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July 29, 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 two additional letters in the above-captioned proceedings in a last-minute attempt to provide a legal basis for its proposal that the Commission could impose “interim” pricing rules for IP special access services (*i.e.*, Ethernet services) as legacy TDM services are discontinued,¹ a proposal it first floated in a previous letter.² As AT&T has

¹ Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-1, *Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligations of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3), et al.*, filed June 12, 2015 (“Windstream July 20 Ex Parte”); Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-1, *Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligations of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3), et al.*, filed July 27, 2015 (“Windstream July 27 Ex Parte”).

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explained, the Commission could not lawfully adopt any proposal to re-impose rate regulation selectively on ILEC provision of highly competitive Ethernet services in light of both the forbearance that was properly granted almost a decade ago and the stringent standards of Section 205 to prescribe the rates for such services.³ Windstream’s latest letters attempt to rehabilitate its position on forbearance while arguing that the Commission could evade Section 205 and adopt a scheme of rate regulation as a condition on discontinuance under Section 214(c).⁴ But however Windstream chooses to label it, it is arguing for the affirmative imposition of rates on long-unregulated Ethernet services, and none of its theories – whether it be “conditional” forbearance or “conditional” discontinuance – gives the Commission a lawful basis to back its way into such an open-ended and industry-wide scheme of rate regulation.

First, Windstream contends that the Commission’s grant of forbearance⁵ with respect to Ethernet services actually “*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.”⁶ Windstream’s incongruous assertion that the Commission’s *Forbearance Order* somehow *necessitates* rate regulation that would undo the central effect of that order is based on

² 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 June 12 Ex Parte”).

³ Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-1, *Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter The Obligations of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3)*; 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* (July 14, 2015) (“AT&T July 14 Ex Parte”).

⁴ 47 U.S.C. § 214(c).

⁵ 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” or “Forbearance Order”).

⁶ Windstream July 20 Ex Parte at 8.

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a misreading of the order and an incorrect understanding of the Commission’s forbearance authority.

Windstream argues that the Commission “relied on the existence of TDM-based special access alternatives in justifying and defending the decision” to grant forbearance,⁷ and points to a few instances in the *Forbearance Order* in which the Commission “referenced” the fact that TDM-based special access services were excluded from the scope of the forbearance relief (because AT&T did not seek forbearance relief with respect to these services).⁸ But as AT&T explained in its previous letter – and as Windstream does not refute – the Commission did not anywhere suggest that its grant of forbearance relief was in any way *conditioned* upon the continued existence or availability of TDM-based services.⁹ Indeed, it would have been exceedingly odd to condition forbearance on the continued provision of an already-outdated technology, and fundamentally inconsistent with the Commission’s recognition in the 2007 *Forbearance Order* that the “broadband marketplace” is a dynamic entity that “is emerging and changing.”¹⁰

In all events, Windstream’s suggestion that the Commission treat its prior forbearance order as inoperative upon the discontinuance of TDM-based services vastly overstates the Commission’s powers in this regard.¹¹ Whatever authority the Commission may have to place conditions upon forbearance,¹² it has never suggested that forbearance can dissolve or “end” if

⁷ *Id.* at 2.

⁸ *Id.* at 8-9; see *AT&T Forbearance Order* at ¶ 20 n.81.

⁹ AT&T June 14 ex parte at 4.

¹⁰ *AT&T Forbearance Order* at ¶ 20; see also *id.* at ¶ 23 (noting the “emerging and evolving nature” of the enterprise broadband market and the possibility of new entry).

¹¹ Windstream July 20 Ex Parte at 10 (“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.”).

