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July 20, 2015

Ex Parte

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

AT&T recently filed a letter opposing the implementation of interim rules that would help ensure small business, government, and nonprofit customers do not experience price hikes or loss of competitive choice during the IP transition.[1] In particular, AT&T objects to Windstream's proposal for how the Commission might implement a carrier-specific, "hold harmless" approach for implementing the concept 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] This filing responds to AT&T's claims.

AT&T's arguments are unmoored from reality and the law. Treating the Commission's rulemaking as a game of "let's pretend," AT&T ignores all of the following:

- That small and medium sized businesses, state and local governments, educational institutions, and health care providers would lose competitive alternatives to service from AT&T, or at a minimum would see significant price increases, if AT&T were to be able to raise its prices for last-mile connections to the vast majority of business locations that CLECs cannot serve without buying AT&T's wholesale last-mile services;

[1] Letter from James P. Young, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-1 & 05-25, GN Docket Nos. 13-5 & 12-353, and RM-10593 (filed July 14, 2015) ("AT&T Ex Parte").

[2] *Id.* at 1 (citing Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, GN Docket Nos. 13-5 & 12-353, and RM-10593 (filed June 12, 2015)).

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- That both the Commission and AT&T relied on the existence of TDM-based special access alternatives in justifying and defending the decision to forbear from ex ante price regulation of specified packet-based special access services;
- That no change to the regulatory status quo occurs unless and until AT&T (or any other large ILEC with a grant of forbearance from ex ante price regulation for packet-based services) seeks to discontinue TDM-based DS1 and DS3 special access services, and that at that point it would be AT&T (or other petitioning ILEC) that would be changing the status quo such that, without a comparable wholesale access requirement including pricing, it would move the vast majority of business locations in its service area over to its ex ante price deregulated packet-based services for which it charges much higher rates;
- That Section 214(c) of the Communications Act expressly authorizes the Commission to impose conditions on discontinuance when necessary to protect the public interest—which includes the effect on competition;
- That the D.C. Circuit (in a case that AT&T fails to cite) has expressly held that Section 214(c) permits the Commission to impose conditions in derogation of the provisions of Sections 203-205; and
- That, as Windstream clearly has noted, any decisions with respect to special access pricing at the time of a discontinuance are necessarily interim given the Commission's already-ongoing assessment of competition and pricing for both TDM-based and packet-based special access services.[3]

Although AT&T attempts to portray these concerns as limited to Windstream, that is not the case. The Commission in its NPRM expressly stated, "[t]echnology transitions must not harm or undermine competition," and thus tentatively concluded that "we should require incumbent LECs that seek section 214 authority to discontinue, reduce, or impair a legacy service that is used as a wholesale input by competitive carriers to commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions."[4]

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[3] In its comments, Windstream stated that the pricing portions of its proposed principles for the tech transitions would be interim "pending the completion of the special access data request and a subsequent rulemaking that addresses, in a data-driven fashion, the appropriate regulatory regime for special access pricing." Comments of Windstream Corporation at 28, GN Docket No. 13-5, RM-11358, WC Docket Nos. 05-25 & 15-1 and RM-10593 (filed Feb. 5, 2015) ("Windstream Comments").

[4] *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications; Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185, 29 FCC Rcd. 14,968, 15,012-13 ¶ 110 (2014) ("NPRM").

Hundreds of business service customers, along with trade associations speaking on behalf of these customers, have urged the Commission to ensure that they can continue to maintain their competitive choices of telecommunications providers.[5] And the Small Business Administration's Office of Advocacy recently wrote to "encourage[] the Commission to adopt policies governing network transitions that will ensure the ability of small competitive carriers to meet the demand that small businesses have for competitive choices in wireline service."[6] SBA specifically recommended, "[t]o prevent incumbents from raising barriers to competition when modernizing their networks, the FCC should also adopt its proposal to require incumbent providers to offer equivalent wholesale rates, terms and services to competitive providers when it grants such applications."[7] As SBA noted, "[t]his is particularly important given that the FCC is still evaluating whether current pricing, terms and conditions for special access are reasonable."[8]

AT&T self-servingly advances a cramped and inaccurate reading of the Commission's statutory authority and precedent. There is no reason, and no basis, for the Commission to adopt such a reading—and doing so would manifestly harm job-generating small and medium-sized businesses, state and local governments, educational institutions, and health care providers. The Commission has full authority to enact rules to implement Section 214, including subsection (c), to protect the public interest in competition when an incumbent LEC such as AT&T seeks to discontinue its TDM-based special access services and leave customers without a comparable IP replacement. The Commission should not delay in adopting rules to that end.

