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VIA ECFS

EX PARTE

June 12, 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 June 10, 2015, Jennie Chandra, William Kreutz, and Lynn Hughes (all by telephone), and I, from Windstream Services, LLC, and Windstream's counsel, John Nakahata and Henry Shi of Harris, Wiltshire & Grannis, LLP (hereinafter "Windstream") met with Matthew DelNero, Deena Shetler, Daniel Kahn, Pamela Arluk, Randy Clarke, David Zesiger, John Visclosky, and Mike Ray from the Wireline Competition Bureau. Carol Matthey, Heather Hendrickson, Jean Ann Collins, Michele Berlove, and Bakari Middleton, all from the Bureau, participated by telephone. We discussed how best to implement the six principles of functionally equivalent service that Windstream has proposed. In particular, Windstream elaborated on a proposal for how the Commission might implement the first principle using a "hold harmless" approach for TDM special access prices paid by individual carriers.¹

Windstream recommended that the Commission consider several sources of TDM special access pricing information. First, Windstream suggested that the Commission should create a database to cover each ILEC, by state and MSA, that includes published rates, on a per Mbps basis, for special access services under each term plan in the ILECs' tariffs. This database would be populated over time, and for each ILEC could resemble the following:

¹ Windstream's first principle states that "The price per Mbps of the IP replacement product shall not exceed the price per Mbps of the TDM product that otherwise would have been used to provide comparable special access service at 50 Mbps or below."

	Month-to-Month per Mbps Price	1-Year per Mbps Price	3-Year per Mbps Price	5-Year per Mbps Price	7-Year per Mbps Price
DS1 Per-Mbps Rate (limit on per-Mbps rate for 12 Mbps or less IP input)	[DS1 rate/1.5]	[DS1 rate/1.5]	[DS1 rate/1.5]	[DS1 rate/1.5]	[DS1 rate/1.5]
DS3 Per-Mbps Rate (limit on per-Mbps rate for 12+ Mbps IP input)	[DS3 rate/45]	[DS3 rate/45]	[DS3 rate/45]	[DS3 rate/45]	[DS3 rate/45]

Second, Windstream suggested that the Commission should archive volume discount plans in its possession when an ILEC discontinues a tariffed TDM special access offering. In response to a question from Commission staff, Windstream noted that the same treatment seemed appropriate for any Section 211 contracts currently filed with the Commission. Third, with regard to commercially negotiated discounts not filed with the Commission, Windstream suggested that the Commission, while not requiring a data collection, may suggest that a competitive LEC would be well advised to maintain such documents if it wants to have a good basis for filing a complaint in the future. None of these measures would raise Paperwork Reduction Act concerns, given the Commission would not be requiring new information collection or retention from communications providers.

Windstream next elaborated on how the TDM special access pricing should be used as a baseline for ensuring prices do not increase in the IP transition. In particular, Windstream explained that for existing special access customers, per-Mbps pricing for IP inputs should not exceed the per-Mbps rates for TDM inputs that otherwise would be used to provision comparable service in the area until comprehensive special access reform is completed. Windstream further elaborated that the TDM benchmark applying to the IP input is the per-Mbps rate for the relevant TDM special access term plan that is at least as long as the term plan for the comparable IP offering. For example, if the IP input is offered on a six-year term plan, the per-Mbps rate under the comparable TDM input's seven-year term plan would apply if the TDM input is not offered on a six-year term plan. While reiterating that an ILEC should not be allowed to evade the proposed requirement for at least equivalent wholesale rates by eliminating its filed term discount plan rates serially prior to TDM discontinuance,² Windstream observed that such rate benchmarks for term discount plans would only be relevant to new offerings if the ILEC voluntarily chooses to offer IP retail and/or wholesale products of that duration. For example, the seven-year term plan discount rate would be inapplicable if the ILEC does not offer products with terms longer than five years. Windstream explained that all carriers would be on notice regarding these provisions and their interim nature and can make offerings accordingly.

Windstream further noted that volume or spend discounts, while generally optional, should also be carefully considered through a "hold harmless" approach as carriers and their customers move into the IP era. Competitive carriers should not be penalized with loss of

² Comments of Windstream Corporation, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1, at 32-34 (February 5, 2015) ("Windstream Tech Transitions Comments").

discounts when transitioning to IP services. If an ILEC chooses to offer a volume or spend discount, the ILEC, pursuant to Sections 201 and 202 of the Communications Act, should offer the discount in a nondiscriminatory manner (i.e., to all similarly situated carriers) and only be permitted to eliminate it on a likewise nondiscriminatory basis. ILECs also should be required to “count” IP inputs like TDM inputs when determining applicable discount levels.³ A similar approach could be used when transitioning any services that are not subject to underlying tariffs.