¹² When the Commission wants to grant forbearance subject to a condition, it knows how to do so. For example, the Commission has granted forbearance from certain cost assignment rules on the condition that the Wireline Competition Bureau approve a compliance plan and upon certain Paperwork Reduction Act approvals. See, e.g., *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order, 28 FCC Rcd. 7627, ¶¶ 42-46 (2013), *pet. for review denied*, *Verizon v. FCC*, 770 F.3d 961 (D.C. Cir. 2014). In such orders, however, the grants of forbearance *take effect* upon the satisfaction of the condition; the forbearance itself does

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facts or market conditions change, thereby causing long-retired schemes of regulation to spring back to life many years after carriers have been relieved from their application. Indeed, no statute or Commission rule authorizes the Commission to rescind or reverse an earlier forbearance ruling.¹³

Even if the Commission can reverse an earlier forbearance ruling, “the Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance had changed, and then survive judicial review under the Administrative Procedure Act’s arbitrary-and-capricious standard.”¹⁴ Moreover, given that many things change over the sweep of time, the Commission could not simply rely on a change in one market condition (here, discontinuance of TDM services) to conclude that regulation should be re-introduced and thereby ignore all other relevant facts. Instead, it would have to develop a full record and look at all of today’s facts. In other words, the Commission would have to conduct a full rulemaking in order to change the *status quo* regime of forbearance, which it cannot do on the current record. Accordingly, Windstream’s suggestion that the Commission bring back rate regulation as an interim measure here, when the Commission is only beginning to review the record in the special access proceeding, plainly could not survive judicial review.

With respect to Section 205, Windstream’s newly-minted “answer” is Section 214(c) of the Communications Act.¹⁵ Windstream contends that Section 214(c) “is separate from, and not subject to, the limitations on the Commission in Section 205,” and “expressly authorizes the Commission to condition its approval [of discontinuation of service] on the applicant’s commitment to ‘such terms and conditions,’ including price terms, that the Commission deems necessary for the public convenience and necessity.”¹⁶ Windstream’s sweeping view that the

not remain subject to continuing conditions indefinitely, such that the forbearance could suddenly “expire” years after it takes effect. And the forbearance orders at issue here indisputably have no such conditional language.

¹³ See Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, at 9 (May 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf (noting that “the FCC has never reversed a forbearance determination made under section 10, nor one made for wireless under the similar criteria of section 332(c)(1)”).

¹⁴ *Id.*

¹⁵ Section 214(c) provides that the Commission may attach to an approval of discontinuance of service “such terms and conditions as in its judgment the public convenience and necessity may require.”

¹⁶ Windstream July 20 Ex Parte at 11.

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Commission can prescribe rates pursuant to its Section 214(c) authority without satisfying the requirements of Section 205 is not supported by any judicial or Commission authority.

Windstream cites only one case in support of its novel view of Section 214 – *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977) – and this single authority does not support its position.¹⁷ In *MCI*, MCI filed tariff revisions establishing rates for a new “Execunet” service over its existing facilities that effectively enabled long-distance calls. The Commission rejected the tariff on the ground that this new service exceeded the authority granted in MCI’s Section 214 applications, without providing any rationale for this conclusion. The D.C. Circuit reversed. It explained that “[t]he primary purpose of Section 214(a) is prevention of unnecessary duplication of *facilities*, not regulation of services” and, therefore, Section 214 has “a limited office with respect to regulation of service offerings on existing lines.”¹⁸ The Commission acknowledged that Section 214(c) may authorize some limited restrictions on the services that are offered over existing facilities, but held that “since any prior approval requirement [for a tariff] is in derogation of the legislative compromise embodied in Section 203-205, the Commission must strictly follow the terms of Section 214(c) and it cannot impose any such restriction unless it has affirmatively determined that ‘the public convenience and necessity [so] require.’”¹⁹ The Court determined that the Commission had not made such an affirmative determination in certain prior orders, and therefore that its rejection of the tariff was unlawful because “[o]nly if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized.”²⁰

Windstream misreads *MCI* in asserting that it adopted a blanket rule that Section 214(c) is “not subject to . . . the limitations on the Commission in Section 205,”²¹ including the limitations that govern rate prescription. *MCI* involved a situation in which the Commission attempted to use its Section 214 authority to block a carrier from initiating a service, in derogation of the *carrier’s* rights under the tariff regime (Sections 203-05) to initiate and file its own rates and services. *MCI*, 561 F.2d at 374-77 (citing *AT&T v. FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973)). Although the Court suggested that the Commission could in extraordinary circumstances lawfully block a service if it made the public interest findings specified in the statute, it overturned the Commission’s attempted use of Section 214 authority because it found

¹⁷ *Id.* at 11-12.