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[5] *See, e.g.,* Letter from Aryeh Fishman, Associate General Counsel, Regulatory Legal Affairs, Edison Electric Institute; Lyle Beckwith, Senior Vice President, Government Relations, National Association of Convenience Stores; Timothy Columbus, Counsel, SIGMA; Louis T. Fiore, Chairman, Alarm Industry Communications Committee; Evan Engstrom, Policy Director, Engine; Lauren Culberton, Executive Director, Internet Freedom Business Alliance; and Karen Reidy, Vice President, Regulatory Affairs, CompTel; to Marlene H. Dortch, Secretary FCC, GN Dockets No. 13-5 & 12-353 (filed July 8, 2015).

[6] Letter of Jamie Belcore Saloom, Assistant Chief Counsel, SBA Office of Advocacy, United States Small Business Administration, to Marlene H. Dortch, Secretary, FCC, at 1 (filed June 23, 2015).

[7] *Id*. at 2.

[8] *Id*.

I. COMPETITION TO SERVE SMALL BUSINESSES, GOVERNMENT ENTITIES, AND NON-PROFITS WILL NOT CONTINUE IF COMPETITORS LOSE THE ABILITY TO CONNECT THEIR FIBER NETWORKS TO INCUMBENTS' WHOLESALE LAST-MILE CONNECTIONS.

When arguing that a comparable wholesale access requirement is unnecessary because "the marketplace for Ethernet services is intensely competitive,"[9] AT&T continues to point to irrelevant data and ignore the fact—recognized by the Communications Act, multiple times by the Commission, and other federal government officials—that the retail business service competition to which AT&T refers depends in large part on ILECs' (including AT&T's) wholesale last-mile connections.[10] A CLEC's ability today to use ILEC wholesale last-mile inputs to offer a differentiated competitive service says nothing about the future ability of the CLEC to discipline ILEC retail price increases if the ILEC increases dramatically the price the CLEC must pay for access to those wholesale last-mile inputs. Both antitrust economics and the Commission have long recognized that an upstream supplier of a critical input (here last-mile connectivity) can exercise market power in a downstream market (e.g., Ethernet and enterprise business services) by raising rivals' costs of the critical input.[11] And as the U.S. Department of

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[9] AT&T Ex Parte at 2.

[10] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, FCC 10-113, 25 FCC Rcd. 8622, 8666-67 ¶ 84 (2010) ("[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 Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 528 (1995) ("[I]f downstream rivals' costs are raised, the integrated firm may be able to effect an exercise of market power in the downstream market . . . ."); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209, 224 (1986) ("Raising rivals' costs can be a particularly effective method of anticompetitive exclusion."). The Commission has recognized the anticompetitive effects of a firm's ability to raise rivals' costs. *See Merger of MCI Communications Corp. and British Telecommunications PLC*, Memorandum Opinion and Order, FCC 97-302, 12 FCC Rcd. 15,351, 15,371 ¶ 40 (1997) ("[A] firm possessing unilateral market power in one market may also discriminate against its rivals in a second market either by raising the price of an essential input it supplies or by reducing the quality of the input as compared with the price or quality that the firm provides the input to itself."); *Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Notice of Proposed Rulemaking, FCC 96-308, 11 FCC Rcd. 18,877, 18,887-88 ¶ 16 (1996) ("[A] carrier may be able to raise and sustain prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input,

Justice noted to the Commission in 2010, "[t]he enormous sunk cost of wireline broadband networks makes it unlikely that additional wired broadband competitors will enter many geographic areas."[12] Thus, if competitive providers lack comparable wholesale access to last-mile facilities in the IP era, many enterprise users—including state and local governments, nonprofits, and small and medium-sized businesses—will have little or no choice in alternatives to an incumbent provider.

Competitive carriers like Windstream are investing heavily in fiber networks. Windstream operates the nation's sixth-largest fiber network (spanning approximately 118,000 miles). But while competitive LECs have made significant investments in their own network infrastructure, this has occurred largely in the network backbone rather than in last-mile connections to the customer, because competitors cannot make an economic case for overbuilding the latter ILEC facilities in most instances. Converting networks from TDM to IP simply requires changing transmission electronics, without necessarily converting loops from copper to fiber. Moreover, even when building out fiber networks, ILECs have insurmountable advantages in serving the vast majority of business locations because, as a legacy of their historical monopolies, they already possess facilities into every building, and they have the overwhelming majority of customers over which to amortize the costs of deploying fiber.

