

July 27, 2015

Ms. 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:

On July 23, 2015, Eric Einhorn and Jennie Chandra, of Windstream Services, LLC (“Windstream”), and I, on behalf of Windstream, spoke with Nick Degani and Trey O’Callaghan of Commissioner Pai’s office and Amy Bender of Commissioner O’Rielly’s office, regarding the above-referenced proceeding. On July 24, 2015, we spoke with Rebekah Goodheart and Evan Scott of Commissioner Clyburn’s office, Daniel Alvarez of Chairman Wheeler’s office together with Carol Matthey and Daniel Kahn of the Wireline Competition Bureau, and Travis Litman of Commissioner Rosenworcel’s office. The points we made in one or more of these meetings are summarized in the attached handout, which was provided to the FCC participants, and further set forth below.

In particular, we emphasized that adoption of a reasonably comparable access rule is important even for CLECs that deploy their own fiber facilities. Windstream builds its own fiber network to support backbone connectivity as well as last-mile service for larger customer locations. For the former, the viability of Windstream’s backbone investments depends on Windstream’s ability to connect to both smaller and larger customer locations in the last mile. And for the latter, even when deploying its own last-mile facilities to serve larger locations, Windstream must frequently also be able to serve smaller locations to which it cannot feasibly build to secure an overall customer contract. Without the ability to obtain reasonably priced last-mile connections to these smaller locations, Windstream could not formulate a viable business case to deploy service to the large locations. Allowing ILECs to raise the costs of last-mile connections through the IP transition will slow the overall deployment of fiber networks and will reduce competition critical to driving further IP service innovations.

We also stated that regardless of whether the standard is articulated as reasonably comparable access or equivalent access, the important point is that functionally, an ILEC should not be able to use the IP transition as an unjustified excuse to increase the rates being charged for

connections purchased by wholesale or retail users who are, or would in the absence of the transition, have been able to purchase and use DS1 and DS3 special access. No party has disputed the conclusions of the CostQuest white paper Windstream filed that demonstrated that costs for fiber-based Ethernet service have declined over time;<sup>1</sup> accordingly, there is no basis in the record for permitting increased rates as a result of the IP transition. We also emphasized that the Commission should make this point clear as guidance through both its rules and its order. Lack of guidance simply fosters regulatory uncertainty and subsequent litigation, both of which deter future competitive investment to serve businesses, nonprofits, and government entities.

We emphasized that the rule has a real impact because it allows CLECs to have greater certainty as they enter into long-term contracts, which they must enter into every day. Thus, it would not be correct to argue that these rules are unnecessary because ILECs may not file discontinuance petitions in the near future; they provide needed stabilization of the regulatory environment, pending completion of the special access data review and rulemaking. In addition, we stated that adoption of a reasonably comparable or equivalent wholesale access rule does not remove the need to complete a review of the special access data and rules, including whether forbearance with respect to specified packet services is justified. Nor does it prejudge the results of the rulemaking, as it would simply preserve the status quo that underlay the Commission's decisions to forbear from ex ante price regulation of specified packet-based special access services. The Commission remains fully able to revise its special access rules, including forbearance, in light of its findings with respect to the state and determinants of competition.

Finally, we urged the Commission to take care to ensure that large ILECs could not easily evade the Section 214 process, and that it can do so by making clear that a discontinuance of a TDM special access connection to an end user location triggers Section 214 review, regardless of whether that connection is provided on a retail or a wholesale basis. Precedent cited by both ILECs and CLECs in this proceeding makes clear that when a discontinuance affects service to end users, a Section 214 review is required regardless of whether the end users are customers of the ILEC or a CLEC.<sup>2</sup> ILECs cannot and should not escape Section 214 discontinuance review

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<sup>1</sup> CostQuest, Network Cost Differentials over Time, submitted as Attachment B to Letter from Jennie B. Chandra, Vice President, Public Policy and Strategy, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 & 12-353, WC Docket Nos. 05-25 & 15-1, and RM-10593 (filed June 8, 2015). In fact, large ILECs' comments have offered further support for these findings. *See* Comments of AT&T Servs., Inc., on Notice of Proposed Rulemaking at 62, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, and RM-10593 (filed Feb. 5, 2015) ("Comments of AT&T") ("No one has questioned or can question that the transition to all-IP networks will greatly enhance the efficiency of telecommunications services and provide a far more capable platform for future innovation."); Comments of Verizon at 5-7, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, and RM-10593 (filed Feb. 5, 2015) (finding fiber offers increased reliability, better performance, and improved energy efficiency).

