of ITTA at 8.

contrary. Instead, they focus on commonsense, objective indicators of whether the substitute service is equivalent to a discontinued service, indicators that should be readily knowable by ILECs: price, quality, and bandwidth options, all of which need only be *no worse* than what is currently offered. The flexibility detailed below and the fact that IP-based services are more efficient than TDM-based services⁵⁹ should be more than enough to enable ILECs to provide on a wholesale basis services that they are already providing right now, under the same terms under which they are providing them.⁶⁰

Reflecting the fact that Windstream has both significant ILEC and CLEC operations, the six principles, when adopted as rules, strike a balance between the certainty of clear “rules of the road” as represented by the objective criteria, and the flexibility offered by these criteria serving merely as the “outer boundaries” for permissible action.⁶¹ ILECs would have discretion to design and offer both wholesale and retail IP services that are most responsive to their wholesale customers’ needs and their own enterprise retail operations in a highly flexible environment.

⁵⁹ See *NRPM* ¶ 7 (“Modernizing communications networks can dramatically reduce network costs . . .”). See also Comments of AT&T at 62 (“No one has questioned or can question that the transition to all-IP networks will greatly enhance the efficiency of telecommunications services and provide a far more capable platform for future innovation.”).

⁶⁰ Indeed, the purported difficulty of providing equivalent wholesale inputs is belied by the large ILECs’ assurances that they have both the “strong incentive to meet customer demand” and the ability to “develop and offer wholesale services to serve their wholesale customers,” such that discontinuance or impairment is a remote risk. Comments of AT&T at 63; Comments of Verizon at 28. For that reason, Verizon’s prediction that it will be confounded by how “unnecessarily difficult [it would be] to discontinue legacy services” if it is required to provide equivalent replacement, and AT&T’s *cri de coeur* that the “punitive regulatory requirements . . . will hurt consumers” both ring hollow. Comments of Verizon at 28; Comments of AT&T at 63.

⁶¹ See Jonathan Sallet, General Counsel, Federal Communications Commission, *The Jurisprudence of Innovation: Prepared Remarks at the Federal Communications Bar Association Year in Review CLE*, at 3-7 (June 23, 2014) (finding that effective resolution of policy disputes requires balancing the need for certainty with a competing need for flexibility).

Moreover, such services could be offered in different tiers with different accompanying prices. Windstream provides examples of how these principles would apply in an attachment to this filing. The principles also retain the option for individualized negotiations between ILECs and competitors for IP-based replacement wholesale services, and preserve the fundamental discretion of ILECs to decide based on their own needs when to switch to IP-based services.

At the same time, the principles set up important safeguards protecting competition by requiring functional equivalency between the proposed IP-based replacement wholesale services and the TDM-based services that are to be discontinued. Windstream's proposed safeguards provide certainty to CLECs and their customers, which is important and beneficial for the IP Transition for several reasons. First, the services provided by CLECs to their customers require advanced planning and contractual commitments made three to five years in advance. As multiple parties noted, CLECs already must set the terms under which they will provide services to retail business customers in 2018 and 2020.⁶² These customer-driven service commitments necessitate assurances that last-mile access will continue to be available on a wholesale basis at equivalent rates, terms, and conditions for the duration of the commitment.⁶³ The Commission thus should reject the large ILECs' invitation to sacrifice consumer protection by deeming any "reasonably comparable service" as an acceptable substitute,⁶⁴ which would benefit only ILECs and undermine the ability of business customers and their CLEC service providers to plan for the

⁶² See Comments of Birch, Integra, and Level 3 at 11; Comments of Granite Telecommunications, LLC at 9; Comments of Wholesale DS-0 Coalition at 12; Comments of XO Communications at 16.

⁶³ See Comments of Windstream at 22-23 (noting long-term contracts are commonplace in the business services market for two key reasons: (1) customers want certainty and will seek out other providers (i.e., incumbents) if competitors do not offer long-term arrangements, and (2) competitive providers sometimes require a longer commitment term to recover expenses like special construction costs).

⁶⁴ Comments of Verizon at 27.

IP Transition. Second, having clear ground rules will make reviews of Section 214 applications faster, and will reduce the likelihood of customer confusion that could cause delay.⁶⁵ Third, the principles serve as a necessary backstop for commercial negotiations between carriers, which otherwise would not be sufficient to ensure continued availability of wholesale inputs needed for services provided by the CLECs to their customers.

III. A SECTION 214 DISCONTINUANCE REVIEW IS AN APPROPRIATE VEHICLE FOR ENSURING ENTERPRISE CONSUMERS ARE NOT HARMED BY THE IP TRANSITION.

The Commission’s proposed standard requiring ILECs to offer at least equivalent wholesale access at equivalent rates, terms, and conditions, when implemented in accordance with Windstream’ proposed six principles, would provide objective ground rules for assessing potential harm to consumers under Section 214(a) when ILECs seek to end wholesale TDM-based special access services that are used as inputs by CLECs. Rather than expanding Section 214(a)’s scope, the proposed ground rules would clarify the long-standing discontinuance factors in the complex post-1996 Act environment in which CLECs rely on ILEC last-mile services to provision their own solutions to enterprise users, and recognize the availability of such wholesale services has a direct impact on end user service. Windstream’s proposed principles for evaluating functional equivalence for DS1 and DS3 special access services further help to fulfill Section 214’s statutory objectives of “preventing a loss or worsening of service”⁶⁶ and focus the Commission’s inquiry on the key issues relating to the functional equivalency of alternative services, thus reducing the need for “time-consuming individual disputes.”⁶⁷

⁶⁵ See *id.* at 25-26.

⁶⁶ *Lincoln County Telephone System, Inc.*, Memorandum Opinion and Order, 81 F.C.C.2d 328, ¶ 11 (1980).

⁶⁷ *Id.* ¶ 11.

A. The Commission’s Packet Forbearance Decisions Necessitate an Equivalent Wholesale Access Rule.

The large ILECs studiously ignore the fact that when the Commission granted forbearance from tariffing and other dominant carrier regulation with respect to certain packet-switched special access services,⁶⁸ it expressly relied on the fact that the forbearance granted “exclude[d] TDM-based, DS-1 and DS-3 special access services”⁶⁹ and UNE loops.⁷⁰ This was an important pillar supporting the conclusion that “competitors can readily respond should [ILECs] seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for [their] enterprise broadband services.”⁷¹

⁶⁸ The packet forbearance orders granted forbearance with respect to specific listed services. *See, e.g., Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 19,478, ¶ 1 n.6 (2007) (*Embarq/Frontier/Citizens Packet Forbearance Order*) (granting the forbearance requests of Embarq, Frontier, and Citizens with respect to “the *petitioner-specified* services”) (emphasis added); *id.* ¶ 16 (restricting grant “to broadband services that the petitioners currently offer and list in their petitions”). Those listed services do not cover all the packet services to which the ILECs appear to have detariffed. For example, with respect to Ethernet, Embarq in its Petition specified nine service speeds between 10 Mbps and 1 Gbps. *See Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, Petition for Forbearance, WC Docket No. 06-147, at Attachment A (filed July 26, 2006). Based upon Windstream’s experience, CenturyLink today offers 13 tiers of Ethernet in its legacy Embarq areas. For simplicity, we do not rely here on the distinction between services actually covered by the forbearance orders and those for which the ILECs have acted as if they are covered. We do not, however, concede that ILECs have properly applied the scope of the granted forbearance.

⁶⁹ *See, e.g., Embarq/Frontier/Citizens Packet Forbearance Order* ¶ 19.

⁷⁰ *See, e.g., id.* ¶ 19 n.78 (“[W]e observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.”).

⁷¹ *See, e.g., id.* ¶ 24. Indeed, AT&T relied on the continued availability of “these still-highly-regulated ILEC TDM inputs” to justify its forbearance order when challenged in the D.C. Circuit. *Ad Hoc Telecommunications Users Committee v. FCC*, No 07-1426, Brief for Intervenors AT&T Inc., et al. in Support of Respondents at 11 (D.C. Cir. Filed Dec. 3, 2008). CenturyLink in its pending petition for packet forbearance similarly asserts that forbearance

Discontinuance of TDM DS1 and DS3 special access services without any requirement for equivalent wholesale access at equivalent rates, terms, and conditions would remove that pillar.⁷² The large ILECs blithely conclude without any justification or analysis that, nonetheless, the forbearance from dominant carrier regulation for certain packet-switched special access services would continue unaffected after the discontinuance of TDM-based DS1 and DS3 special access services. To the contrary, a more straightforward conclusion would be, when a key factor justifying forbearance is removed, that the statutorily required findings for forbearance under Section 10 are no longer met, and thus forbearance must end.

