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July 14, 2015

Ex Parte Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. §251(c)(3), WC Docket No. 15-1; Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593

Dear Ms. Dortch:

Windstream recently filed a letter in the above-captioned proceedings asking the Commission to impose “interim” pricing rules for IP special access services (*i.e.*, Ethernet services) as legacy TDM services are discontinued.¹ Under Windstream’s “hold harmless” approach, Windstream proposes 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.”² It urges the Commission to develop “TDM benchmark[s]” by considering “several

¹ Letter from Malena F. Barzilai, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, 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* (June 12, 2015) (“Windstream Ex Parte”).

² *Id.* at 2.

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sources of TDM special access pricing information,” and proposes that the applicable TDM benchmark be “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.”³ Windstream recommends that these “same general pricing safeguards would extend to special access customers entering a new market.”⁴

The Commission should reject these and all similar proposals to re-impose rate regulation selectively on ILEC provision of highly competitive Ethernet services. Any Commission measure to dictate ILEC prices for Ethernet services would be a prescription, and the Commission would face two insurmountable legal bars to any such rules: it would have to “reverse” the forbearance that was properly granted nearly a decade ago for such services *and* satisfy the stringent standards of Section 205 to prescribe the rates for such services. The Commission does not remotely have the record to reach either conclusion, and it would be especially inappropriate to jump the gun and impose such ratemaking measures before it has even considered the data it is collecting in the special access proceeding.

Before addressing the legal defects in these proposals for interim rate regulation, it should be emphasized that Ethernet services are among the least appropriate candidates for any sort of rate regulation, interim or permanent. As AT&T and others have repeatedly demonstrated, the marketplace for Ethernet services is intensely competitive.⁵ The marketplace for Ethernet services is rapidly expanding and numerous providers are successfully competing to meet this demand. In 2014 the U.S. base of Ethernet port installations increased by 23 percent, following a 26 percent increase in 2013.⁶ No provider has a port share that exceeds one-fifth of the market.⁷

³ *Id.* at 1-2.

⁴ *Id.* at 3.

⁵ See, e.g., Comments of AT&T, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, at 6, 27-32 (April 16, 2013) (“AT&T 2013 Comments”); Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, Secretary, FCC, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, at 2-3 (Oct. 10, 2014).

⁶ 2014 U.S. Carrier Ethernet Leaderboard; Shakeup in rankings; Ports grew by 23% in 2014, Vertical Systems Group (2015), available at <http://www.verticalsystems.com/vsglb/2014-u-s-carrier-ethernet-leaderboard> (“Vertical Systems 2014 Carrier Ethernet Leaderboard”); see also Nav Chandler (Research Manager, Enterprise Telecom), “U.S. Carrier Ethernet Service 2015-2019 Forecast,” March 2015, available at <http://222.idc.com/getdoc.jsp?containerId=255002>.

⁷ Vertical Systems Group, ENS Research Program, 2015.

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There are eight providers with port shares that exceed 5 percent, including three ILECs, two CLECs, and three of the nation's largest cable companies.⁸ And smaller providers – *i.e.*, those with port shares under 4 percent – together have a port share of more than 20 percent.⁹ For example, Level 3, a CLEC, has overtaken Verizon as the second largest Ethernet provider in the U.S. measured by port share.¹⁰ And Comcast was recently named the fastest growing Ethernet provider on Vertical Systems Group's U.S. Carrier Ethernet Leaderboard for the second consecutive year and “is well positioned in 2015 due to its extensive fiber network footprint.”¹¹ In the face of this intense and growing competition, re-regulation of Ethernet services is wholly unwarranted.

But even if this were not the case, the Commission could not lawfully adopt Windstream's interim pricing proposals or anything similar. Several years ago, the Commission granted forbearance from rate regulation with respect to Ethernet services.¹² Assuming the Commission has the authority to “reverse” a decision forbearing from rate regulation, it could do so only by satisfying the rulemaking standards of the Communications Act and the Administrative Procedure Act. As AT&T has previously explained, after forbearance has been granted, the Commission faces the same situation as in any other circumstance in which there is no regulation governing a particular activity – it must start from scratch with a new regulatory proceeding under the APA.¹³ Because the Ethernet marketplace is extremely competitive, the Commission does not remotely have a record that would allow it to conclude that heavy-handed rate regulation has become necessary to protect consumers and the public interest. Indeed, the very premise of the ongoing special access proceeding is that the Commission does *not* have the data it would need to assess competition in the special access marketplace, and thus it would be

⁸ *Id.*

⁹ *Id.*

¹⁰ See Vertical Systems 2014 Carrier Ethernet Leaderboard.

¹¹ Comcast, “The Fastest Growing Ethernet Provider, Two Years Running, Comcast Business” (Feb. 25, 2015), available at <http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running>.

¹² Memorandum Opinion and Order, *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*, 22 FCC Rcd. 18705 (2007) (“AT&T Forbearance Order”).

¹³ See, e.g., Comments of AT&T Inc., *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (April 16, 2013).

