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**VIA HAND DELIVERY**

***EX PARTE***

April 17, 2015

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

Re: *GN Docket No. 13-5, Technology Transitions; GN Docket No. 12-353, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; WC Docket No. 05-25, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; RM-10593, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*

Dear Ms. Dortch:

On April 15, 2015, Jennie Chandra, Malena Barzilai, and (via phone) Peggy Rubino of Windstream Services, LLC (hereinafter “Windstream”) and Henry Shi and John Nakahata of Harris Wiltshire & Grannis LLP, counsel to Windstream, met with Pam Arluk, Robin Cohn, Richard Kwiatkowski, William Layton, Jim Lichford, Virginia Metallo (via phone), Eric Ralph, Marvin Sacks, Doug Sloten, and David Zesiger of the Wireline Competition Bureau to discuss the imposition of special construction charges by large ILECs (“incumbent local exchange carriers”) as part of the purchase of Ethernet and TDM special access services.

It is customary for ILECs to impose special construction charges, in addition to regular charges for service, where new deployment of fiber or other facilities is necessary to provide the wholesale special access service and the ILEC has no other requirement for the facilities. However, when used improperly, special construction charges can be a means for ILECs to effect backdoor price increases for wholesale services and thereby undermine competition in the business services market—leading to less choice and higher prices for schools, health care providers, governmental entities, and businesses, among other customers.

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These special construction charges, if left unchecked, could undermine the Commission’s intention to ensure IP replacement products are not priced higher than comparable TDM inputs.<sup>1</sup>

In the meeting on Wednesday, Windstream presented data on the frequency and amount of special construction charges quoted for its Ethernet and TDM special access orders placed with the largest ILECs. These data are contained in Attachments A, B and C to this letter. Attachment A shows 2014 summary data on special construction charges quoted for Windstream’s special access orders with Verizon and AT&T, as well as data on completed orders with each ILEC. Attachments B and C show similar data broken out for the last three months of 2014 and the first three months of 2015, respectively.

Windstream’s data indicate significant variation between the largest ILECs’ special construction practices. In particular, these data show that—based on an analysis comparing 2014 special construction quotes to completed orders—Verizon is more than thirty times as likely to impose Ethernet special construction charges than AT&T, and much more likely to impose special construction charges on Ethernet services as compared with TDM DS1 special access services. Windstream data also indicate Ethernet special construction charges are increasing in frequency: Verizon issued nearly twice as many Ethernet special construction quotes to Windstream in first quarter 2015 as compared to first quarter 2014.

Multiple parties have submitted filings to the FCC that report ILEC abuses of special construction charges.<sup>2</sup> For example, the Ad Hoc Telecommunications Users Committee states that its members—including many very large businesses that should have the strongest negotiating power—have found that “ILECs have claimed that special construction charges apply when any construction of new facilities occurs, even when the new facility construction is a mere expansion of capacity on existing routes to accommodate increased marketplace demand or is part of a network build-out that can serve a segment of the market at large and not only the

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<sup>1</sup> See *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358 and RM 10593, FCC 14-185 at ¶ 110 (2014) (“*Technology Transitions NPRM*”).

<sup>2</sup> See, e.g., 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 19 (Feb. 5, 2015) (Ad Hoc Comments); Comments of COMPTTEL, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 35-37 (Feb. 5, 2015) (COMPTTEL Comments); Comments of Birch, Integra, and Level 3, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 14-16 (Feb. 5, 2015) (Birch et al. Comments); 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 11 (Feb. 5, 2015) (XO Comments); Letter from Eric N. Einhorn, Windstream, to Jonathan Sallet and Julie Veach, FCC, GN Docket Nos. 13-5 and 12-353, at 14 (April 28, 2014) (Windstream Ex Parte).