A recent analysis performed by CostQuest confirmed yet again that the costs of building new last-mile network facilities as compared with the revenue that can be generated from those facilities show that a CLEC can build out its own facilities only if it can attain substantial end user density and penetration.[13] For example, for a 30-mile fiber ring with 20 revenue-producing

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such as access to bottleneck facilities, that its rivals need to offer their services."); *see also Petition of Qwest Communications Int'l Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, FCC 07-13, 22 FCC Rcd. 5207, 5216 ¶ 14 (2007) (concluding that Qwest continues to have "exclusionary market power by reason of its control of bottleneck facilities" that could be used to raise rivals' costs).

[12] Letter from Christine A. Varney, Assistant Attorney General, U.S. Department of Justice Antitrust Division, to Marlene H. Dortch, Secretary, FCC, at 13, GN Docket No. 09-51 (filed Jan. 4, 2010); *see also* Letter from William J. Baer, Assistant Attorney General, U.S. Department of Justice Antitrust Division, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-209, at 17 (filed Apr. 11, 2013) (noting that "the economies of scale often present in wireless networks are significantly tempered compared to those the Department has encountered when analyzing competition among wireline networks, since it is easier and less costly to expand capacity over a fixed amount of spectrum than it is, for example, to reduce the cost of constructing the physical 'last-mile' link to each premises").

[13] CostQuest, Analysis of Fiber Deployment Economics for Efficient Provision of Competitive Service to Business Locations, at 2, submitted as Attachment A to Letter from Jennie B. Chandra, Vice President, Public Policy and Strategy, Windstream, to Marlene H.

commercial buildings on the ring (the scenario presumed by AT&T in an earlier cost study), CLEC deployment of last-mile facilities to serve a single customer in each building would not be viable—based on current services, retail rates, and costs—unless each customer purchases more than 1 Gbps of capacity.[14] This study reconfirms that CLECs cannot feasibly build to the vast majority of business locations, just as the Commission found in its 2004 *Triennial Review Remand Order*.[15]

Accordingly, the retail Ethernet competition cited by AT&T, in very large part, depends on competitors' continued ability to connect their fiber network to the incumbents' last-mile facilities. For example, a recent Current Analysis report shows that Level 3 has approximately 30,000 lit buildings, and XO has approximately 4,000,[16] a miniscule fraction of the approximately 20 million business buildings in the United States (according to data from GeoResults),[17] including more than 3.5 million buildings that house more than one business.[18]

Dortch, Secretary, FCC, GN Docket Nos. 13-5 &12-353, WC Docket Nos. 05-25 & 15-1, and RM-10593 (filed June 8, 2015) ("CostQuest White Paper").

14 *Id.*

15 *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2536, 2617-2619 ¶¶ 5, 150-154 (2005) ("*Triennial Review Remand Order*").

16 Brian Washburn, U.S. WAN Services Update: A Look at Access Fiber, SDN, NFV, APIs and Automation, CURRENT ANALYSIS, at 2-3 (Jan. 22, 2015) ("Current Analysis Report").

17 Single-business buildings in this estimate include buildings that are used for home businesses.

18 GeoResults Q3/2014 GeoAnalytic Report. Even the largest ILECs usually cannot find an economic case to build out last-mile networks outside their incumbent service areas. As noted in their press releases, AT&T's much-touted Project Velocity IP is focused on its 22-state ILEC footprint, while Verizon's FiOS network investments similarly are targeted inside its ILEC footprint. *See, e.g.*, Press Release, AT&T, AT&T to Invest $14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services, (Nov. 7, 2012), http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode (discussing deployments in "AT&T's 22-state wireline service area"); *One Powerful Decade: FiOS Turns 10!*, VERIZON PUBLIC POLICY BLOG (Sept. 5, 2014), http://publicpolicy.verizon.com/blog/entry/one-powerful-decade-fios-turns-10 (noting that FiOS deployments are limited to Verizon's ILEC footprint of "12 states and the District of Columbia"). *See also* Opposition of AT&T Services, Inc. at 23, WC Docket No. 15-1 and GN Docket No. 13-5 (filed Feb. 5, 2015) (noting Project Velocity IP is focused on "its 21 state [ILEC] footprint"). And though CenturyLink has alleged that competitive overbuilding is a viable alternative in most instances because "[a]ll competing providers face the same entry barriers" and "[a]ll competing providers have the same revenue opportunities," these claims are belied by CenturyLink's own investment strategy—focusing fiber deployments in its ILEC footprint and leasing in its CLEC areas. *See* Comments of CenturyLink at 8-17, WC Docket No.