The Commission's proposed requirement to provide equivalent wholesale access with at least equivalent rates, terms, and conditions neatly avoids this outcome by preserving the availability of special access services that fulfill the role that TDM-based DS1 and DS3 services formerly fulfilled. While the appropriateness of packet forbearance should be reviewed as part of the Commission's assessment of competition in the special access proceeding, the equivalent wholesale access requirement preserves the status quo with respect to tariffed alternatives to the detariffed services currently subject to packet forbearance.

would not harm competition, because "potential providers can also rely on CenturyLink's special access services and [UNEs] to provide enterprise broadband services." *CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, CenturyLink Petition for Forbearance, WC Docket No. 14-9 (filed Dec. 13, 2013) at 29.

⁷² That is not all; in their opposition to Windstream's Petition for Declaratory Ruling, the large ILECs also assert that they lack any ongoing obligation to provide nondiscriminatory access to unbundled DS1 or DS3 capacity loops once they have converted their networks from TDM to IP. See Verizon's Opposition to Windstream's Petition for Declaratory Relief, *Petition for Declaratory Ruling to Clarify that Technology Transitions Do Not Alter the Obligation of Incumbent Local Exchange Carriers To Provide DS1 and DS2 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3)*, WC Docket No. 15-1, GN Docket No. 13-5 (filed Feb. 5, 2015) ("*Windstream Petition*"); Opposition of AT&T Services to *Windstream Petition*, WC Docket No. 15-1, GN Docket No. 13-5 (filed Feb. 5, 2015).

B. Adoption of Equivalent Wholesale Access Ground Rules Falls Well Within the Scope of Section 214.

Section 214 requires carriers to obtain Commission approval prior to any discontinuance, reduction, or impairment of service provided to a community or part of a community, which the Commission shall grant only upon concluding that “neither the present nor future public convenience and necessity will be adversely affected thereby.”⁷³ As the large ILECs themselves acknowledge, Section 214 applies when the planned changes will “impair the adequacy or quality of service provided.”⁷⁴ Moreover, the Commission’s precedent is clear that a discontinuance falls within Section 214 whenever discontinuance, reduction, or impairment of that service would lead to discontinuance of service to an end user.⁷⁵

As discussed in Section IV, below, the Commission may legally presume, either conclusively or rebuttably, end user impairment when an ILEC discontinues a wholesale special access service—particularly a last-mile service—that is purchased by a CLEC. Once that end user impact is established, Section 214(c) expressly grants the FCC the power to condition discontinuance on the provision of equivalent wholesale access on equivalent rates, terms, and conditions.

⁷³ 47 U.S.C. § 214(a)(3). Verizon’s recounting of the legislative history of Section 214(c)(3)’s last clause is consistent with the Commission’s proposed application of Section 214. *See* Comments of Verizon at 23-24. The insertion of the last clause of Section 214(c)(3) makes clear by negative implication that where “changes in plant, operation, or equipment” would “impair the adequacy or quality of service provided,” then Section 214 authorization is required.

⁷⁴ Comments of AT&T at 45 (*quoting* 47 U.S.C. § 214(a)(3)); Comments of Verizon at 24.

⁷⁵ *See Southwestern Bell Telephone Company, US West Communications, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, Memorandum Opinion and Order, 8 FCC Rcd. 2589, 2599 ¶ 48 (1993); *BellSouth Tel. Companies Revisions to Tariff F.C.C. No. 4*, 7 FCC Rcd. 6322, 6323 ¶ 5 (1992) (“If, for example, a discontinuance, reduction, or impairment of service to the carrier-customer ultimately discontinues service to an end user, the Commission has found that § 214(a) requires the Commission to authorize such a discontinuance.”).

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AT&T argues, however, that Section 214(c) precludes the issuance of an equivalent wholesale access rule.⁷⁶ AT&T cites two cases, *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974), and *MCI Telcomms. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), for the proposition that the Commission can proceed under Section 214 only with application-specific balancing on a case-by-case basis. Neither of these ancient cases (neither of which addressed discontinuances) goes this far, and AT&T fails to acknowledge that the Commission has previously acted under Section 214 pursuant to rule. Most notably, the FCC adopted 47 C.F.R. §§ 63.01(a) and 63.08(a), which, by rule, grant blanket authorizations respectively to any domestic common carrier to provide service, and to any LEC to provide cable and non-common carrier services outside of its exchange area.⁷⁷ Similarly, the Commission adopted detailed rules as to when it would grant foreign carrier entry into the United States pursuant to these exact same provisions of Section 214.⁷⁸ If Section 214 were limited to case-by-case review, the Commission could not have adopted any of these rules.

⁷⁶ Comments of AT&T at 59-60.

⁷⁷ See *Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area*, Report and Order, 98 F.C.C.2d 354, 355 ¶ 2 & n.2 (1984) (noting that none of the commenting parties, which include among others, New York Telephone Company, Pacific Bell, Southwestern Bell Telephone Company, “challenge[] our legal authority to eliminate any requirement of separate, individual Section 214 applications for the lines covered by the proposal”).

⁷⁸ *Mkt. Entry & Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd. 3873, 3962 ¶ 233 (1995). In that decision, the Commission distinguished *MCI Telecomm. v. FCC*, noting, “[t]he court was not faced with, nor did it address, the Commission’s authority to modify the terms of a carrier’s existing Section 214 authorizations through a notice and comment rulemaking. It is well established that the Commission has the authority, through its broad rulemaking powers, to adopt rules of general applicability that modify existing authorizations and licenses.” *Id.*

Adopting the equivalent wholesale access standard would not “reinterpret Section 214 to create a broad authority for regulatory micro-management”⁷⁹ of “the technological details of carriers’ networks and services.”⁸⁰ While some ILECs suggest otherwise, the proposed approach, as elaborated on above, does not require ILECs to preserve TDM technologies or maintain separate networks, but simply stipulates that they must make available an equivalent service on at least equivalent rates, terms, and conditions when discontinuing a TDM input.⁸¹ The equivalent wholesale access standard is a way for ILECs to move ahead with migrations from TDM to IP, while preserving existing competitive safeguards.

Moreover, contrary to AT&T’s suggestion, the proposed equivalent wholesale access rules do not “distort the role of the ‘adequate substitute’ factor in every [Section] 214 analysis.”⁸² The proposed rules, in fact, account for all five of the factors. The rules respond to the first factor (the financial impact on the carrier of continuing to provide the service to be discontinued) by permitting the ILEC to discontinue the TDM service, which ensures no adverse financial impact from continuing the service. The second and third factors (the need for services and the need for facilities) are embraced by the proposed equivalent wholesale access rules, as the rules chart a course to maintain competitive access to special access service functionality and facilities in the IP Transition. This is consistent with the Commission’s long-standing recognition that maintaining such access is necessary for ensuring marketplace competition continues.⁸³ The

⁷⁹ Comments of Verizon at 25.

⁸⁰ Comments of AT&T at 45.

⁸¹ See Comments of ITTA at 8.

⁸² See Comments of AT&T at 43 (citing the five factors as articulated in *Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, Order, 18 FCC Rcd. 22737, 22742 ¶ 8 (2003)).

⁸³ The need for the service (the second factor) was determined by the Commission in the *Packet Forbearance Orders* in which the continued offering of the tariffed TDM alternatives was a key condition in permitting packet forbearance. The Commission established the need for

proposed rules respond to the fourth factor (adequacy of alternatives) by offering clarity to the Commission as it evaluates the sufficiency of alternatives presented in the slew of discontinuance proposals that will come before it as part of the IP Transition. Finally, the proposed rules address the fifth factor (increased charges for alternative services) by establishing pricing provisions that would prevent ILECs from using the IP Transition as an excuse to increase charges for comparable capacity. In the absence of the equivalent wholesale access rule, the large ILECs' wholesale customers would only have the option of taking deregulated IP replacement services, which can be vastly more expensive than equivalent TDM inputs.⁸⁴ Thus, the proposed equivalent access rules facilitate, rather than "distort," the Commission's overall evaluation of whether Section 214 discontinuances should be permitted.