¹⁸ 561 F.2d at 375 (emphasis in original).

¹⁹ *Id.* at 377.

²⁰ *Id.* at 380.

²¹ Windstream July 20 Ex Parte at 11.

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that the Commission had not made the requisite findings. The D.C. Circuit did not address, and had no occasion to address, the much different situation presented here, where AT&T is seeking to discontinue a service, and Windstream is proposing that the Commission use its Section 214 discontinuance authority to *require* AT&T to offer a service at Commission-determined rates. *MCI* contains no suggestion that Section 214 allows the Commission to impose such a requirement and affirmatively impose a new scheme rate regulation – especially here, in the face of statutory findings of forbearance – which would be in derogation of the entirety of the rate prescription regime in Section 205, and not just the implications of a carrier-initiated scheme of tariffed rates as was at issue in *MCI*. *Cf. AT&T*, 487 F.2d at 874 (“[w]hat is determinative in the instant case is the incontrovertible fact that the [rule] under review has the same effect as a Section 205 rate prescription”). *MCI* does not suggest that Section 214(c) is an alternative or back-door mechanism for imposing rate regulation, which is what Windstream contends.²²

The only other cases cited by Windstream are Commission orders granting Section 214 approval of “voluntary transactions” such as mergers, in which the parties “agree[d] to wide-ranging conditions, including conditions on pricing.”²³ These Commission orders are inapposite because they do not involve any exercise by the Commission of its prescription authority under Section 205 or the promulgation of any rules. Instead, the carriers involved in the transactions voluntarily agreed to charge certain rates for particular services, and typically did so only for a limited period of time. This hardly suggests that the Commission’s Section 214 discontinuance authority permits it to impose industry-wide *rules* requiring all carriers to offer particular services at Commission-determined rates for an indefinite period of time – without providing any

²² Windstream’s contention that its proposal would merely maintain the “status quo” pending the outcome of the special access proceeding is incorrect. *See* Windstream July 20 Ex Parte at 15; Windstream July 27 Ex Parte at 2. The reintroduction of rate regulation for Ethernet services would in fact represent a profound change in the status quo in the *Ethernet* marketplace, effectively repealing the statutory findings of forbearance. Windstream concedes that its back-door theories do not eliminate the need to conduct a forbearance and rate analysis on a full record in the special access proceeding, *see* Windstream July 27 Ex Parte at 2, but the courts have consistently held that slapping an “interim” label on rate prescriptions does not permit the Commission to ignore the requirements of Section 205. *AT&T v. FCC*, 449 F.2d 439, 451 (2d Cir. 1971); 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 (1981).

²³ *Id.* at 13-14.

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of the procedural safeguards required by Section 205²⁴ and without a record that would be necessary for the Commission to make the findings that are required by Section 205.²⁵

Apart from these legal arguments, Windstream devotes many pages to arguing about the lack of alternatives to incumbent LECs' last-mile connections and other purported market conditions.²⁶ These arguments are largely a rehash of assertions that Windstream and others have made before in the above-captioned proceedings, and that AT&T and others have repeatedly refuted. For present purposes, the critical point is that the very premise of the ongoing special access proceeding is that the Commission does *not* have current data about competitive conditions in the special access marketplace. Accordingly, any regulatory action would be premature until the Commission completes its review of the industry data, which is still in its early stages.

Sincerely,

/s/ James P. Young

James P. Young
Attorney for AT&T

²⁴ 47 U.S.C. § 205(a) (authorizing Commission to prescribe rates after providing carriers with “full opportunity for hearing”).

²⁵ Similarly, in Order, *Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, 18 FCC Rcd. 22737, ¶ 21 (2003), the Commission granted a discontinuance request in part because Verizon voluntarily “offered to enter into non-carrier contracts to provide physical collocation” at rates available to carriers under state interconnection offerings. As with the merger orders, the Commission’s action did not involve any exercise of its Section 205 or rulemaking authority.

²⁶ Windstream July 20 Ex Parte at 4-8.