The same general pricing safeguards would extend to special access customers entering a new market. In particular, the interim per-Mbps rate benchmarks for the IP inputs, which are established in the proposed database for special access term plan rates, would apply. In addition, an ILEC, pursuant to Sections 201 and 202, would have to offer any existing volume/spend plan terms to any new carrier customer that is similarly situated to a carrier currently benefitting from such discounts. And as noted above, an ILEC should be required to permit a CLEC to “count” IP inputs like TDM inputs when determining volume/spend discount levels.

Windstream added that an early termination fee should never apply if a TDM circuit is discontinued as a result of transitioning a customer location to an IP input.⁴ This should be the case any time before the ILEC’s election to discontinue its TDM offerings, and regardless of whether the transition is the result of the ILEC’s decision to eliminate TDM inputs or an end user customer/CLEC’s choice to move to IP. Moreover, in the case of a partially run term for a TDM input at the time of transition, the remainder of the term should apply to its IP successor input.

Windstream emphasized that since the Commission will not have all information in its possession, it is especially important that the complaint process enable effective Commission oversight and enforcement of the six equivalency principles. Specifically, the Commission should (1) make clear that complaints will be adjudicated within five months of filing (which is the rule for tariffed inputs as well as inputs that would be tariffed but for forbearance)⁵; (2) establish that an ILEC cannot preclude a wholesale customer from disclosing rates, terms, and conditions to a regulator in the context of an action before the Enforcement Bureau (including formal or informal complaints and any pre-complaint mediation), provided that the wholesale customer seeks confidential treatment for such information pursuant to 47 C.F.R. §§ 0.457 and 0.459, or 47 C.F.R. 1.731; and (3) find, as with pole attachments, that a demand for a clause waiving the wholesale customer’s “right to federal, state, or local regulatory relief would be per

³ Reply Comments of Windstream Services, LLC, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1, at 36-37 (March 9, 2015) (“Windstream Tech Transitions Reply Comments”).

⁴ See *id.* at 35-37 (elaborating on Windstream’s position that early termination penalties should not apply when service is discontinued due to the IP Transition).

⁵ See *Implementation of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 22497, ¶ 37 (1997) (“We hold, therefore, that the Section 208(b)(1) deadline shall apply to . . . those matters that would have been included in tariffs but for the Commission’s forbearance from tariff regulation.”).

se unreasonable and an act of bad faith in negotiation,” and that a request for “a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.”⁶

In response to a question, Windstream stated that claims by some ILECs that they do not know when a wholesale purchaser uses a product to serve end users are not well taken, especially for last-mile inputs.⁷ When Windstream orders channel terminations for last mile special access services, it must specify the end points of those services. The ILEC has those end point locations. Within a wire center, the ILEC should be able to determine with a high degree of accuracy whether that location is its own switching office, the switching office or point of presence of a third party carrier, a carrier hotel, or an end user premises. And as supported by CenturyLink’s comments, the same is true for copper loops subject to retirement.⁸

Finally, Windstream reiterated that a conclusive presumption that discontinuance by an ILEC of wholesale last-mile services affects end users is fully supportable given the record, as well as the Commission’s experience with the *Qwest Phoenix Forbearance Order*.⁹ For enterprise users, it is highly unlikely that alternative facilities-based wholesale facilities will be available to a substantial majority of a wire center, such that only a de minimis number of locations are served only by the ILEC.¹⁰ Moreover, as the Commission has previously found, wholesale loops of differing capacities constitute distinct product markets.¹¹

⁶ See Windstream Tech Transitions Comments at 30-32 (citing *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777, ¶ 21 (1998)). See also *Implementation of Section 224 of the Act A Nat’l Broadband Plan for Our Future*, 26 FCC Rcd. 5240, 5245 ¶ 8 (2011) (declining to modify “sign and sue” rule).

⁷ See Reply Comments of AT&T, GN Docket No. 13-5, PS Docket No. 14-174, RM-11358, WC Docket No. 05-25, RM-10593, at 43 (March 9, 2015). See also Comments of Cincinnati Bell Telephone Company LLC, GN Docket No. 13-5, PS Docket No. 14-174, RM-11358, WC Docket No. 05-25, RM-10593, at 20 (filed Feb. 5, 2015).

⁸ See Comments of CenturyLink at 31, Exhibit A (indicating CenturyLink provides CLECs using copper facilities proposed to be retired with detailed information on impacts, including addresses and phone numbers of affected end user customer locations).

⁹ *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 (2010) (“Qwest Phoenix Forbearance Order”).

¹⁰ See Windstream Tech Transitions Reply Comments at 14-16, 28-34. See also *Qwest Phoenix Forbearance Order* 25 FCC Rcd. at 8666-67, ¶ 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.”).

¹¹ See *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8648-49, ¶ 49.

Please contact me if you have any questions.

Sincerely yours,

/s/ Malena F. Barzilai

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