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customer being required to pay the charges.”<sup>3</sup> Ad Hoc adds that ILECs are often able to get away with these abuses, because “the business need for the service is so pressing that customers do not have the luxury of delaying service so they can seek formal relief from the Commission.”<sup>4</sup>

Competitive carriers, which purchase wholesale last-mile services from the ILECs, echo Ethernet special construction concerns voiced by the ILECs’ larger retail customers.<sup>5</sup> In response to these issues, COMPTTEL and other competitive carriers have requested, in particular, that the Commission make clear that ILECs going forward cannot charge special construction for deployment of Ethernet services in either of the following circumstances:

- *Existing Facilities Can Meet Competitors’ Needs* – When fiber for any of the ILEC’s services (retail and/or wholesale) already connects to the location addressed by the order, the ILEC shall make capacity available to the requesting wholesale customer without assessing a special construction charge, just as it would for a retail customer at the same location.
- *The ILEC Would Incur the Construction Costs in Its Normal Course of Business* – With existing infrastructure at exhaust, any new network delivery infrastructure (conduit, subduct, buried, aerial infrastructure) configured for capacity beyond that requested is presumed to be in part for the ILEC’s own use and therefore deemed normal construction that is not subject to special construction charges. To rebut this presumption, the ILEC must certify that it will not use the infrastructure for any of its or its affiliates’ retail services in the future.<sup>6</sup>

Windstream urged the Commission to take near-term action on this recommendation to ensure Ethernet special construction charges do not become an unauthorized form of backdoor ILEC price increases as carriers and their customers further advance into the IP era.

Windstream seeks highly confidential treatment of the content in Appendices A, B and C pursuant to the Second Protective Orders in the above-referenced proceedings and subsequent

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<sup>3</sup> Ad Hoc Comments at 19 (“Ad Hoc members can attest first hand that ILECs have repeatedly demanded payment of special construction charges when none of the conditions required under the tariff are present.”).

<sup>4</sup> *Id.*

<sup>5</sup> See COMPTTEL Comments at 35-37; Birch et al. Comments at 14-16; XO Comments at 11. See also Windstream Ex Parte at 14.

<sup>6</sup> See Attachment to Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353 (October 24, 2015). Simultaneous or subsequent modifications of a facility to bring the ILEC into compliance with applicable codes and other safety or engineering requirements that are not exclusively for the requesting customer’s benefit are for ILEC use.

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clarification by Delegated Authority.<sup>7</sup> Highly confidential treatment is required to protect information about Windstream’s wholesale purchases and expenses.<sup>8</sup>

Pursuant to the two Second Protective Orders, please find enclosed the highly confidential version of the attached document for filing in the above-referenced dockets. A redacted version of the document is being filed electronically via ECFS. Windstream also is sending two copies each of the highly confidential version and this 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.

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

cc: Jonathan Reel  
Marvin Sacks

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<sup>7</sup> *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). *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, Second Protective Order, 25 FCC Rcd. 17725 (WCB 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*).

<sup>8</sup> *See* IP Transition Second Protective Order at Appendix A, number 3 (declaring eligible for highly confidential treatment “information that provides granular information about a Submitting Party’s current or future costs, revenues, marginal revenues or market share”); 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”).

**Attachment A**

**2014 Windstream Special Construction Data**

<b>Ethernet</b>	<b>Verizon</b>		<b>AT&amp;T</b>	
	<b>Quotes</b>	<b>Amount</b>	<b>Quotes</b>	<b>Amount</b>
Total Quotes				
Avg amt quoted - all quotes				
Monthly average # of quotes				
Monthly average # of completed orders				

<b>DS-1</b>	<b>Verizon</b>		<b>AT&amp;T</b>	
	<b>Quotes</b>	<b>Amount</b>	<b>Quotes</b>	<b>Amount</b>
Total Quotes				
Avg amt quoted - all quotes				
Monthly average # of quotes				
Monthly average # of completed orders				

Note: Highlighting indicates redaction of Highly Confidential information.



Attachment C

First Quarter 2015 Windstream Data on Special Construction Quotes

		Number of Quotes	Total Amount Quoted	% YOY Change in the Number of Quotes	% YOY Change in the Total Amount Quoted
<b>Verizon</b>					
January	DS-1 Ethernet				
February	DS-1 Ethernet				
March	DS-1 Ethernet				
<b>AT&amp;T</b>					
January	DS-1 Ethernet				
February	DS-1 Ethernet				
March	DS-1 Ethernet				

Note: Highlighting indicates redaction of Highly Confidential information.