These conditions lead the Current Analysis report to conclude that "[b]usiness network services providers need access to survive, and there's a real threat of getting squeezed on margins when reaching buildings through third-party providers."[19]

Moreover, the record does not support a generalized inference that cable networks provide an adequate substitute for the more sophisticated enterprise solutions that CLECs provide to small and medium-sized business, state and local government, educational institutions, and health care providers. GeoResults data shows that cable's competitive significance falls off substantially as business locations grow in size, and cable is particularly weak with respect to business customers with more than one location.[20] And even with respect to the product markets and geographies within which cable can provide a retail competitive alternative to the ILEC, if CLECs are unable to use ILEC wholesale services to reach business customer locations, the vast majority of smaller to medium-sized non-residential consumers would confined to a service duopoly. As the Commission and its staff have repeatedly noted, antitrust law reflects a significant concern that reducing competition to a duopoly can significantly harm retail consumers.[21]

The unvarnished truth is that the market for wholesale special access service remains remarkably concentrated and in the control of the large ILECs. In 2013 ILECs and their affiliates made up nearly 82 percent of the local wholesale transport market, which includes last-

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15-1 and GN Docket No. 13-5 (filed Feb. 5, 2015); *id.* at 11 (noting that "outside its ILEC footprint . . . CenturyLink must rely on other wholesale providers to serve its customers . . . .").

[19] Current Analysis Report at 6.

[20] *See* Windstream Comments at 9-11.

[21] *See Application of EchoStar Communications Corp. et al.*, Hearing Designation Order, FCC 02-284, 17 FCC Rcd. 20,559, 20,605 ¶ 103 (2002) ("[Ex]isting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."); *id.* at 20,662 ¶ 276 ("[C]ase law under the antitrust laws is generally quite hostile to proposed mergers that would have these impacts [merger to duopoly or monopoly] on the competitive structure, because such mergers are likely to increase the incentive and ability to engage in anticompetitive conduct."); *Application of AT&T Inc. and Deutsche Telekom AG*, Staff Report and Analysis, DA 11-1955, 26 FCC Rcd. 16,184, 16,226-27 ¶ 74 (Wireless Telecomm. Bur. 2011) (noting "[i]t is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur") (citation omitted).

mile connectivity for wireless cell towers, commercial building connections, and data center and aggregation points.[22] AT&T, Verizon, and CenturyLink alone hold 70 percent of this market.[23]

II. THE PACKET FORBEARANCE ORDERS NECESSITATE A COMPARABLE WHOLESALE ACCESS RULE.

Contrary to AT&T's assertions, the Commission's grant of forbearance to AT&T and others from tariffing and dominant carrier regulation of certain Ethernet services[24] *necessitates* imposition of a requirement that an ILEC provide a comparable IP service before it is permitted to discontinue a legacy TDM special access service pursuant to Section 214. In this regard, it is particularly important to recognize that, at the time AT&T would be proposing to discontinue TDM-based special access services, it would be proposing to *alter* the status quo of the availability of generally rate-regulated TDM-based special access services that existed and that formed the basis for the Commission's decision to forbear from ex ante rate regulation of specified packet-based special access services. Section 214(c) expressly permits the Commission to impose conditions on discontinuance "as in its judgment the public convenience and necessity may require."[25] It is well recognized, including in the text of the Communications Act itself, that the effect on competition must be addressed under the public interest standard.[26]

When the Commission granted forbearance, it expressly relied on the fact that the forbearance granted "exclude[d] TDM-based, DS-1 and DS-3 special access services"[27] and

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22 ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report*, September 2014 (estimating market share based on 2013 data). Since commercial buildings are usually in brownfield areas where the ILEC has a pronounced first-mover advantage, it follows that the ILEC share of last-mile access to commercial buildings alone would be even higher.

23 *Id.*

24 The packet forbearance orders granted forbearance with respect to specific listed services. *See, e.g., 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; Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and* Computer Inquiry *Rules with Respect to its Broadband Services*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18,705, 18,713 ¶ 13 (2007) ("*AT&T Forbearance Order*"). For simplicity, we do not rely here on the distinction between services actually covered by the forbearance orders and those for which the ILECs have acted as if they are covered. We do not, however, concede that ILECs have properly applied the scope of the granted forbearance.

25 47 U.S.C. § 214(c).

26 *See, e.g.*, 47 U.S.C. § 160(b).

27 *See AT&T Forbearance Order* at 18,717 ¶ 20.