Finally, there is no factual basis to the suggestion that the Commission's proposal would lead to additional unbundling obligations for ILECs.⁸⁵ A requirement to provide at least equivalent wholesale access at equivalent rates, terms, and conditions applies only to services that the ILEC already offers. Of course, as presented by Windstream's Petition for Declaratory Ruling, Section 251(c) and the Commission's rules currently require unbundling of certain network elements, such as high-capacity DS1 and DS3 loops, irrespective of the underlying

the facilities in question (the third factor) and evaluated the existence, availability and adequacy of alternatives in its impairment analysis in the *TRRO*, which has not been superseded and from which the ILEC has not obtained forbearance.

⁸⁴ Notably, this situation is quite different than that addressed in *Verizon*, the case cited by AT&T, in which the Commission permitted Verizon to discontinue physical collocation under Section 201, because it still had to provide physical collocation pursuant to Section 251(c)—a price-regulated alternative—and also provided virtual collocation pursuant to Section 201. Here, in the absence of an equivalent wholesale access rule, the large ILECs' wholesale customers are left only with the inadequate alternative of taking vastly more expensive IP services.

⁸⁵ See Comments of Corning at 12-13.

transmission protocol. But an equivalent wholesale access requirement does not impose unbundling requirements beyond those that already exist.

IV. THE COMMISSION IS CORRECT TO PRESUME—CONCLUSIVELY IN THE CASE OF LAST-MILE INPUTS—THAT DISCONTINUANCE OF TARIFFED SPECIAL ACCESS SERVICES REQUIRES A SECTION 214 REVIEW.

Large ILECs argue that the Commission cannot lawfully create a presumption that—in the post-1996 Act era of local service competition—discontinuance of wholesale inputs will lead to discontinuance, reduction, or impairment of end user services and thus warrant Commission review pursuant to Section 214.⁸⁶ This assertion lacks credibility, especially because what is being determined is whether the Commission should conduct a review; the presumption in no way bars discontinuance. At most, a rebuttable presumption allocates the burden of proof, which the Commission has inherent authority to do. And given the fact that CLECs cannot feasibly build last-mile connections to the vast majority of locations,⁸⁷ and packet forbearance was premised on continued availability of other ex ante price-regulated wholesale inputs,⁸⁸ this presumption should be conclusive for tariffed special access inputs used for last-mile access.

A. Neither Section 214 nor Commission Precedent Precludes the Use of a Presumption that Discontinuance of a Wholesale Input Will Effect a Discontinuance, Reduction, or Impairment of an End User’s Service.

AT&T argues that the Commission cannot, consistent with Section 214(a), adopt even a rebuttable presumption that discontinuance of a wholesale service affects end users in the community. This argument lacks any basis. In the first instance, nothing in the express language of Section 214(a) addresses the use of presumptions. As a matter of statutory interpretation, the Commission has the discretion to determine that Section 214 permits the use of presumptions.

⁸⁶ See Comments of AT&T at 54; Comments of Verizon at 25.

⁸⁷ See Section II.B, *supra*.

⁸⁸ See Section IV.B.1, *infra*.

AT&T then relies on the Commission’s acknowledgement in *Western Union* (which predated the passage of the competition-enabling 1996 Act) that it “must distinguish those situations in which a change in a carrier’s service offerings to another carrier will result in an actual discontinuance, reduction or impairment to the latter carrier’s customers as opposed to a discontinuance, reduction or impairment of service to only the carrier itself.”⁸⁹ But that statement also does not preclude the use of a presumption to allocate the burden of proving the impact, or lack thereof, on the purchasing carrier’s customers. In *Western Union*, the Commission went on to make clear that “[i]f there has been a discontinuance, reduction or impairment of service to the carrier’s customer, we would then need to determine whether it violated Section 214(a).”⁹⁰ The Commission, therefore, can structure its Section 214 determination using presumptions regarding impact on the purchasing carrier’s customers.

B. The Facts Presented Support the Presumption that Elimination of Tariffed Special Access Inputs Warrants Commission Review.

Numerous parties—including customers whose service from CLECs would be affected and state public utility commissions—have expressed support for the Commission’s proposed presumption that an ILEC must seek Section 214 authorization whenever it discontinues a wholesale input,⁹¹ including support for a conclusive presumption where the input is last-mile

⁸⁹ *In the Matter of W. Union Tel. Co. Petition for Order to Require the Bell Sys. to Continue to Provide Grp./Supergroup Facilities*, 74 F.C.C.2d 293, 296 ¶ 7 (1979).

⁹⁰ *Id.*

⁹¹ *See, e.g.*, Comments of the Pennsylvania Public Utility Commission at 16 (agreeing that the presumption could be rebutted upon a showing no impairment to the quality or adequacy of service to the end user); Comments of Birch, Integra, and Level 3 at 22 (“[T]he Commission should adopt a rebuttable presumption that incumbent LECs must seek approval prior to eliminating a tariffed term discount plan.”); Comments of Granite Telecommunications, LLC at 10 (“Granite supports this rebuttable presumption, provided the presumption is deemed conclusive, unless and until the ILEC files a *prima facie* case demonstrating and providing the basis for the ILEC’s assertion that it has rebutted the presumption”); Comments of Wholesale DS-0 Coalition at 10 (“The Wholesale DS-0 Coalition strongly supports this rebuttable presumption.”).

access to the end user.⁹² Business service customers that require differentiated, personalized communications services at lower bandwidths—a group that includes many “main street” businesses as well as local offices of government entities—rely on wireline communications services that CLECs are able to provide using ILECs’ wholesale inputs.⁹³

1. *Service Is Discontinued, Reduced, or Impaired When a Tariffed Special Access Input Is Replaced with a Deregulated Alternative.*

The large ILECs claim that the availability of deregulated offerings compels the conclusion that there are adequate alternatives to the current tariffed wholesale inputs, notwithstanding significant differences in price.⁹⁴ This assertion flouts the Commission’s packet forbearance orders and the large ILECs’ contentions when seeking relief from regulation of those offerings. The Commission’s decisions to forbear from dominant carrier regulation of Ethernet

⁹² See Comments of the Michigan Public Service Commission at 9 (“The FCC must always presume that a discontinuance of service by an ILEC will affect interconnecting carriers and must take all necessary steps to prevent this from occurring and allow a full vetting process of the discontinuance by all affected parties.”); Comments of COMPTTEL at 6 (“[T]he Commission should adopt the proposed presumption and, *at a minimum*, in the case of ILEC wholesale input services for which the Commission has already found carrier customers generally reliant on to serve end-users—as is the case, for example, with last mile services such as DS1 and DS3 special access services—the Commission should find conclusively (i.e., it is not rebuttable) that the Section 214 process applies.”); Comments of Competitive Carriers Association at 10 (“[R]ather than a rebuttable presumption, the Commission should adopt a bright line rule that requires ILECs to seek prior Commission approval in any situation involving the discontinuance of TDM-based wholesale service.”); Comments of XO Communications at 23 (“XO submits that the need for section 214 approval should unequivocally be required when the wholesale service at issue used to provide end users with last-mile access.”).

⁹³ See, e.g., Comments of COMPTTEL at 10-12 (“[T]he entities competitors serve include government, health care facilities, and schools and libraries and the services competitive carriers offer these entities are critical to their operations.”); Comments of Granite Telecommunications, LLC at 3 (“Granite provides service to post offices in towns as small as approximately 200 people. Granite provides these national customers with the ability to obtain service from a single supplier at their disparate retail locations nationwide. Granite’s customers find this to be a major benefit.”); Comments of XO Communications at 26 (“XO is dependent in many locations upon ILEC DS1 and DS3 services to access end user customers, having no competitive alternatives.”).

⁹⁴ See Comments of AT&T at 61; Comments of Verizon at 28.

special access service for the large ILECs are expressly predicated on the existence of tariffed DS1 and DS3 TDM special access and UNE alternatives to supplement marketplace alternatives.⁹⁵ AT&T itself relied on the continued availability of “these still-highly-regulated ILEC TDM inputs” to justify forbearance with respect to Ethernet services in its brief before the D.C. Circuit when defending the Commission’s packet forbearance orders.⁹⁶ And in its pending petition for packet forbearance, CenturyLink asserts that forbearance would not harm competition, because “potential providers also can rely on CenturyLink’s special access services and [UNEs] to provide enterprise broadband services.”⁹⁷

These packet forbearance decisions—recognizing the importance of ex ante regulated wholesale inputs—are consistent with Commission findings in its 2012 *Special Access Order*.⁹⁸ In that decision, the Commission concluded that “[c]ompetitive carriers rely heavily on special

⁹⁵ See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18,705, 18,717 ¶ 20 n.86 (2007) (“[W]e observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.”).

