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VIA ECFS ***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 and Malena Barzilai of Windstream Services, LLC (hereinafter "Windstream") and John Nakahata and Henry Shi of Harris, Wiltshire & Grannis LLP, counsel to Windstream, met with Matthew DelNero, Pam Arluk, Daniel Kahn, William Layton, Virginia Metallo, and David Zesiger, along with Michelle Berlove, Heather Hendrickson, and Jean Ann Collins joining by phone, to discuss the Commission's *Technology Transitions NPRM*.[1] Windstream reiterated and clarified points in its comments on the *NPRM*.[2]

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[1] *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185, 29 FCC Rcd. 14,968, 14,972-73 ¶ 6 (2014) ("*Technology Transitions NPRM*" or "*NPRM*").

[2] *See* Comments of Windstream Corp., GN Docket Nos. 13-5, 12-353 (filed Feb. 5, 2015); Reply Comments of Windstream Services, LLC, GN Docket Nos. 13-5, 12-353 (filed Mar. 9, 2015) ("Windstream Reply Comments").

Consistent with its prior advocacy, Windstream reiterated that its six proposed principles are designed to function as rules—a "thou shall not" framework that provides ILECs the flexibility to design TDM-replacement Ethernet services as they choose, while preserving the discipline formerly served by regulated TDM DS1 and DS3 special access inputs, which formed a key basis for the Commission's packet service forbearance decisions.[3] These principles cannot achieve both of these objectives if they are merely a list of factors to be balanced against other factors when an ILEC is eliminating TDM DS1 and DS3 special access services. In addition, the principles were designed to ensure—in the absence of a rule change or forbearance decision based on a new assessment of marketplace conditions—that wholesale inputs remain available and do not provide less functionality after the IP Transition than before.[4]

The Commission has ample legal authority to implement a general standard that an ILEC must, as a condition of obtaining Section 214 authorization to discontinue its TDM services, provide at least equivalent wholesale access at equivalent rates, terms, and conditions (as proposed in the *NPRM*), and to clarify what constitutes equivalent wholesale access at equivalent rates, terms, and conditions for DS1 and DS3 services by adopting Windstream's six proposed principles in its rules.[5] First, no commenter disputed that Section 214 applies to carrier-to-carrier discontinuation of service when that discontinuation will impair or reduce the adequacy or quality of end users' service. The 1996 Act requires all local exchange carriers, whether ILECs or CLECs, to make retail services available for wholesale use,[6] and requires ILECs to provide interconnection, access to unbundled network elements, and resale subject to a wholesale discount.[7] Under these conditions, it is highly likely that discontinuance of ILEC wholesale services, especially last-mile services, will impair end users' services, because as recognized by the Commission, this last-mile access is a "critical input" for competitors that build and market their own service solutions to end users.[8] Cases cited by the ILECs predate the 1996 Telecommunications Act and the introduction of both deregulation and local telecommunications competition.[9]

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[3] *See* Windstream Reply Comments at 27.

[4] *See Technology Transitions NPRM*, 29 FCC Rcd. at 14,984-85 ¶ 27. Thus, Windstream's proposed pricing framework is capped at 50 Mbps simply because that is the capacity equivalent of existing DS3 lines.

[5] *See id.* at 15,013-14 ¶ 111.

[6] *See* 47 U.S.C. 251(b)(1). *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, FCC 96-325, 11 FCC Rcd. 15,499, 15,981-82 ¶¶ 976-977 (1996).

[7] *See* 47 U.S.C. § 251(c)(2)-(4).

[8] *Special Access for Price Cap Local Exchange Carriers et al.*, Report and Order, FCC 12-92, 27 FCC Rcd. 10,557, 10,559 ¶ 2 (2012).

[9] *See* Windstream Reply Comments at 4.

Second, when the Commission forbore from the application of tariffing and other dominant carrier pricing requirements to packet-switched special access services, it expressly relied upon the presence of tariffed TDM DS1 and DS3 special access services, as well as unbundled DS1 and DS3 capacity loops.[10] Nothing in the Act prevents the Commission now from removing or modifying its previous grants of forbearance through a subsequent rulemaking, particularly when the factual underpinnings for the grants of forbearance cease to exist.[11] This is an especially reasonable response when ILECs themselves are seeking, through their Section 214 discontinuance applications, to produce a significant change in the circumstances grounding their prior forbearance requests.[12] Section 214 oversight will provide certainty to competitive carriers and their customers that service will not be impaired or reduced in the IP Transition. It also will prevent an odd result whereby an ILEC's total elimination of tariffed last-mile connectivity for many end user business locations would be subject to far less oversight than its prior elimination of only select tariffed IP last-mile inputs. Third, Section 201(b)'s prohibition on unjust and unreasonable practices and its authorization of implementing regulations further support the adoption of the proposed rules.

Moreover, adoption of the proposed rules would be appropriate and consistent with many ways in which the Commission has carried out its statutory mandates. As a preliminary matter, nothing in Section 214 prevents the Commission from adopting rules to effectuate it, as the Commission previously has done. 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.[13] 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.[14] If Section 214 were limited to case-by-case review, the Commission could not

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[10] *See* Windstream Reply Comments at 20-22.

[11] Windstream is not suggesting that a rulemaking is the only way that the Commission can modify a grant of forbearance, but it is one viable path.