UNE loops.[28] The Commission did not, as AT&T asserts, merely "note" this "in a footnote."[29] The Commission referenced continued availability of rate-regulated inputs more than a half-dozen times and cited it as supporting the Commission's argument that competitors will still have alternatives "[w]here self-deployment and purchasing from competitive LECs are not options . . . ."[30] This was an important pillar supporting the Commission's conclusion that "competitors can readily respond should [ILECs] seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for [their] enterprise broadband services."[31] Indeed, AT&T itself relied on the continued availability of "these still-highly regulated ILEC TDM inputs" to justify its forbearance order when challenged in the D.C. Circuit.[32]

Discontinuance of TDM DS1 and DS3 special access services now without any requirement for comparable wholesale access at comparable rates, terms, and conditions would remove this important pillar for competition in the communications market.[33] The large ILECs

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28 *See id.* at n.85.

29 AT&T Ex Parte at 4.

30 *AT&T Forbearance Order* at 18,718 ¶ 21.

31 *AT&T Forbearance Order* at 18,720 ¶ 25.

32 Brief for Intervenors AT&T Inc., et al. in Support of Respondents at 11 (filed Dec 3. 2008), *Ad Hoc Telecommunications Users Committee v. FCC*, No 07-1426, Brief for Intervenors AT&T Inc., et al. in Support of Respondents at 11 (D.C. Cir. 2008). CenturyLink in its recently granted petition for packet forbearance similarly asserts that forbearance would not harm competition, because "potential providers can also rely on CenturyLink's special access services and [UNEs] to provide enterprise broadband services." CenturyLink Petition for Forbearance at 29, WC Docket No. 14-9 (filed Dec. 13, 2013).

33 That is not all: in their opposition to Windstream's Petition for Declaratory Ruling with respect to the continued availability of DS1 and DS3 capacity unbundled network element loops following a transition to IP and/or fiber networks, the large ILECs also assert that they lack any ongoing obligation to provide nondiscriminatory access to unbundled DS1 or DS3 capacity loops once they have converted their networks from TDM to IP. *See* Verizon's Opposition to Windstream's Petition for Declaratory Ruling, WC Docket No. 15-1 and GN Docket No. 13-5 (filed Feb. 5, 2015) ("Windstream Petition"); AT&T Opposition. Thus, the large ILECs propose to remove another constraint on the pricing of packet-based services. At the same time, inexplicably, AT&T continues to rely on the availability of UNE DS1 loops as a reason the Commission should refrain from further regulation of special access services. *See* Letter from Keith M. Krom, General Attorney and Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary FCC, WC Docket No. 05-25, RM-10593, and GN Docket Nos. 13-5 & 12-353, at 4, n.20 (filed June 9, 2015) ("It is highly questionable why unbundled DS1s are unsuitable for serving TDS CLEC's market base. TDS CLEC indicates that small businesses with 10 or fewer employees comprise more than 75% of its market . . . ."). *See also* Attachment to Letter from Melissa Newman, Senior Vice President, Federal Policy and Regulatory Affairs,

appear to be setting up a regulatory "bait-and-switch"; having obtained forbearance from tariffing and ex ante price regulations for certain packet-switched special access services—including Ethernet—by indicating they would continue to offer tariffed DS1 and DS3 special access services and UNEs, they now seek to strip retail business customers and wholesale purchasers of these alternative options for last-mile connectivity while retaining packet forbearance. This scheme would leave AT&T and other ILECs in the position of deregulated monopolists (or perhaps duopolists for the limited product markets that can be served by cable) for service to the vast majority of business locations.[34]

Effectively the large ILECs' plans would unilaterally expand the scope of the prior Commission's forbearance orders, without filing a petition for forbearance from or waiver of the Commission's rules. In the large ILECs' view, the elimination of competition policies automatically flows from their substitution of IP for TDM—without even a pretense of following the statutory forbearance requirements pursuant to Section 10 of the Communications Act. In the post-transition marketplace that the large ILECs envision, they would have an unfettered ability to raise the prices of both wholesale and retail last-mile connections far beyond what is paid today. By raising their CLEC rivals' wholesale costs for all locations at which the CLEC lacks a viable alternative, and thereby forcing the CLECs (as the ILECs' primary competitors) to increase their retail prices, ILECs can then significantly raise their own retail prices, which no longer would be effectively constrained by the CLECs' pricing. This is not merely a hypothetical fear: AT&T's current publicly available pricing for a 2 Mbps Ethernet circuit already is more than eight times the price of a DS1 circuit (1.5 Mbps) for the same term.[35]

The Commission could find that, when a key factor justifying forbearance—the availability of DS1 and DS3 special access services—is removed, the statutorily required findings for forbearance under Section 10 are no longer met, and thus forbearance must end. The Commission's proposed requirement to provide comparable wholesale access offers a more moderate solution by preserving the availability of special access services that fulfill the role that

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CenturyLink, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 and RM-11358 (filed June 19, 2015) ("CenturyLink Ex Parte") (asserting that solutions "to provide retail and wholesale customers the IP-based products they demand . . . include an existing Ethernet-over-DS1 product," even though CenturyLink has been arguing that it should not be required to make unbundled DS1 capacity loops available to competitive carriers in the IP era).

