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**VIA ECFS**

***EX PARTE***

June 8, 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, *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 June 4, 2015, Jennie Chandra and Peggy Rubino (by telephone) of Windstream Services, LLC (hereinafter “Windstream”) and John Nakahata and Henry Shi of Harris, Wiltshire & Grannis LLP, counsel to Windstream, met with Deena Shetler (by telephone), Pamela Arluk, William Layton, Virginia Metallo, Richard Flannery, and Vanessa Riley, all of the Wireline Competition Bureau, to discuss several issues relating to special construction charges. Jennie Chandra also further discussed these issues (via telephone) with Pamela Arluk on June 5, 2015. Specifically, Windstream described recent instances of ILEC special construction practices that highlight the need for Commission guidance on the circumstances in which special construction charges are and are not warranted—particularly in the market for Ethernet services. Windstream also provided data on the numbers and amounts of special construction assessment received, as well as on the estimated effects of an ILEC’s special construction charges on Windstream’s CLEC business. Windstream pointed out that special construction regulatory obligations are difficult to enforce through case-by-case formal complaints because, by the time any complaint is completed, the CLEC will most likely have lost the sale with which the special construction

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charges were associated. It would thus be beneficial for the Commission to clarify ILECs' responsibilities through enforcement guidance and/or additional rules, particularly with respect to recurring scenarios. These examples and data reaffirm the importance that the Commission make clear that all ILECs are subject to regulatory limits with respect to special construction associated with Ethernet services, for the reasons presented by COMPTTEL in its ex parte letter of May 27, 2015.<sup>1</sup>

First, Windstream described three recent examples in which the same ILEC alleged construction was necessary. These following examples raise serious competition issues and highlight the urgent need for Commission guidance.

- Example 1: When seeking to upgrade a multilocation small-business customer from copper-based TDM special access to fiber-based Ethernet, Windstream was informed that the customer would need to deploy new conduit on its property in order to connect fiber to one of the its three buildings. Until that point, the building had been addressed with an ILEC copper connection in the last mile, and the customer had experienced repeated service issues. This customer construction would come at an expense of several thousand dollars and, if on the standard timeline, would take 90-120 days to complete. However, an ILEC engineer sent to conduct a customer site survey informed the customer that an ILEC retail service could be quickly activated for the customer via the ILEC's fiber in two weeks, and at no additional cost. Upon hearing this, the customer asked Windstream to cancel its service.
- Example 2: The ILEC proposed to assess Windstream for special construction involving new fiber and placement of two new poles for Ethernet service to a business location in a developed commercial area. Windstream was informed that special construction was needed to route fiber for Windstream's service order over railroad tracks. However, the ILEC's copper-based connection currently used for the business location is routed *under* those same tracks, and existing poles already line the business's street. The ILEC explained that this new routing was required due to the presence of existing facilities between the tracks. Windstream provided the attached photo of the location, showing the commercial nature of the area at issue.

If the existing conduit and poles in the commercial area are at exhaust, it suggests that the ILEC would inevitably need new network delivery infrastructure to use for its own operations in the future. Thus, it should not be able to use a special construction charge to make a rival bear the whole up-front costs of facilities that will be used in the future for the ILEC's own services. The parties' discussion regarding the special construction charges have been ongoing for weeks during which the customer must wait to receive Ethernet service.

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<sup>1</sup> See Letter from John T. Nakahata, on behalf of COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, PS Docket No. 14-174, WC Docket No. 05-25, RM-10593, at 2-3 (filed May 27, 2015) ("COMPTTEL May 27, 2015 Letter").

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- Example 3: The ILEC asked Windstream to pay for special construction involving 3,700 feet (i.e., more than half a mile) of new fiber to deploy TDM special access service to a business customer in a heavily populated portion of a major city. Windstream's records showed that the customer's building is adjacent to high-rise buildings already lit with the ILEC's fiber. Windstream first raised its concerns about the special construction with the ILEC in March 2015. In May – with resolution of these special construction concerns still pending – the customer cancelled its service order.

Second, Windstream provided updated data on special construction quotes that it received for Ethernet and TDM special access services from Verizon and AT&T. Attachment A shows the number and amounts of quotes received by Windstream in 2014. Attachment B shows the number and amounts of quotes, as well as the number and amounts accepted, for Q4 2014 and Q1 2015. Attachment C contains a comparison of the number and amounts of quotes received by Windstream for the first five months of 2015 against the same period in 2014. Windstream noted that the data show a significant disparity in the number of special construction charges assessed between the two large ILECs, and that they reveal large monthly year-over-year increases in special construction assessments for Ethernet services.