<sup>2</sup> *See BellSouth Tel. Cos. Revisions to Tariff F.C.C. No. 4*, FCC 92-384, 7 FCC Rcd. 6322, 6322-23 ¶ 5 (1992) ("If, for example, a discontinuance, reduction, or impairment of service to the carrier-customer ultimately discontinues service to an end user, the Commission has

simply by claiming that a service to a particular building or set of buildings is not currently being taken by one of its own retail end users, as ITTA and several of its ILEC members propose.<sup>3</sup> As an ILEC itself, Windstream knows that ILECs know when a wholesale service terminates at an end user location, even though the end user is not the ILEC's retail customer.<sup>4</sup> Furthermore, the 1996 Act's market-opening provisions and long-standing Commission precedent recognize that a CLEC's retail offering to an end user relies on ILEC wholesale access. If ILECs could eliminate all rate regulation simply by discontinuing the only remaining form of rate-regulated last-mile connectivity to an end user, that would be inconsistent with the checks that Congress placed in Section 10 to ensure that regulatory oversight was not eliminated when doing so would lead to unreasonable rates, or would inadequately protect consumers or the public interest, including competition. When such action would lead to an end to regulatory oversight, the Commission has correctly outlined a rigorous review anchored in an antitrust-type competitive analysis. It would be ironic if it became easier to eliminate that last rate-regulated service option, than to eliminate regulatory oversight of one of multiple rate-regulated alternatives for last-mile access, when other rate-regulated alternatives would remain.<sup>5</sup> If the ILEC wants to challenge this policy

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found that § 214(a) requires the Commission to authorize such a discontinuance.”); *W. Union Tel. Co. Petition for Order to Require the Bell Sys. to Continue to Provide Grp./Supergroup Facilities*, FCC 79-726, 74 F.C.C.2d 293, 296 ¶ 7 (1979) (“If there has been a discontinuance, reduction or impairment of service to the carrier’s customer, we would then need to determine whether it violated Section 214(a).”); *see also* Comments of AT&T at 44-46.

<sup>3</sup> Letter from Micah M. Caldwell, Vice President, Regulatory Affairs, ITTA to Marlene H, Dortch, Secretary, FCC, at 5, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, and RM-10593 (filed July 23, 2015).

<sup>4</sup> *See* Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket Nos. 13-5 & No. 12-353, WC Docket No. 05-25, and RM-10593 (filed June 12, 2015) (“Windstream Ex Parte”).

<sup>5</sup> *See Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phx., Ariz. Metro. Statistical Area*, Memorandum Opinion and Order, FCC 10-113, 25 FCC Rcd. 8622, 8660 ¶ 71 (2010) (“In light of the limited state of competitive loop deployment and the even more limited availability of alternative wholesale loop facilities, we need not analyze in detail all the specific product and geographic markets defined above.”); *id.* 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.”); *see also* Windstream Ex Parte at 4.

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determination, it can do so in a petition requesting forbearance or waiver of the rules – as is the case for any time it wants less rate regulation.

Sincerely,



John T. Nakahata

*Counsel to Windstream*

cc: Daniel Alvarez  
Amy Bender  
Nick Degani  
Rebekah Goodheart  
Daniel Kahn

Travis Litman  
Carol Matthey  
Trey O'Callaghan  
Evan Scott

**THE COMMISSION SHOULD ADOPT A RULE REQUIRING  
REASONABLY COMPARABLE ACCESS, INCLUDING ALL RATES,  
TERMS AND CONDITIONS, WHEN AN ILEC DISCONTINUES  
TDM DS1 AND DS3 SPECIAL ACCESS SERVICES**

**Reasonably comparable access is needed to preserve the status quo pending completion of the special access data review and rulemaking.**

- Current status quo is that specified Ethernet services are detariffed, but DS1 and DS3 special access services are available as tariffed alternatives.
- Special access data review and rulemaking (including petitions for rulemaking) are considering the level of facilities-based competitive alternatives and whether current rules need to be changed, including with respect to packet-based services.

**Preserving the status quo protects competitive choices for small- and medium-sized businesses, state and local governments, educational institutions and health care providers pending completion of the special access data review and rulemaking.**

- CLECs are the largest source of competition to the ILECs across non-residential customers of all sizes and numbers of locations.
  - While they have made substantial investments in fiber backbone facilities, CLECs do not have their own last-mile facilities to the overwhelming majority of business locations in the country, even though they continue to build wherever feasible.
  - CostQuest study reconfirms that CLECs cannot feasibly build last-mile connections to the vast majority of business locations.
  - ILECs can exercise retail market power through raising rivals' last-mile costs.
- Cable is not yet a significant alternative to ILECs and CLECs, especially for more sophisticated services, locations with more employees, and users with multiple locations.
- Large ILEC invocations of UNEs are particularly ironic since the Large ILECs also argue that the obligation to provide UNEs ceases with the IP or fiber transition.
- SBA Office of Advocacy supports adoption of a rule requiring reasonably comparable wholesale access as a condition of discontinuances of TDM-based special access.

**Section 214(c) expressly permits the Commission to impose conditions of discontinuances that “as in its judgment the public convenience and necessity may require.”**

- The Commission can implement Section 214 by rule (e.g., blanket domestic authorizations, ECO test for foreign carrier entry).
- Section 214(c) conditions can apply in derogation of Section 203 to 205 requirements. *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977) (“*MCI*”).
- Section 214(c) is a separate basis of authority from Sections 203 and 205, *see MCI*, and grants of packet-forgiveness from 203-205 do not preclude imposing price-related conditions, especially where, as here, the presence of TDM-based tariffed special access alternatives was a key basis for the grant of forbearance and the rule is established through rulemaking.

**Sunsetting an interim reasonably comparable wholesale access rule to a date certain is illogical, and is unnecessary given the availability of Section 10 forbearance.**

**A reasonably comparable wholesale access rule can be implemented, so long as Windstream’s principles are used to establish boundaries on ILEC conduct.**