[34] In its recent ex parte presentation, CenturyLink proposed an "interim glide path" with IP replacement products that would have "[r]ates for existing circuits [that] would gradually adjust to the market rate for the IP replacement product." *See* Attachment to CenturyLink Ex Parte. In other words, CenturyLink is making clear the large ILECs' intention to price IP-based special access services higher than comparable TDM-based alternatives.

[35] *See* Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 & 12-353, Attachment at 1 (filed June 10, 2014) (also including, under protective order, the discounted prices charged to Windstream pursuant to commercial negotiation).

TDM-based DS1 and DS3 services have fulfilled. While the appropriateness of packet forbearance should be reviewed as part of the Commission's assessment of competition in the special access proceeding, a comparable wholesale access requirement preserves the status quo with respect to tariffed alternatives to the detariffed services currently subject to packet forbearance—and thus is totally appropriate as an interim solution.

III. SECTION 205 DOES NOT PROHIBIT THE COMMISSION FROM EXERCISING ITS EXPRESS AUTHORITY UNDER SECTION 214(C) TO IMPOSE CONDITIONS ON APPLICATIONS TO DISCONTINUE SERVICE.

AT&T also asserts that the Commission cannot impose any conditions relating to prices on carriers that seek permission to discontinue TDM services because the Commission must first satisfy the substantive and procedural requirements of 47 U.S.C. § 205.[36] In doing so, AT&T ignores the fact that the "hold harmless" principle proposed by Windstream is limited to situations in which the CLEC customer—and its own end-user customers—would experience a change in the *status quo*, a loss or impairment of service caused by an ILEC's voluntary discontinuance of specific TDM services. In such instances, Section 214(a) requires prior Commission approval and Section 214(c) expressly authorizes the Commission to condition its approval on the applicant's commitment to "such terms and conditions," including price terms, that the Commission deems necessary for the public convenience and necessity.[37]

The authority conferred by Section 214(c) is separate from, and not subject to, the limitations on the Commission in Section 205. The D.C. Circuit has recognized as much, stating in *MCI Telecommunications Corp. v. FCC* that "Section 214(c) does, in [its] judgment, authorize the Commission" to impose prior approval requirements outside of the tariffing process "in derogation of the legislative compromise embodied in Sections 203-205," as long as the Commission has "affirmatively determined that 'the public convenience and necessity [so] require.'"[38] The court's interpretation of these sections of the Communications Act is clear:

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[36] AT&T Ex Parte at 4.

[37] Section 214(c) states that the Commission "shall have power to issue such certificate as applied for, or to refuse to issue it . . . for a . . . discontinuance, reduction, or impairment of service, described in the application, . . . may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c).

[38] *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977) (quoting 47 U.S.C. § 214(c)). Although the Commission invoked Section 214, notwithstanding the procedures set forth in Sections 203-205, to restrict MCI's ability to offer *new* services, the statutory authority of the FCC to condition approval of discontinuance of services is the same. The courted rejected the Commission's assertion of Section 214(c) authority in that particular case, while recognizing that it has such authority, because it concluded that the Commission had failed to make an affirmative determination of public convenience and necessity. *See id.* This

where Section 214(c) applies, the Commission's authority to require prior approval and impose conditions on such approval trumps the tariffing mechanisms prescribed in Section 205.[39] AT&T's discussion of interim measures under Section 205 misdirects focus from the real issue, which is the need for conditions on voluntary ILEC elimination of wholesale TDM service that would result in a discontinuance, deduction, or impairment of service. As discussed above, absent such conditions the loss of competitive service options would be detrimental to public convenience and necessity, and the Commission may and should mitigate that effect through Section 214(c). Windstream's proposal would mitigate the harms attributable to these voluntary service discontinuances by preserving the status quo for a limited period.