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especially inappropriate even to consider these issues before the Commission has completed its review of the industry data, which is still in the beginning stages.¹⁴

Nor could the Commission hold that rate regulation is somehow consistent with its forbearance orders.¹⁵ Some have suggested that the Commission's forbearance from regulation of Ethernet services assumed the continued availability of TDM-based special access services, but that suggestion is based on a misreading of the *AT&T Forbearance Order*. While the Commission noted, in a footnote, that the forbearance relief that it was granting did not extend to TDM-based special access services, and that those services "remain available for use as wholesale inputs for these enterprise broadband services,"¹⁶ nowhere did the Commission suggest that its grant of forbearance relief was in any way conditioned upon the continued existence of the availability of TDM-based services. In all events, Section 10 does not authorize "conditional" grants of forbearance, under which regulations could spring back to life many years after the Commission's original decision upon the satisfaction of some condition. If the Commission can reverse forbearance at all, it would have to conduct a rulemaking and affirmatively find that the re-imposition of regulation was warranted on *today's* facts.¹⁷

But proposals such as Windstream's face a further legal hurdle: even if the Commission's prior findings of forbearance could be "reversed," the Commission could not require ILECs to provide an Ethernet service at the rates and terms of the pre-existing TDM service without complying with the stringent standards for a prescription under Section 205. Section 205 provides that the Commission may order a carrier to offer its services on different rates or terms only *after* it conducts a hearing and (1) makes definitive findings that the existing charges or practices for these services are "in violation of any provisions of this chapter" and (2) determines "what will be the just and reasonable" charges or practices "to be thereafter

¹⁴ See, e.g., Letter from Diane Griffin Holland, United States Telecom Association, to Marlene H. Dortch, Secretary, FCC, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 2 (June 24, 2015).

¹⁵ See, e.g., Windstream Ex Parte at 4; see also Letter from John T. Nakahata, representing COMPTTEL, to Marlene H. Dortch, Secretary, FCC, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 4-6 (May 27, 2015).

¹⁶ *AT&T Forbearance Order* ¶ 20 n.86.

¹⁷ The proponents of regulation bear the burden of showing, on *today's* facts, that there is a market failure that requires regulatory intervention. See, e.g., *Cellco P'ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (Commission may adopt regulations only "upon finding that they advance a legitimate regulatory objective").

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observed.”¹⁸ Accordingly, the Commission would have to find *both* that AT&T’s competitive Ethernet rates are unjust and unreasonable, and that the TDM “benchmark” rate is the just and reasonable charge that must be “thereafter observed.” In other words, the Commission has no record that would allow it to make or defend any such rate prescriptions.

Equally important, the courts and the Commission have repeatedly recognized that these § 205 requirements apply regardless whether the contemplated prescription is permanent or “interim.”¹⁹ In fact, the Commission has already so held in this proceeding. As the Commission recognized in its 2005 Notice of Proposed Rulemaking in WC Docket No. 05-25 when it rejected certain interim rate proposals, slapping on an “interim” label does not change the fact that the Commission can *only* prescribe special access rates and terms when it can make definitive findings, on a complete record, both that carriers’ existing rates and terms are unjust and unreasonable and that proposed replacement rates and terms are themselves just and reasonable.²⁰ Indeed, to paraphrase the Commission’s defense of its decision not to impose interim special access rate prescriptions, here “the record would have to support the conclusion that *every* . . . rate [and practice for] *every* [non-TDM-based service for] which [forbearance] has

¹⁸ 47 U.S.C. § 205; *see also* *AT&T v. FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973) (a “full opportunity for hearing” and express Commission findings that the carrier-initiated rate is unjust and unreasonable and the prescribed rate is just and reasonable “are essential to any exercise by the Commission of its authority” to prescribe rates); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995) (“The Commission is not free to circumvent or ignore th[e] balance [created by Congress in § 205]. Nor may the Commission rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.”).

¹⁹ *See AT&T v. FCC*, 449 F.2d 439, 451 (2d Cir. 1971) (striking down interim prescription; since record was insufficient, “§ 205(a) required the Commission to leave the matter of prescription for resolution on an adequate record”); Memorandum Opinion and Order, *American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, 86 FCC 2d 820, ¶ 88 (rel. May 20, 1981) (rejecting interim “phase-in” proposal, because “we now have no record on which to base such a prescription. Section 205 of the Act, 47 U.S.C. § 205, permits the Commission to prescribe just, fair, and reasonable charges, regulations or practices only after hearing. Since we have not yet investigated NTS costs, we are not in a position to determine whether such proposals are reasonable”).

²⁰ Order and Notice of Proposed Rulemaking, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd. 1994, ¶ 130 (2005) (“[W]e find the record inadequate for prescribing new special access rates pursuant to section 205 of the Communications Act”).

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been granted violates section 201.”²¹ The still-to-be-developed record in this proceeding does not remotely afford any basis for such Commission findings.²²

In reality, proposals such as Windstream’s do not appear to be “interim” at all. Windstream nowhere explains when its “interim” period would end; for example, it does not suggest that its “hold harmless” rate regulations would be suddenly lifted when the transition to IP special access services is complete. Rather, these proposals would apparently swap out the existing rate regulation of TDM services for permanent rate regulation of IP services. There is no basis to impose rate regulation on these extremely competitive services after almost a decade of forbearance, and any such regulation would inevitably retard investment in broadband facilities.

²¹ Brief for Federal Communications Commission, *In re AT&T Corp., et al.*, No. 03-1397, 2004 WL 1895955, at *23-24 (D.C. Cir. filed Aug. 23, 2004) (emphasis in original).

²² To be sure, courts have sometimes upheld Commission discretion to adopt interim measures while it continues to study a problem, but those cases involved interim measures that *preserved* the *status quo* to avoid serious industry disruptions. See *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (“[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule”); *MCI v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (deference owed to “an agency when it acts to maintain the *status quo*”; interim freeze of separations factor necessary to avoid “exceedingly disruptive” consequences); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002) (same); *CompTel v. FCC*, 117 F.3d 1068, 1075 (8th Cir. 1997) (upholding temporary unbundling rules designed to protect access charge revenues to avoid “serious disruption in universal service”). Proposals like Windstream’s, by contrast, would force AT&T to *change* its rates and terms, thus profoundly altering the *status quo*.

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Sincerely,

/s/ James P. Young
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