[12] There is no distinction between Verizon and CenturyLink, which obtained forbearance by operation of law, and other ILECs that obtained forbearance through affirmative Commission action. Any of these grants of forbearance can be modified by a subsequent rulemaking.

[13] *See Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for it Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area*, Report and Order, FCC 84-198, 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").

[14] *Mkt. Entry & Regulation of Foreign-Affiliated Entities*, FCC 95-475, 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

have adopted any of these rules. Furthermore, the Commission routinely imposes specific behavioral requirements as conditions of granting permission in all manner of transactions, such as license transfers in the mergers context.[15] The use of a "checklist" of requirements is common in other areas of the Commission's regulation of common carriage, such as in the requirements for Regional Bell Operating Companies' entry into the long-distance market.[16]

The six principles also are firmly rooted in the statute and regulatory precedent. Three principles (Nos. 2, 4, and 6) are all aspects of the longstanding Commission doctrine under Section 202(a) and Section 251(b)(1) that a carrier cannot unreasonably discriminate against a wholesale purchaser. Principle 2 (a provider's wholesale rates shall not exceed its retail rates) simply sets forth that a provider's wholesale rates for the IP replacement product cannot exceed its retail rates for the equivalent offering. Principle 4 (bandwidth options shall not be reduced) makes clear that an incumbent cannot refuse to sell at wholesale those bandwidth options that it offers at retail. This is inherent is Section 251(b)(1)'s requirements on all LECs. Principle 6 (no impairment of service delivery or quality) simply reiterates that an ILEC cannot offer its wholesale customers services with longer installation intervals, inferior service functionality or quality, and/or less OSS efficiency as compared to what the incumbent provides to its retail business customers or its affiliates.

With respect to Principle 1 (price per Mbps shall not increase) and Principle 3 (basic service pricing shall not increase), the principles merely preserve the competitive status quo pending the Commission's more comprehensive revision of its special access rules.[17] Principle 1 focuses on the price per Mbps, because Ethernet services do not have to be offered in exact 1.5 Mbps increments as with DS1s for competition to continue. An ILEC may choose to offer different increments (for example 2 Mbps Ethernet as a replacement for a DS1, or a 4 Mbps as a replacement for two DS1s), and should not be forced to offer a 1.5 Mbps or a 3 Mbps service. With respect to Principle 3, that rule would preclude an ILEC from declaring its lowest level of Ethernet service was, for example, 3 Mbps, and then doubling the charge that previously would be paid for a single DS1 while claiming to preserve the price per Mbps. There is no reason to subject small businesses and nonprofits for whom a DS1 is sufficient (or their serving carriers) to a doubling of their monthly service charge simply because that is the smallest increment the ILEC now chooses to make available. To maintain the discipline that TDM DS1 or DS3 special access pricing formerly imposed, Principle 1 thus sets a limit based on the per Mbps rate of the DS1, for services at or below 12 Mbps, and of the DS3 for services greater than 12 Mbps. This balances flexibility for the ILEC in service design with preserving sufficient pricing discipline.

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its broad rulemaking powers, to adopt rules of general applicability that modify existing authorizations and licenses." *Id.*

[15] *See, e.g., Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, FCC 11-47, 26 FCC Rcd. 4194 (2011).

[16] *See* 47 U.S.C. § 271.

[17] *See id.* at 48.

With respect to the Principles 1 and 3, Windstream also clarified that the maximum per-Mbps price and the basic service price should be established based on the most common, publicly available prices offered by the relevant ILEC for any given TDM DS1 or DS3 special access service, which may as a practical matter be prices that include discounts for longer terms and/or volume commitments. Windstream expects that this rate usually would be the three-year discount plan rate charged by the ILEC for TDM special access in the place where the ILEC is seeking to discontinue service. Such a rate falls generally in the middle of the term plan spectrum, between month-to-month rates and seven-year term plan rates.

Windstream added that Principle 5 (no backdoor price increases) serves to ensure that the other principles can be given effect. Given the variety of ways in which ILECs can effectively increase the price for their wholesale customers, Windstream urged the Commission to adopt this anti-evasion principle to avoid having to attempt to anticipate each and every potential way in which the wholesale equivalent rules could be undermined. For areas where concerns are already evident, the Commission, however, should make application of this principle clear: (1) by adopting the special construction recommendations endorsed in Windstream's ex parte also filed today in the above-referenced dockets, and (2) by prohibiting any volume commitments (including minimum revenue commitments) that penalize competitive carriers for transitioning their purchases from DS1 and DS3 special access to Ethernet services.[18]

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[18] *See* Letter from Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593 (filed April 17, 2014); Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593 (filed Sept. 26, 2014) (asking the Commission to require carriers that offer volume-based discounts commitments (including minimum revenue commitments) or thresholds for early termination fee relief for TDM special access services to permit customers to meet those commitments or thresholds using Ethernet services as well as their purchases from TDM special access services).

Finally, to further elucidate the operation of its proposed pricing principles, Windstream walked through the attached two examples, which were previously filed as an attachment to Windstream's Reply Comments.

Please contact me if you have any questions.

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

Attachment

cc: Matthew DelNero
Pam Arluk
Michelle Berlove
Jean Ann Collins
Heather Hendrickson
Daniel Kahn
William Layton
Virginia Metallo
David Zesiger

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.