AT&T apparently agrees with the repeatedly-affirmed finding that the Commission may adopt measures to preserve the status quo,[40] yet myopically asserts that Windstream's proposal "by contrast, would force AT&T to *change* its rates and terms, thus profoundly altering the *status quo*."[41] The Commission should not embrace a conception of the status quo that results from AT&T's self-serving inability to see past its own nose. The cases cited by AT&T all support the Commission's authority to preserve the status quo at a market or industry level.[42] Windstream's hold-harmless principle is designed narrowly to preserve the status quo in which small and medium-sized business, government, and nonprofit customers have a choice for services in a competitive marketplace because wholesale TDM inputs are available at regulated rates. It is AT&T and other large ILECs that seek to upend the status quo by eliminating the wholesale TDM services over the last mile that make existing competition possible.

Contrary to AT&T's insistence on the overriding applicability of Section 205, the Commission has routinely required parties seeking Section 214 approvals of voluntary transactions to agree to wide-ranging conditions, including conditions on pricing, when it determines that conditions would mitigate transaction-specific harms to public convenience. For example, the FCC granted CenturyLink and Qwest's Section 214 authorization transfer

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underscores the Commission's ability to impose conditions in derogation of Sections 203-205 when it finds that doing so is in the public interest.

39 *See id; see also MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 593 (D.C. Cir. 1978) (reiterating that the "only limitation" on the tariffing mechanism "is found in Section 214(c)").

40 *See* AT&T Ex Parte at 6.

41 *Id* at n.22.

42 *See Competitive Telecomms. Ass'n 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") (emphasis added); *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (affirming adoption of interim measures to prevent "exceedingly disruptive" effects "[g]iven the changes in the competitive structure of the telecommunications industry"); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1075 (8th Cir. 1997) (approving the use of interim rule to avoid disruption to the entire universal service framework).

application conditioned upon, among other things, CenturyLink's commitment not to raise rates for certain fiber customers.[43] The Commission has also conditioned the approval specifically of a Section 214 discontinuance application on the carrier's rate commitments. When Verizon sought approval to discontinue certain physical collocation interconnection services, one of the conditions upon which the Commission granted the application was Verizon's agreement to make physical collocation services available to its non-telecommunications carrier customers at the (lower) Section 251 interconnection rates, even though Verizon was not required by Section 251 itself to make such rates available to these customers.[44]

Under AT&T's present theory, the Commission would have lacked the authority to impose a "rate regulation" condition in any of these cases absent a full-fledged proceeding under Section 205. This position relies on a failure to recognize the distinction between the Commission's Section 214(c) authority that applies only when a carrier seeks to construct, extend, or operate a "line," or when it seeks to discontinue a "service"[45] and the general rate-setting authority under Section 205 that applies broadly to "any charge, classification, regulation, or practice of any carrier or carriers."[46] Windstream's proposed principle would not require AT&T to alter prices on any of its current services, TDM or IP-based, in the absence of a discontinuance. The principle would impose no requirements on its behavior at all *unless and until* AT&T chooses to discontinue wholesale TDM special access inputs. The Commission should not permit AT&T to avoid the requirements of Section 214 by mislabeling a condition for granting statutory approval relating to specific key services and specific customers as a general regulation of rates.

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[43] *Application 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, 4233 ¶ III (2011); *see also Application of Cricket License Company, LLC, et al., Leap Wireless Int'l, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations*, Memorandum Opinion and Order, DA 14-349, 29 FCC Rcd. 2735, 2804 ¶¶ 169-70 (Wireless Telecomm. Bur. and Int'l Bur. 2014) (conditioning approval of Sections 214 and 310 application on, among other things, AT&T's commitment to offer certain data and voice packages subject to specific rate caps, and to grandfather Leap customers into their existing plans' terms and rates); *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, FCC 06-189, 22 FCC Rcd. 5662, 5808 ¶ 3 (2007) (requiring the companies to offer to certain new retail customers "a broadband Internet access service at a speed of up to 768 Kbps at a monthly rate . . . of $10 per month").

[44] *Verizon Telephone Cos. Section 63.71 Application to Discontinue Expanded Interconnection Services Through Physical Collocation*, FCC 03-256, 18 FCC Rcd. 22,737, 22,748 ¶ 21 (2003).

[45] 47 U.S.C. § 214(a).

[46] *Id.* § 205(a).

AT&T similarly ignores Section 214(c) in asserting that the Commission must also go through the process under Section 10 of the Communications Act to "reverse" the forbearance previously granted for certain packet-switched services before it can attach conditions under Section 214(c).[47] AT&T's position would hollow out Section 214(c)'s express grant of authority by rendering the Commission powerless to impose an approval condition unless it already has exercised separate regulatory authority to require the very same condition.