⁹⁶ Brief for Intervenors AT&T Inc., et al. in Support of Respondents at 11 (filed Dec 3, 2008), *Ad Hoc Telecommunications Users Committee, et al., v. FCC*, No. 07-1426 (D.C. Cir. 2008) (“Because these [ATM and frame relay over TDM circuits] are alternative technologies [to Ethernet] within the same market for enterprise services, competing providers could purchase these still-highly-regulated ILEC TDM inputs to compete effectively in that market, even in circumstances where the provider could not deploy its own facilities-based alternative or purchase capacity from a third-party provider, and even if petitions had any basis for challenging the Commission’s conclusions about Ethernet-over-TDM.”) (internal citations omitted). Predictably, AT&T offers a different, creative view of its wholesale obligations when seeking to avoid or reduce its regulatory burden.

⁹⁷ CenturyLink Petition for Forbearance at 29.

⁹⁸ See *Special Access for Price Cap Local Exchange Carriers et al*, Report and Order, 27 FCC Rcd. 10557, 10559 ¶ 2 (2012).

access to reach customers.”⁹⁹ It also noted that tariffed special access offerings remain a “critical input” for even a large competitive local exchange carrier.¹⁰⁰

In light of this precedent, the large ILECs misplace reliance on *Aeronautical Radio, Inc. v. FCC* when claiming elimination of tariffed special access offerings merely would effectuate a “rate increase” that does not warrant Commission review.¹⁰¹ In that case, the Court upheld the Commission’s determination that the removal of a bulk discount from a provider’s tariff did not implicate Section 214, because the service was “still available thereafter from [the ILEC] pursuant to other tariffs or other sections of the same tariff[, such that] only the rates differed.”¹⁰² Here, in contrast, there would be no tariffed alternative, because of the packet forbearance relief granted to the large ILECs. In addition, it is important to remember that CLECs and other competitors (including systems integrators) utilize ILEC wholesale inputs to provide their own enterprise solutions to retail end user customers. Competitors combine their own networks beyond the last mile and, in some cases, add last-mile electronics to provide retail end users with integrated service solutions differentiated not only by price, but also by quality and features. The discontinuance of a wholesale input thus means not only a significant price increase, but also loss of investment and individualized solutions for enterprise customers.¹⁰³

⁹⁹ *Id.* ¶ 2.

¹⁰⁰ *Id.*

¹⁰¹ *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980). *See also* Comments of AT&T at 53; Comments of Verizon at 23.

¹⁰² 642 F.2d at 1223 (emphasis added).

¹⁰³ This loss in investment likely would implicate customers of both CLECs and ILECs. If CLECs are less able to make an economic case to deploy new facilities and services to business customers, ILECs will face less competitive pressure to invest in their own business service offerings. *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, at 3, WC Dkt. No. 05-25 (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)).

2. *A Conclusive Presumption—Which Could be Contravened with a Grant of Forbearance if Circumstances Warrant—Is Appropriate for Discontinuing Tariffed Special Access Inputs Used in the Last Mile.*

As explained above, multiple Commission decisions indicate that replacing a tariffed special access input with a deregulated alternative would effect a discontinuance, reduction, or impairment of service. The remaining question then is whether this impact is experienced by the carrier customer alone or also its end user customer. For a last-mile input, which is directly connected to an end user customer location and which has been recognized as essential for ensuring meaningful competitive choice in an end user's service, the answer definitively is yes.

Pending a comprehensive reassessment of the market, the Commission, therefore, should establish a conclusive presumption that Section 214 authorization is required for discontinuance of a tariffed special access input used for last-mile access. A conclusive presumption will provide certainty to competitive carriers and their customers that service will not be impaired or disrupted in the IP Transition. It also will prevent an odd result whereby an ILEC's elimination of tariffed TDM last-mile inputs would be subject to less Commission oversight than the ILEC's elimination of tariffed IP inputs. Indeed, the burden on ILECs should be higher now, because

And for the same reasons articulated in the text above, Windstream agrees with the comments stating that ILECs should not be permitted to evade Section 214 and the proposed rule by discontinuing its wholesale service in a piecemeal fashion through the elimination of tariff discount plans, particularly those for last-mile access. *See* Comments of Birch, Integra, and Level 3 at 22; Comments of COMPTTEL at 14-15; Comments of XO Communications at 25-26. The same presumptions that apply to a discontinuation of wholesale input should also apply to the elimination of a term discount plan, because the effect on the end user—the loss of the competitive carrier's service—implicates Section 214. *Aeronautical Radio* does not support the ILECs' position both because the elimination of the bulk-discount in that case was not a precursor to eliminating the underlying tariffed service, and because the discounted TELPAK service was not being used as an input to provide integrated, competitive services, but rather was being used by the retail end users themselves only at a discounted rate. 642 F.2d at 1226. Moreover, the Commission has authority under Section 201(b) to prevent evasion of the proposed Section 214 rules.

elimination of remaining tariffed special access inputs means there no longer will be *any* option of tariffed last-mile connectivity for many end user business locations.

And just because the presumption is conclusive does not mean that an ILEC would lack a means to address situations in which the wholesale market is truly competitive: ILECs always have the option to petition for forbearance from the presumption, either throughout a broad geographic area or on a more targeted basis—just as they had the option to petition for forbearance from ex ante rate regulations applying to Ethernet last-mile access.¹⁰⁴ Requiring ILECs to follow the forbearance process focuses the analysis on the correct issues—whether the charges and practices that would prevail absent the safeguards would be reasonable and not harmful to consumers and the public interest more broadly—before discontinuing wholesale services on which competitors must rely.¹⁰⁵ As set out in the *Qwest Phoenix Forbearance Order*, that review should include an analysis of whether the ILEC has retained the ability to exercise market power.¹⁰⁶ In addition, this forbearance approach appropriately shifts the burden to the ILEC to produce evidence that consumers would not be harmed if a wholesale input is discontinued and there is no replacement offering equivalent rates, terms, and conditions.¹⁰⁷

The need for Commission supervision over elimination of tariffed special access inputs used in the last mile is supported by a long line of Commission decisions assessing existing market conditions and the underlying economics of networks, and finding wholesale last-mile

¹⁰⁴ This fully addresses the hypothetical case in which an ILEC seeks to discontinue a service for which deregulated products are a perfect substitute and are subject to extensive retail competition not reliant on the service to be discontinued. Alternatively, this situation, which is likely to be extremely rare, could also be addressed by waiving the equivalent wholesale access rule, assuming such a rule is adopted.

¹⁰⁵ See 47 U.S.C. § 160(a).

¹⁰⁶ See *Qwest Phoenix Forbearance Order* ¶ 21.

¹⁰⁷ See Comments of Competitive Carriers Association at 10.

access is a necessity for CLECs' business services. As detailed in Section II.B. above, the Commission consistently has recognized that it is generally uneconomic for a CLEC to build out to serve less than multiple DS3s of customer demand.¹⁰⁸ ILECs enjoy a nearly insurmountable advantage in deploying overbuilt fiber to most locations, because they already have access to infrastructure needed to connect over the last mile and can spread the costs of the investment over a far larger customer base that they inherited from the monopoly era.¹⁰⁹ Given CLECs' reliance on ILECs' last-mile facilities, the *TRRO* found that "incumbent carriers could strategically . . . prevent competition in the downstream retail market" if competitors were able to manipulate the price of their competitors' wholesale access.¹¹⁰ And with packet forbearance conditioned on availability of other ex ante price-regulated wholesale inputs,¹¹¹ these underlying market conditions, which the Commission has recognized, compel adoption of a conclusive presumption that discontinuance of a tariffed special access input used for last-mile access implicates service available to the end user and thus requires Section 214 authorization.

¹⁰⁸ See, e.g., *TRRO*, 20 FCC Rcd. at 2616 ¶ 150.

¹⁰⁹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, 17,173-74, 17,156, ¶ 325 and n.859 (2003) ("*TRO*") (finding that deployment of last-mile facilities to customers that do not require high bandwidth presents "extremely high economic and operational barriers," and "overbuilding to enterprise customers that require services over [DS1 and DS3] facilities generally does not present sufficient opportunity for competitors to recover their costs"); *Qwest Phoenix Forbearance Order* ¶ 90 (noting that there was "nothing in the record to indicate the passage of time has lowered" the barriers to entry that underlie the regulatory framework for DS1 and DS3 UNEs and special access).