Finally, Windstream estimated the impact of the ILEC's demand for special construction charges on Windstream's retail service revenues. As the examples described above show, special construction assessments can cause the competitive carrier to lose a service contract due to charges that significantly increase its, or its customers', costs as well as delaying service delivery, or, as in the first scenario, to the ILEC's own retail offerings when the ILEC then offers its own services without such additional costs and/or delays. Windstream estimated the retail revenue lost by using the wholesale costs of last-mile access for the retail service contracts that were lost because an ILEC sought to impose special construction charges. In Q4 2014, Windstream would have initiated retail service agreements that, had the ILEC not imposed special construction charges, would have totaled **\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*** **██████████** **\*\*\*END HIGHLY CONFIDENTIAL\*\*\*** in ILEC wholesale revenue. In Q1 2015, this number would be just over **\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*** **██████████** **\*\*\*END HIGHLY CONFIDENTIAL\*\*\***. As noted in Windstream's prior filings,<sup>2</sup> nearly **\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*** **██████████** **\*\*\*END HIGHLY CONFIDENTIAL\*\*\*** earned by its CLEC operations currently goes to pay for wholesale last-mile access. Thus, Windstream estimates that the figures described above translate into lost *retail* revenue in the range of **\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*** **██████████** **\*\*\*END HIGHLY CONFIDENTIAL\*\*\*** annually.

Taken together, these examples and data demonstrate the acute need for the Commission to reinforce the basic requirements of Sections 201 and 202 with respect to special construction by affirming the two principles, as recommended by COMPTTEL, that must both be satisfied for special construction charges to be justified: (1) existing ILEC facilities, even with routine maintenance and conditioning, do not have capacity at or above the level requested by the CLEC

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<sup>2</sup> See Letter from Jennie B. Chandra, Windstream Communications, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593, at 3 (filed Sept. 26, 2014).

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for any type of customer, and (2) the ILEC’s special construction charges do not address costs of network delivery infrastructure that the ILEC will use for its own operations during the life of that infrastructure (as opposed to just at the moment of the wholesale order).<sup>3</sup> As COMPTTEL pointed out, “the Commission long ago made clear [that] ‘[a]n individual customer cannot fairly be assessed special construction charges simply because existing facilities are fully utilized and additional facilities are necessary.’ Special construction also may not be charged when ‘the facility is fungible,’ and therefore ‘if a long term customer ceases to use it the facility would become available to serve other long term or occasional customers.’”<sup>4</sup> Moreover, these examples and data underscore the need for the Commission to ensure that special construction is not used as a way to achieve backdoor price increases to special access wholesale prices for Ethernet or TDM-based services.<sup>5</sup>

Please contact me if you have any questions.

Sincerely,

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/s/

Jennie B. Chandra

Attachments

cc: Deena Shetler  
Pamela Arluk  
William Layton  
Virginia Metallo  
Richard Flannery  
Vanessa Riley

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<sup>3</sup> COMPTTEL May 27, 2015 Letter at 2-3.

<sup>4</sup> *Id.* at 2 (quoting *Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 258 & 260, & the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Servs.*, Memorandum Opinion and Order, 88 FCC2d 1656, 1665 ¶¶ 15, 16 (1982)).

<sup>5</sup> 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, at 1 (filed Apr. 17, 2015).

Attachment A

2014 Windstream Special Construction Data

Ethernet	Verizon		AT&T	
	Quotes	Amount	Quotes	Amount
Total Quotes	[REDACTED]	\$ [REDACTED]	[REDACTED]	\$ [REDACTED]
Avg amt quoted - all quotes		\$ [REDACTED]		\$ [REDACTED]
Monthly average # of quotes	[REDACTED]		[REDACTED]	
Monthly average # of completed orders	[REDACTED]		[REDACTED]	

DS-1	Verizon		AT&T	
	Quotes	Amount	Quotes	Amount
Total Quotes	[REDACTED]	\$ [REDACTED]	[REDACTED]	\$ [REDACTED]
Avg amt quoted - all quotes		\$ [REDACTED]		\$ [REDACTED]
Monthly average # of quotes	[REDACTED]		[REDACTED]	
Monthly average # of completed orders	[REDACTED]		[REDACTED]	