IV. COMPARABLE WHOLESALE ACCESS PRICING PRINCIPLES WOULD NECESSARILY BE INTERIM PENDING COMPLETION OF THE SPECIAL ACCESS DATA REVIEW AND RULEMAKING.

As Windstream has noted clearly in the past, the comparable wholesale pricing portions of its proposed principles would apply only if an ILEC *voluntarily* chooses to discontinue TDM service and would be interim "pending the completion of the special access data request and a subsequent rulemaking that addresses, in a data-driven fashion, the appropriate regulatory regime for special access pricing."[48] AT&T's assertion that "these proposals would apparently swap out the existing rate regulation of TDM services for permanent rate regulation of IP services" is disingenuous.[49] With a comprehensive data collection completed earlier this year and under review by the Commission, and the pendency of the Commission's ongoing review of its special access rate regulation rules, such resolution is attainable in the foreseeable future.

The Commission has the authority to adopt an interim approach pending the promulgation of permanent rules[50] and preserving the status quo of offerings on rates, terms, and conditions comparable to the to-be-discontinued DS1 and DS3 TDM-based services until a comprehensive resolution is appropriate in this instance. The Commission should resist Verizon's invitation to set a date certain sunset for the hold harmless principles.[51] First, until the

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47 *See* AT&T Ex Parte at 3-4.

48 Windstream Comments at 28. The principles proposed by Windstream that govern wholesale services as compared to retail services are inherent in the longstanding Commission doctrine under Section 202(a) and Section 251(b)(1) that a carrier cannot unreasonably discriminate against a wholesale purchaser. Thus, these principles would apply as long as the statute is in force.

49 AT&T Ex Parte at 6.

50 *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, FCC 04-179, 19 FCC Rcd. 16,789, 16,795 ¶ 24 (2004) ("Incumbent LECs and competitive LECs recently have both agreed that the Commission has the authority to adopt some form of interim rules, pending the expeditious completion of a proceeding crafting new permanent rules.").

51 *See* Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 and RM-11358, at 1 (filed July 16, 2015).

Commission addresses the special access issues through a permanent rule, there is no basis to conclude that the public convenience analysis under Section 214 for TDM discontinuance would change. As discussed above, the economic realities of CLEC self-deployment have been persistent. Second, establishing a date certain sunset would create a perverse incentive for ILECs to stonewall the special access proceeding. The ability to simply run down the clock would not only frustrate the Commission's work in the special access proceeding, but would also undermine the goal of ensuring that consumers will continue to have access to the services they choose from the competitive carriers. In any event, the Act already provides a more appropriate and tailored means for relief should future competitive conditions render the hold-harmless principles unnecessary: in that instance, an ILEC could petition for forbearance pursuant to Section 10, which requires forbearance once its conditions are met (which includes the impact on competition) within a statutorily-prescribed deadline.[52]

Finally, the proposed Windstream framework does not prejudge that such subsequent, data-driven rulemaking would result in new special access rate regulation. Instead, this framework seeks to preserve the status quo—in which small businesses, government customers, and nonprofits have access to competitive alternatives for communications services pending a data-driven assessment by the Commission as to the competitiveness of the market. As such, the present situation is precisely analogous to those cases, cited by AT&T, in which courts have "upheld Commission discretion to adopt interim measures while it continues to study a problem, . . . *preserv[ing]* the *status quo* to avoid serious industry disruptions."[53]

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52 *See* 47 U.S.C. § 160.

53 *See* AT&T Ex Parte at 6, n.22 (citing several cases).

AT&T is simply wrong when it asserts that the Commission lacks the statutory authority to impose interim comparable wholesale access conditions on an ILEC's discontinuance of its TDM-based special access services. AT&T wholly ignores the express language of Section 214(c); long-standing Commission precedent as well as recent analyses that recognize the continuing importance of wholesale access for enabling enterprise market competition; AT&T's and the Commission's justification and defense of existing packet-service forbearance decisions based on the presence of ex ante rate-regulated TDM-based special access alternatives; and a D.C. Circuit decision interpreting Section 214(c) as permitting the FCC to impose conditions in derogation of Sections 203-205 when, in the Commission's judgment, the public interest so requires. The Commission has full statutory authority to adopt a meaningful comparable wholesale access rule, including with respect to prices, that will govern any discontinuance pending completion of the Commission's ongoing review of and rulemaking with respect to both TDM- and packet-based special access services.

Please contact me if you have any questions.

Sincerely yours,

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