¹¹⁰ *TRRO* ¶ 63.

¹¹¹ See *supra* nn.69-70.

3. *Other Tariffed Special Access Inputs Should Be Subject to a Rebuttable Presumption, Which ILECs Should Bear the Burden of Disproving.*

A rebuttable presumption should apply to tariffed special access inputs that are not used in the last mile. For these inputs, the Commission should make clear that ILECs bear the burden of producing evidence to rebut the presumption that a discontinuation of these wholesale services will result in a discontinuation, impairment, or reduction of service to the competitive carrier's end users. As explained above, replacing a tariffed special access input with a deregulated alternative effects a discontinuance, reduction, or impairment of service, so the focus of this inquiry simply should be on how this result impacts end users.¹¹² Windstream agrees with commenters contending that the ILEC should be required to certify to the Commission that the presumption has been rebutted and to make available to affected wholesale customers the evidence on which it bases its certification.¹¹³ Without the requirement for supporting evidence, the rebuttable presumption would in effect shift the burden from the ILEC, the carrier instigating the change, to the wholesale customer to disprove the ILEC's assertion that no end user's service would be affected by discontinuance of the wholesale input at issue.¹¹⁴

V. *EARLY TERMINATION PENALTIES SHOULD NOT APPLY WHEN SERVICE IS DISCONTINUED DUE TO THE IP TRANSITION.*

As Windstream has previously argued, competitive carriers that have entered into long-term wholesale contracts that contain early termination penalties (which can take the form of

¹¹² Consistent with the prior discussion, if the ILEC seeks to disprove the notion that eliminating the wholesale input would not effect any discontinuance, reduction, or impairment of service warranting Commission review, the ILEC could make its case in a forbearance petition or request for waiver of the equivalent wholesale access rule, assuming such a rule is adopted.

¹¹³ See Comments of Granite Telecommunications, LLC at 9-10; Comments of XO Communications at 23-24.

¹¹⁴ See Comments of Competitive Carriers Association at 10 n.23; Comments of Birch, Integra, and Level 3 at 9 (quoting *NPRM* at ¶ 103) (“[T]he Commission should reject its alternative proposal of allowing an incumbent to merely ‘maintain a record of the facts and analysis it relied on to determine [that] the presumption was rebutted.’”).

minimum revenue commitments or early termination fees) should not be forced to pay such a penalty as a result of migration to IP-based services.¹¹⁵ XO correctly recognizes that plans containing these provisions often are the only options for competitive carriers to purchase wholesale access to the last mile.¹¹⁶ Permitting customers to meet such minimum revenue commitments or thresholds using Ethernet service purchases (as well as their purchases from TDM special access services) is needed to avoid outcomes that would be contrary to the public interest: (1) the penalties would constitute a backdoor price increase over the rates charged for remaining TDM circuits (effectively increasing costs for competitors due to their transition to IP),¹¹⁷ or (2) competitors would be pushed to purchase legacy DS1 and DS3 services solely to meet spend or circuit commitments on a declining base of TDM offerings.

In light of these conditions, the Commission should adopt a simple rule in short order to address a problem that will only become more significant as IP Transition accelerates. The rule would require carriers that offer volume-based discount commitments or thresholds for early termination penalty relief for TDM special access services to permit customers to meet those commitments or thresholds using purchases of Ethernet services as well as their purchases from TDM special access services.¹¹⁸ Without a rule providing a backstop to negotiations, CLECs—

¹¹⁵ For the same reason, the Commission also should reform the terms and condition for volume discounts, so that commitments that apply to TDM-based services do not penalize competitive carriers when they transition their wholesale inputs from TDM to IP-based technology.

¹¹⁶ See Comments of XO Communications at 24. (“[I]t is this ability to get a better price for services to locations only the ILECs can offer only by consenting to the lock-in provisions of the discount plans that is the source of their perniciousness.”)

¹¹⁷ See Comments of COMPTTEL at 22 (arguing that “backdoor price increases” such as “ETFs” should not be permitted); Comments of Granite Telecommunications, LLC at 14 (supporting principle that “price increases shall not be permitted or be effectuated by ILECs via . . . early termination fees”).

¹¹⁸ The rule would not prohibit private negotiations between carriers and their customers on ways of addressing the issue—either during contract negotiation or during the transition to

which are already in these long-term contracts—have no sufficient recourse when an ILEC decides to discontinue a TDM circuit in the middle of the contract, and would be penalized for encouraging their own customers to transition to IP-based solutions.¹¹⁹ AT&T’s assurance that “effective contracts and tariffs” will “adequately address any issues” ignores the obvious fact that those contracts impose the early termination penalties in the first instance.¹²⁰

VI. INCUMBENT CARRIERS SHOULD BE REQUIRED TO PROVIDE COMPETITORS SUFFICIENT NOTICE OF COPPER RETIREMENT.

Windstream agrees with the numerous commenters supporting the Commission’s tentative conclusion that network change disclosure rules for copper retirement should be revised to better protect consumers, including those served by competitive carriers using ILEC last-mile facilities.¹²¹ The current regime does not provide enough transparency or notice to enable

IP—that are more advantageous for both parties. However, such negotiations are far more likely to be fruitful with a default rule in place.

¹¹⁹ See Comments of XO Communications at 27 n.47 (“The term discount plans that XO and other CLECs enter into with incumbents for DS1 and DS3 special access circuits include volume commitments and extremely high shortfall penalties for failure to meet these commitments. These plans generally prevent the use of Ethernet services as substitutes for TDM services under those commitments.”).

¹²⁰ See Comments of AT&T at 64.

¹²¹ *Technology Transitions NPRM* at ¶ 55. See, e.g., Public Interest Commenters at 29 (“urg[ing] the Commission to ensure its copper retirement rules prevent carriers from leaving customers behind and give consumers a voice in the copper retirement process”); NASUCA Comments at 1-2 (“NASUCA endorses the Commission’s belief that the transition must follow the ‘principles embodied in the Communications Act that have long defined the relationship between those who build and operate networks and those who use them . . . includ[ing] competition, consumer protecting, universal service, and public safety and national security.”); Comments of the Michigan Public Service Commission, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 4-6 (Feb. 5, 2015) (“support[ing] robust notification requirements and public disclosure of effects and changes to customers and interconnected providers of any discontinuance or impairment of services as a result of copper retirement”); NYPSC Comments at 5-7 (noting that “[c]opper retirements cannot be a vehicle for LECs to diminish existing minimum consumer protections under state laws”); Pennsylvania Public Utility Commission Comments at 10-11 (supporting “revisions to the FCC’s network change disclosure rules to allow for greater transparency, to provide a meaningful opportunity to participate by all stakeholders, including incumbents and competitors, and to ensure consumer protection”); Comments of

business service consumers, and competitive carriers using copper loops to provide services to those consumers, to adequately prepare replacement facilities. The Commission should revise its rules to require standardized notices that contain sufficient information about impacted circuits to facilitate continuity of service to end users served by competitive carriers, as well as sufficient advance notice so that carriers and customers can plan for the transition. As an ILEC, Windstream believes that it could feasibly implement these requirements, and they would not cause disruption to its copper retirement processes.

A. The Commission Has Ample Statutory Authority to Adopt Changes to Its Copper Retirement Rules.

The Commission has several sources of statutory authority for undertaking copper retirement rule changes. Of course, to the extent that a copper retirement would effect the discontinuance of a service, when discontinuance is considered functionally, that retirement is subject to prior Commission review and authorization pursuant to Section 214.¹²² As enterprise consumers caution, the Commission should not permit carriers to cloak what is substantively a discontinuation of service in the form of a copper retirement to avoid Section 214 requirements.¹²³ Adopting the proposed equivalent wholesale access rules also would prevent

Ad Hoc at 11 (“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.”); Comments of the Utilities Telecom Council at 5-8 (“UTC further suggests that the notice requirements should be sufficient to provide utilities and CII with enough time to transition towards alternative communications solutions.”).

¹²² See *Technology Transitions NPRM* ¶ 114-116. As the Commission noted, in response to Verizon’s proposal to discontinue wireline service in parts of New York and New Jersey, “[m]any consumers raised concerns about the loss of ‘certain third-party services or devices that were designed specifically to work with traditional voice services offered over copper facilities [that] may not be compatible with [a wireless alternative]. This includes fax machines, DVR services, credit card machines, some medical alert devices, and some (but not all) other monitoring systems like alarm systems.’” *Id.* ¶ 116.