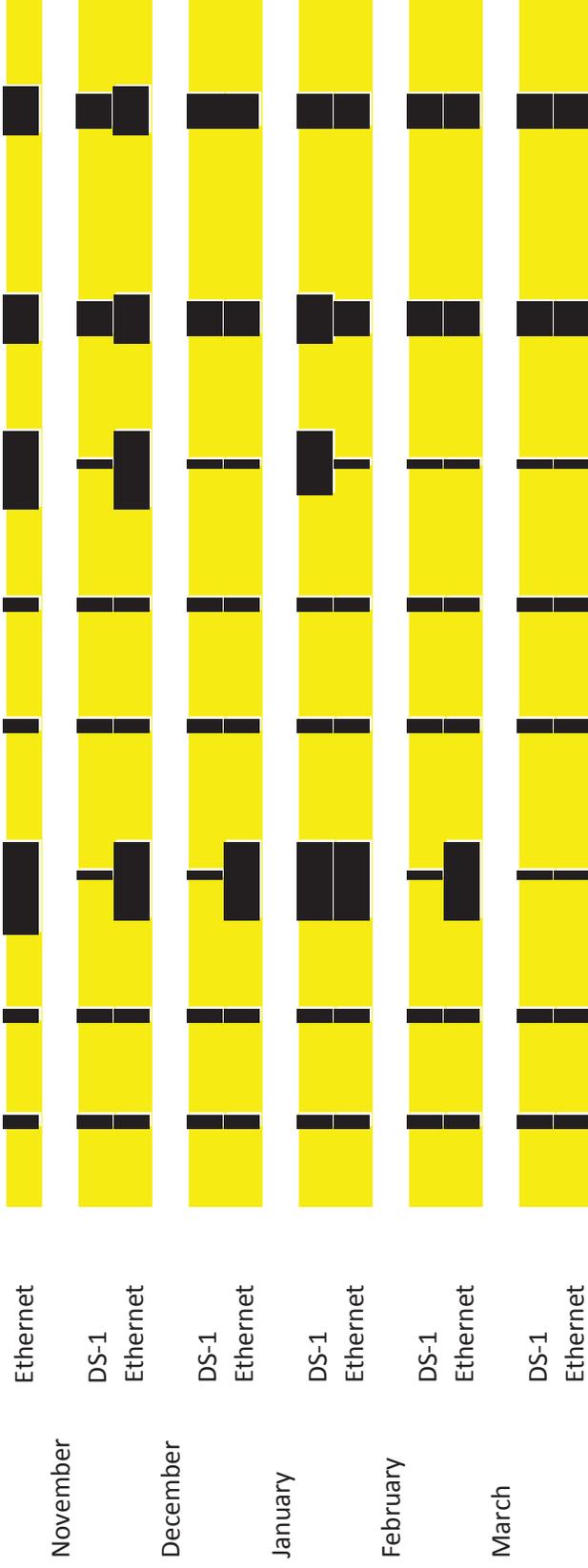
Note: Highlighting indicates Highly Confidential information.

Attachment B

Fourth Quarter 2014, First Quarter 2015 Windstream Data on Special Construction Quotes Accepted

Carrier	Month	Service	Number of Quotes		Total Amount		Total Amount		% of Quotes		% of Total Quoted	
			Received	Accepted	Quoted	Paid on	Accepted	Accepted	Accepted	Amount Accepted		
Verizon	October	DS-1	1	1	1	1	1	1	100%	100%	1	1
		Ethernet	1	1	1	1	1	1	100%	100%	1	1
	November	DS-1	1	1	1	1	1	1	100%	100%	1	1
		Ethernet	1	1	1	1	1	1	100%	100%	1	1
	December	DS-1	1	1	1	1	1	1	100%	100%	1	1
		Ethernet	1	1	1	1	1	1	100%	100%	1	1
January	DS-1	1	1	1	1	1	1	100%	100%	1	1	
	Ethernet	1	1	1	1	1	1	100%	100%	1	1	
February	DS-1	1	1	1	1	1	1	100%	100%	1	1	
	Ethernet	1	1	1	1	1	1	100%	100%	1	1	
March	DS-1	1	1	1	1	1	1	100%	100%	1	1	
	Ethernet	1	1	1	1	1	1	100%	100%	1	1	
AT&T	October	DS-1	1	1	1	1	1	1	100%	100%	1	1

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Attachment C

First Five Months 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	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
February	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
March	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
April	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
May	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>AT&amp;T</b>					
January	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
February	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
March	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
April	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
May	DS-1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Ethernet	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Note: Highlighting indicates Highly Confidential information.

Attachment D