¹²³ See Comments of Ad Hoc at 7 (“Carrier choices for managing their networks . . . 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.”). See also *id.* (“The Commission’s rules must not

the “blurring of this distinction” between Section 214 and Section 251. Where there is no functional equivalent available, copper retirement is a discontinuation of service.

Even when copper retirement would not result in a Section 214 discontinuance, Section 251(c)(5) requires ILECs to “provide reasonable public notice of changes made in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks.” For example, this provision is implicated when migrating from copper to fiber necessarily requires CLECs providing Ethernet over Copper (“EoC”) to attain other forms of last-mile connectivity.¹²⁴ Moreover, both retail enterprise and wholesale customers may be required to install different end user equipment to interface with an IP service.¹²⁵ Given the potential impact on services such as fax machines, premises monitoring, and medical alert services, at least some of which utilize interstate telecommunications, as well as on wholesale customers’ provision of Internet access and other interstate services to enterprise users, the Commission has additional authority under Section 201(b) to require clear notice to all users, whether retail or wholesale, of significant changes in their interstate service, which

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.”).

¹²⁴ To provision EoC, competitors lease “dark” copper loops (UNE DS0s) from ILECs and combine two or more loops to a location with their own electronics to provide EoC services at speeds of up to 100 Mbps; ILECs offer similar service using their own copper loops. *See* Letter from Thomas Cohen, Counsel to XO Communications LLC, to Marlene H. Dortch, Secretary, FCC, GN Dockets 13-5 and 12-353, at 2 (Nov. 17, 2014) (explaining that competitors lease “dark” copper loops (UNE DS0s) from ILECs and combine two or more loops to a location with their own electronics to provide EoC services at speeds of up to 100 Mbps). Concerns regarding retirement of copper facilities are amplified with business customers’ increasing usage of copper loops for EoC services, because these services will not work if the ILEC retires any portion of the copper in the transmission line. *See id.* at 12 (explaining EoC only works with home run copper loops).

¹²⁵ *See* Comments of Ad Hoc at 8 (stating that copper retirement could “unilaterally force costly CPE changes or upgrades upon customers”); Comments of Utilities Telecom Council at 8 (explaining that a utility may have difficulty obtaining new equipment that meet the reliability and resilience requirements met by existing equipment).

includes use of the subscriber's switched or non-switched line to originate or terminate more than a de minimis amount of interstate traffic.

There is no merit to AT&T's claim that the Commission's proposal to require a description of "expected changes in prices, terms, or conditions" attributable to the proposed network modifications lacks sufficient statutory basis.¹²⁶ Section 251(c)(5) requires "notice of changes in the information necessary for transmission and routing of services . . . as well as of any other changes that would affect the interoperability of those facilities and networks,"¹²⁷ but does not limit the Commission's discretion to specify the contents of such notice. AT&T's argument conflates what changes *trigger* the notice requirement with what the notice *contains*.¹²⁸ The Commission previously explained that the public notice should provide "sufficient information to deter anticompetitive behavior," and "must include *but not be limited to* references to technical specifications."¹²⁹ Indeed, the current rules are not limited to the technical specifications, and require the ILEC to provide both "a description of the reasonably foreseeable impacts of the planned changes" as well as contact information for a person to "supply additional information" regarding the changes.¹³⁰ Specifying changes in prices, terms, and conditions fits well within the existing category of "foreseeable impacts" of planned network changes, which carriers are already required to provide. Moreover, when establishing the current rules, the Commission recognized that "notice of changes in ordering, billing and other

¹²⁶ See Comments of AT&T at 35 (*citing NPRM* ¶ 57).

¹²⁷ 47 U.S.C. § 251(c)(5).

¹²⁸ See Comments of AT&T at 36 ("[T]he additional information that the revised rules would require the ILECs to provide *in its notice* to each competitive provider is not technical information." (emphasis added)).

¹²⁹ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 19392, 19479 ¶ 188 (1996) (emphasis added).

¹³⁰ 47 C.F.R. § 51.327(a).

secondary systems is required if such changes will have an effect on the operations of competing service providers.”¹³¹ AT&T’s attempts to draw a distinction between “services” and “facilities” for notice purposes fail, because the Commission also has not limited the contents of the notice to information about the carrier’s facilities.

B. The Copper Retirement Rules Need to Be Revised to Ensure a Smooth Transition from Copper to Fiber.

As many comments suggest, to prevent service disruption caused by copper retirement, the Commission’s rules should require that notices be provided further in advance of planned changes and through standardized methods irrespective of the amount of time between notice and implementation.¹³² Furthermore, the rules should require notices to contain information on impacted circuits and wholesale alternatives.

1. Incumbents Should Be Required to Provide Standardized Notice of Impacted Circuits and, Whenever There Is A Network Interface Change, Information Regarding the Incumbents’ Wholesale Alternatives.

First, Windstream agrees with other commenters that ILECs should be required to provide each CLEC a standardized complete and accurate list of the CLEC’s affected circuits and, whenever there is a network interface change, the rates, terms, and conditions of the ILEC’s wholesale replacement inputs available after the network change.¹³³ A network interface change triggering the latter provision should include any change to a network interface facing the CLEC’s network (colocation or point of interface) or at the demarcation point at the customer’s

¹³¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. at 19471 ¶ 171 (1996).

¹³² *See, e.g.*, Comments of XO Communications at 7-8; Comments of Ad Hoc at 10; Competitive Carriers Association Comments at 11-12; Comments of Birch, Integra, Level 3 at 37; Pennsylvania Public Utility Commission Comments at 12.

¹³³ *See* Comments of Ad Hoc at 10; Comments of the California Public Utilities Commission, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 12-13 (Feb. 26, 2015); Comments of Competitive Carriers Association at 12-13; Comments of Birch, Integra, and Level 3 at 37; Comments of XO Communications at 14.

premise.¹³⁴ As a competitor, Windstream does not have a readily achievable way to identify which of its individual customers will be affected by copper feeder/distribution retirement when only a portion of the outside plant in a wire center is replaced with fiber, nor does it know what wholesale replacement offerings the ILEC will offer as alternatives to eliminated inputs. If this information is not clearly and accurately provided by the ILEC, competitors will spend much of their “lead time” seeking to track down what the impacted circuits are and what alternatives are possible—before being in a position to take any steps to make changes for customers impacted by the ILEC’s copper retirement plans.

Given these concerns, Windstream, in particular, recommends that when a copper loop, or a portion of a copper loop (e.g., feeder), is slated for retirement, the Commission should require the ILEC to provide to each affected CLEC:

- a complete and accurate list of the individual CLEC’s circuits affected by the copper retirement (including Circuit ID, working telephone number for UNE-P and resale, and end user address of each circuit); and
- if there is a network interface change, rates, terms, and conditions for replacement wholesale inputs available from the ILEC after the network change.

¹³⁴ A network interface change could occur, for example, when all or part of an end-to-end copper loop is replaced with fiber (thereby precluding a competitor from offering EoC), or when DS1 capacity changes from TDM format to IP format (requiring the CLEC to invest in IP-based equipment to continue use of the capacity). Information on rates, terms, and conditions of replacement wholesale inputs, however, would not be needed when there is no change to a network interface. An example of this scenario is where the ILEC will continue to provide existing TDM special access services over fiber when the copper is retired, as was the case with Verizon’s copper retirements last fall in towns in New York, Pennsylvania, New Jersey, and Massachusetts. *See, e.g.*, Letter from Verizon Global Wholesale to Windstream, Re: Notice of Conversion of Embedded Base of Certain Wholesale Services to Replacement Facilities in Orchard Park, NY, Hummelstown, PA, Farmingdale, NJ, and Lynnfield, MA (Nov. 19, 2014).

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This information is critical to a CLEC's ability to ensure continuity of service for its customers and will not place undue burdens on the ILECs.¹³⁵ Notably, CenturyLink provides all such circuit identification information listed above—and more—to CLECs today.¹³⁶

Likewise, providing data on ILEC wholesale replacement inputs should not overly burden ILECs, as the data on the impact on rates, terms, and conditions are already in the ILECs' possession. While several large ILEC commenters expressed concern that it would be impossible to provide data on changes in prices, terms, and conditions accompanying copper retirement, these concerns seem to be rooted in the assumption that ILECs retiring copper facilities would need to provide details on services offered by other providers.¹³⁷ Under Windstream's proposed construction, however, ILECs only would be obligated to provide information on the prices, terms, and conditions of *their own* replacement wholesale inputs that will be available after the network change. And in any event, the burden placed on carriers to comply with this notice requirement must be balanced against the public interest in minimizing the disruption to service resulting from copper retirement.

¹³⁵ See Comments of Ad Hoc at 10 (agreeing with the Commission's proposal requiring notice to contain specific information about changes to price, terms or conditions); Comments of XO Communications LLC at 13 ("The notices should include the addresses that will be affected by the planned retirement, the CLLI codes for each loop, and the nearest intersection.").

¹³⁶ See Comments of CenturyLink at 31, Exhibit A (indicating CenturyLink provides CLECs using copper facilities with proposed to be retired with detailed information including Circuit ID, cable and pair numbers, and impacted addresses and phone numbers).

¹³⁷ See Comments of CenturyLink at 34-35; Comments of Verizon at 13.

2. *Competitors Need More Advance Notice of Copper Retirements.*

Second, Windstream joins many other parties in urging the Commission to require an ILEC to provide more advance notice before the network change would take effect.¹³⁸ Enterprise users in the record make clear that the 90 days notice provided under existing rules is insufficient.¹³⁹ As recognized in the comments, more time is especially important when the ILEC's plans would require elimination of a CLEC's wholesale input,¹⁴⁰ such as EoC service.

The steps that competitors undertake following a copper retirement announcement—including contacting customers, discussing alternatives, ordering and installing alternatives, and/or acquiring/building new facilities—all take time, and if competitive carriers do not have sufficient notice, it is ultimately their customers who experience disruptions in or impairment of service.¹⁴¹ The Ad Hoc Telecommunications Users Committee notes that “planning and carrying

¹³⁸ See, e.g., Comments of XO Communications at 16-17 (seeking a year's notice); Comments of Birch, Integra, and Level 3 at 37-38 (a year for affected competitive carriers); Competitive Carriers Association Comments at 12 (180 days).

¹³⁹ See Comments of Ad Hoc at 11 (“Large enterprise users like the members of Ad Hoc will typically need substantially more than 90 days lead time in preparing for changes.”); Comments of The Utilities Telecom Council at 7-8 (“Currently, utilities are being provided with inconsistent and insufficient levels of notice from the carriers concerning the discontinuance of service.”).

¹⁴⁰ See Comments of ADTRAN, Inc., PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 10 (Feb. 5, 2015) (advocating for 180 days notice when services are eliminated as a result of change); Comments of the City of New York at 6 (finding “[n]inety days’ notice is grossly insufficient for the City to plan for and implement replacement services”). See also Pennsylvania Public Utility Commission Comments at 13 (“[A]dvance notice given by an ILEC to a competitive wholesale access provider of a planned copper retirement should be of sufficient length that the competitive provider has ample lead time to obtain a functionally equivalent service.”).

¹⁴¹ For a voice customer, the ILEC will need to install its new facility, provide that facility to the competitive provider, and remove the copper. This work often entails temporary service loss that needs to be coordinated with the customer in advance. EoC presents additional challenges. If the ILEC will not provide an input enabling equivalent Ethernet capacity at equivalent rates, terms, and conditions (as is usually the case today), the competitive provider will need to seek out another solution, which may involve building its own facilities or leasing from a third party and installing new equipment. And if the competitive provider

out the migration of a large enterprise network from one service to another often takes a year or more.”¹⁴² The Committee thus recommends that “at least 180 days notice of copper retirement would be appropriate.”¹⁴³ Similarly, the City of New York reports that its “transition to alternative technologies requires long term planning,” given “the City’s telecommunications environment is extensive and complex” and “[g]overnmental entities . . . are often required to pursue substantial procurement cycles.”¹⁴⁴ The City concludes that “[n]inety days’ notice is grossly insufficient for the City to plan for and implement replacement services in the communications technology space.”¹⁴⁵ And if large and sophisticated business and government users require at least 180 days, a reasonable notice period to encompass the needs of small and medium-sized entities could well be longer.

The Commission’s conclusion, referenced by Verizon, that the current copper retirement notice regime is sufficient predates the widespread adoption of EoC.¹⁴⁶ The terms “Ethernet over Copper” and “EoC” never appear in the *TRO*. But now ports deployed for EoC have been growing at more than 20 percent per year—making EoC the fastest growing technology in the Ethernet Access Device space.¹⁴⁷ And as previously noted by TelePacific, “changed circumstances” include not only “explosion of EoC capability to provide high speed broadband

cannot find a cost-effective alternative, its customer will need to select and switch to a new provider.

¹⁴² Comments of Ad Hoc at 11.

¹⁴³ *Id.*

¹⁴⁴ Comments of the City of New York at 6.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *See* Comments of Verizon at 10-11.

¹⁴⁷ Letter from Jeff Reedy, Overture Networks, to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket Nos. 09-47, 09-51, 09-137, RM-11358 (Dec. 7, 2012) (citing Infonetics Research Data).

Internet access,” but also “consecutive FCC findings that broadband is not being deployed on a reasonable and timely basis, and the national goal of promoting affordable broadband.”¹⁴⁸

3. *The Notice Period Should Not Start Until a CLEC Receives Complete and Accurate Notice of the Required Information.*

Third, the “clock” for the advance notice requirement should not start running until after the ILEC has provided this complete and accurate information to each competitive provider.¹⁴⁹ Windstream’s experience is that this notice to a CLEC otherwise may not be contemporaneous with an ILEC’s network change disclosure at the Commission. For example, Cincinnati Bell recently submitted a network change disclosure announcing its intention to migrate from copper to fiber infrastructure, but two weeks passed until Windstream received notice of its affected circuits¹⁵⁰—and specifics on the rates Cincinnati Bell planned to charge for the replacement circuits were not readily available.¹⁵¹ The initial two-week delay in receipt of notice of affected circuits precluded Windstream from filing an objection within nine business days of the Bureau’s Public Notice, as the rules current require.¹⁵² The City of New York reports facing similar difficulties: “As a major purchaser of communications technology, the City’s experience is that notice of tech transitions from service providers has been, for practical purposes, sporadic, inadequate and in some cases provided not at all.”¹⁵³

¹⁴⁸ Letter from Tamar E. Finn, Counsel to TelePacific, to Marlene H. Dortch, Secretary, FCC, at 1, GN Docket No. 09-51, WC Docket No. 10-188, RM-11358 (Dec. 6, 2012).

¹⁴⁹ See ADTRAN Comments at 10.

¹⁵⁰ Letter from John T. Nakahata, Counsel to Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, WC Docket No. 15-1 (filed Jan. 7, 2015).

¹⁵¹ See Letter from John T. Nakahata, Counsel to Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, WC Docket No. 15-1 (filed Jan. 15, 2015).

¹⁵² The issues surrounding the affected circuits were later resolved.

¹⁵³ Comments of the City of New York at 6.

4. Wholesale Notices Should Take Several Forms.

Finally, copper retirement notices should be required to take the form of notices currently provided by CenturyLink. As noted in its comments, CenturyLink, in particular, provides notice of its copper retirement plans by: (1) e-mailing individual CLECs operating in the affected area of the proposed retirement, (2) posting notices online (via CenturyLink's CLEC-facing system, Interconnect Media Access interface), and (3) filing a public notice with the Commission.¹⁵⁴ Windstream supports new rules to require this three-pronged approach for providing notice to CLECs, even though this would require some changes to Windstream's own practices and those of other large ILECs (e.g., Windstream's experience is that some carriers generally only provide a list of affected circuits if requested by the CLEC).

These three forms of notice should be provided in all instances, for both short-term and long-term copper retirements. This critical information is needed irrespective of the time interval preceding a proposed retirement of copper facilities. It is inefficient for the CLEC to try to track down information about impacted circuits and ILEC wholesale alternatives, given this information is readily available from the ILEC, which stands to benefit the most from the proposed network changes. Windstream, therefore, recommends eliminating regulatory disparities in the notice method required for short-term notices versus long-term notices.¹⁵⁵

¹⁵⁴ Comments of CenturyLink at 31.

¹⁵⁵ Accordingly, the Commission should revise 47 C.F.R. § 51.329(a) to require that notice be provided in both forms currently listed as alternatives in Sections 51.329(a)(1) and 51.329(a)(2), as well as require the filing of a certificate of service stating that the affected CLECs have been served in accordance with the procedure set forth in 47 C.F.R. § 51.333(a). In addition, the short-term notice procedure should be revised to require not only the current individualized service upon affected CLECs, but also both of the methods currently described in Sections 51.329(a)(1) and 51.329(a)(2).

VII. THE NEAR-TERM REFORMS PROPOSED BY THE COMMISSION DO NOT REMOVE THE NEED FOR COMPREHENSIVE REFORM IN RESPONSE TO THE SPECIAL ACCESS DATA ANALYSIS.

The proposed ground rules are designed to ensure service continuity for consumers during the transition from TDM- to IP-based technology. They also preserve policies that, as the Commission recognized, allow for competition in the business market. However, adopting the proposed ground rules is an interim step and does not eliminate the need for comprehensive special access reform.

Far from “shield[ing]” CLECs from the competitive need to innovate and invest (as AT&T alleges),¹⁵⁶ preserving the status quo would not even level the playing field with respect to IP-based special access services. At most, it is a necessary stop-gap to reduce erosion in competition in the wholesale special access market. Pending such reform, ILECs increasingly will enjoy their unwarranted competitive advantage in the special access market as a direct result of their ability to build more efficient fiber facilities in the legacy infrastructure they own.¹⁵⁷

Likewise, the special access reform process does not make adoption of the proposed rules “premature” as ITTA suggests.¹⁵⁸ ITTA’s argument ignores the fact that the proposed ground rules require only the equivalent of the TDM-based services that carrier customers are currently purchasing from ILECs. Adopting the ground rules does not expand the special access services available to CLECs, and also does not restrict or impose conditions on the Ethernet services that the ILECs are offering in the absence of discontinuance of TDM-based services.

¹⁵⁶ See Comments of AT&T at 59.

¹⁵⁷ See Comments of AT&T at 62 (“No one has questioned or can question that the transition to all-IP networks will greatly enhance the efficiency of telecommunications services and provide a far more capable platform for future innovation.”); Comments of Verizon at 5-7 (finding fiber offers increased reliability, better performance, and improved energy efficiency).

¹⁵⁸ Comments of ITTA at 10.

VIII. CONCLUSION

The Commission is correct to focus on the need to continue protecting the Communications Act's core statutory values both during and after the transition of network services from TDM to IP. As recognized by the Commission and business service customers, the substitution of IP electronics for TDM electronics over the last mile does not change the fundamental economics of building and deploying alternative network facilities. There is substantial reason to believe that what the Commission found to be the case in 2005—that CLECs could not reasonably be expected to deploy fiber loops to most business locations—remains true. Lacking a clear and convincing ILEC showing to the contrary, the Commission's approach of preserving existing competitive checks through a requirement to continue providing at least equivalent wholesale access on equivalent rates, terms, and conditions is needed to preserve meaningful competitive choice for business customers. Moreover, the record shows that the principles Windstream proposed should be adopted as rules to define what constitutes equivalent wholesale access.

ILECs ask the Commission to allow them to perpetrate a shell game in which they obtained packet forbearance based on maintaining tariffed DS1 and DS3 special access services, and providing unbundled DS1 and DS3 capacity loops, and now seek to end both of those through the IP Transition while retaining packet forbearance. This would leave the ILECs in the position of a deregulated monopolist with respect to service to the vast majority of business locations. There is no good reason for the Commission to embrace such a result, and particularly no reason for the Commission to allow the ILECs to create such a result by unilaterally

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converting their networks from TDM to IP, without any further Commission examination of the impact on competition and consumers.

Respectfully submitted,

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ATTACHMENT:

Application of Windstream’s Proposed Principles to Two Hypothetical Scenarios

Scenario 1:

ILEC A offers the following TDM special access and retail Ethernet offerings at the specified rates, and is seeking to discontinue the former as a part of the IP Transition:

Bandwidth	TDM Rate	TDM Price per Mbps	Retail IP Rate	Retail IP Price per Mbps	Maximum Allowable Wholesale IP Rate
1.5	\$120.00	\$80.00	\$475.00	\$316.67	\$120.00
2.0			\$525.00	\$262.50	\$160.00
4.0			\$600.00	\$150.00	\$320.00
6.0			\$675.00	\$112.50	\$480.00
8.0			\$750.00	\$93.75	\$640.00
10.0			\$825.00	\$82.50	\$800.00
20.0			\$875.00	\$43.75	\$875.00
30.0			\$920.00	\$30.67	\$920.00
40.0			\$950.00	\$23.75	\$950.00
45.0	\$2,000.00	\$44.44	N/A	N/A	
50.0			\$1,000.00	\$20.00	\$1,000.00

To satisfy the principles, ILEC A would be required to offer wholesale customers at least the same bandwidth options and rates offered to its retail customers; could not set rates exceeding, on a per Mbps basis, those for TDM inputs that otherwise could be used to provision the requested service; and could not set the price of its lowest IP replacement service at or above 1.5 Mbps at a level exceeding the TDM DS1 price.¹ Here this means ILEC A’s wholesale IP 1.5 Mbps rate would be limited to \$120, and rates for other wholesale IP products at/below 10 Mbps could not exceed the lower of \$80 per Mbps, the corresponding TDM DS1 special access rate per Mbps, or the retail IP price for the same level of service. Since the retail rates for all IP products at/below 10 Mbps exceed \$80 per Mbps, the ILEC’s TDM DS1 special access per Mbps rate would be the defining benchmark and thereby would provide that prices for these wholesale IP products do not exceed \$80 per Mbps. Rates for the ILEC’s wholesale IP products at/above 20 Mbps would be limited to the lower of \$44.44 per Mbps, the per Mbps rate for TDM DS3 service, or the retail IP price for the same level of service. For these tiers, the retail IP per Mbps rate is less than the TDM DS3 per Mbps rate, so the wholesale price would be limited by the retail price.

¹ For Ethernet products at/below 12 Mbps, the relevant point of comparison for TDM services is the DS1 service offered by the ILEC in the area. But for products above 12 Mbps, the TDM rates benchmark would be set by the price per Mbps of the ILEC’s DS3 service.

These limits would be responsive to any future changes in ILEC A’s retail IP offerings. For example, the retail IP price would set the upper bound of rates for wholesale inputs at/below 10 Mbps if the new retail IP per Mbps rate fell below that of the TDM input that would be used to provision service at the specified level. The referenced ILEC retail rates apply to ILEC retail products that have service quality reasonably comparable to discontinued TDM inputs and that are offered in the area for more than 90 days.²

Scenario 2:

As indicated in the chart below, ILEC B seeks to discontinue its TDM DS1 and DS3 services, which are wholesale inputs, and it only offers retail IP products at three levels (2 Mbps, 10 Mbps, and 50 Mbps). Thus, unless it elects to change its retail product offerings, ILEC B would not have to offer more than three bandwidth choices at/below 50 Mbps to wholesale purchasers after transitioning to all-IP service offerings.

Bandwidth	TDM Rate	TDM Price per Mbps	Retail IP Rate	Retail IP Price per Mbps	Maximum Allowable Wholesale IP Rate
1.5	\$140.00	\$93.33	N/A		
2.0			\$200.00	\$100.00	\$140.00
10.0			\$750.00	\$75.00	\$750.00
45.0	\$1,400.00	\$31.11	N/A		
50.0			\$1,000.00	\$20.00	\$1,000.00

ILEC B’s wholesale rate for its 2 Mbps IP product could not exceed \$140, the price of TDM DS1 special access service, because 2 Mbps now would be the lowest level of capacity offered at or above a DS1 level. (Note, however, that that the ILEC could introduce a new 1.5 Mbps IP product priced at or below \$140, and then its 2 Mbps product could have a wholesale price at the lower of the retail price or \$186.66 (\$93.33 x 2).) ILEC B’s rates for its 10 Mbps and 50 Mbps wholesale IP products would be limited by the rates of its corresponding retail products, because the retail IP per Mbps prices are below the respective per Mbps prices of corresponding TDM DS1 and DS3 special access services. As noted for the prior scenario, the relevant retail rates for reasonably comparable IP services would be those that the ILEC currently offers in the area for more than a 90-day period.

² This should include any retail offering of reasonably comparable service quality even if the ILEC does not routinely sell the particular product to wholesale customers.