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VIA ECFS

EX PARTE

July 31, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *WC Docket No. 15-1, 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); GN Docket No. 13-5, Technology Transitions; GN Docket No. 12-353, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; WC Docket No. 05-25, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; RM-10593, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,*

Dear Ms. Dortch:

I spoke yesterday with Daniel Kahn of the Wireline Competition Bureau regarding AT&T's July 29, 2015 letter filed in the above proceedings, in which AT&T doubled down on its regulatory bait-and-switch on Ethernet forbearance, and in which it ignored the plain language of Section 214(c)'s grant of authority, the D.C. Circuit's clear interpretation of that authority, and a long line of Commission precedent on imposing conditions on an entity's voluntary conduct.¹ I reemphasized several points Windstream made in its July 20, 2015 ex parte filing,² and explained how AT&T's letter fails to address the key legal arguments made by Windstream.

First, AT&T continues to present a grossly cropped picture of the Commission's authority to attach conditions where it has the statutory authority and obligation to preapprove

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, RM-10593 (filed July 29, 2015) ("AT&T July 29 Ex Parte").

² Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-1 & 05-25, GN Docket Nos. 13-5 & 12-353, RM-10593 (filed July 20, 2015) ("Windstream July 20 Ex Parte").

voluntary carrier conduct. AT&T's argument misreads the plain language of Section 214(c) and the D.C. Circuit's interpretation of that language in *MCI Telecommunications Corp. v. FCC*.³ The *MCI* court concluded (and later reiterated) that Section 214(c) authorizes the Commission to act notwithstanding the tariffing procedures in Sections 203-205.⁴ Thus, Section 205 does not, contrary to AT&T's claim, prevent the Commission from exercising its authority under Section 214(c) to preapprove, and attach conditions to its approval of, a carrier's discontinuation of wholesale TDM special access services.

AT&T's attempts to distinguish *MCI*—and the Commission's precedents of invoking Section 214 to impose pricing conditions on transactions including discontinuations⁵—all fail in the face of express provisions of Section 214(c). The statute's authorization to the Commission to issue a certificate on public convenience and necessity apply to “a line, or extension thereof, or discontinuance, reduction, or impairment of service.”⁶ Section 214(c) also expressly authorizes the Commission to “attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.”⁷ There is no basis for AT&T's suppositions, either in the statute or in the *MCI* court's opinion, that this authority exists only in “extraordinary circumstances,” or that the Commission may only exercise the authority to “block a service,”⁸ and not with respect to any other aspect of offering common carrier services covered by Sections 203-205, including limits on prices. AT&T attempts to draw lines without any textual basis in Section 214. The Commission also should not accept AT&T's question-begging assertion that its prior uses of Section 214 to impose pricing and other terms as approval conditions are “inapposite.”⁹ Nor should the Commission accept the mischaracterization made throughout AT&T's advocacy that the hold-harmless principle amounts to “a new scheme [of] rate regulation.”¹⁰ The hold harmless principle imposes no price regulation whatsoever on AT&T's current packet-based offerings unless and until AT&T voluntarily discontinues its wholesale TDM special access inputs—and even then the impact would be limited in both scope

³ *MCI Telecomms. Corp. v. FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977).

⁴ *See id.* *See also MCI Telecomms. 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)”).

⁵ *See* Windstream July 20 Ex Parte at 12-13, 13 n.43 (citing Commission orders pursuant to Section 214 that impose conditions on carriers to offer certain data and voice services subject to specific rate caps); *id.* at 13 n.44 (citing Commission order requiring Verizon to make physical collocation services available to its non-telecommunications carrier customers at the lower Section 251 interconnection rates as a condition to approval a discontinuation application).

⁶ 47 U.S.C. § 214(c).

⁷ *Id.*

⁸ AT&T July 29 Ex Parte at 5.

⁹ *Id.* at 6.

¹⁰ *Id.*

and duration to preserving the competitive status quo in areas where AT&T had discontinued DS1 and DS3 services pending the Commission's conclusion of the special access proceeding.

Second, AT&T misses the relevance and significance of the packet-based forbearance order and its reliance on the continued availability of TDM special access services and UNEs.¹¹ AT&T claims that it would be “incongruous” for the “*Forbearance Order* [to] somehow *necessitate*[] rate regulation that would undo the central effect of that order.”¹² This conclusion only appears incongruous to AT&T because it holds a one-dimensional view of the “central effect” of that order and because it continues to pretend that discontinuance of TDM special access services, without reasonably comparable alternatives, will have no impact on competition and customers. In fact, the regulatory regime in place after forbearance, which the Commission made clear repeatedly in the *Forbearance Order*, is *both* that certain ex ante regulations will no longer apply to the packet-based services at issue *and* that they *will continue to apply* to TDM special access services and unbundled network elements (“UNEs”).¹³ As Windstream explained in the July 20, 2015 ex parte letter, the continued availability of TDM special access services and UNEs were both important pillars supporting the Commission's conclusion—as well as in AT&T and other ILECs' arguments defending that conclusion—that the forbearance factors under Section 10 of the Communications Act were met;¹⁴ with these key pillars now slated for removal, the Commission can act in a rulemaking (what this proceeding is) in recognition that the resulting lack of competition and harm to consumers reasonably requires imposition of a new rule, not because AT&T violated a “condition” of the order.¹⁵ And in any event, Section 214(c)

¹¹ See Windstream July 20 Ex Parte at 8-11. See also, e.g., *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 Servs.*; *Petition of BellSouth Corp. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Servs.*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18,705, 18,713 ¶ 13 (2007) (“*Forbearance Order*”). For simplicity, Windstream does not rely here or elsewhere 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.

¹² AT&T July 29 Ex Parte at 2.

¹³ See Windstream July 20 Ex Parte at 8-9.

¹⁴ See *id.*

¹⁵ See *id.* at 10-11. See also *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007) (providing that FCC can implement pricing methodologies either through Section 205 rate prescription or through general “rules that . . . insist upon certain carrier practices”); *AT&T Co. v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978) (holding that notice-and-comment provides a “full opportunity to be heard” sufficient under Section 205); *Forbearance Order*, 22 FCC Rcd. at 18,738-38 ¶ 67 (concluding that “the record does not demonstrate that forbearance from,” among other economic regulations, Sections 201 and 202, “would meet the statutory forbearance criteria”).

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specifically permits the Commission to impose conditions on discontinuances that the Commission, in its judgment, deems necessary to protect the public interest in light of a large carrier's proposed change of circumstances.

Finally, AT&T fails to acknowledge that it is the party that is seeking to the change to status quo for consumers and competition—by seeking to expand the scope of the forbearance granted to certain packet-based services to cover capacity provisioned by some of its TDM services currently—without any Commission oversight. This AT&T-proposed change in circumstances warrants Commission review. In particular, as Windstream has noted previously,¹⁶ AT&T's action to charge higher Ethernet prices to customers who are currently purchasing capacity in a TDM format is either an expansion of forbearance to TDM special access services that requires Commission action pursuant to Section 10, or a discontinuation of those TDM services that requires approval pursuant to Section 214(c). Either way, the Commission's proposed adoption of a meaningful comparable wholesale access rule, including with respect to prices, in response to the large carriers' self-initiated discontinuance plans is an appropriate way to maintain the status quo pending the completion of the ongoing rulemaking with respect to both TDM- and packet-based special access services.

Please contact me if you have any questions.

Sincerely yours,

/s/ Jennie B. Chandra

Jennie B. Chandra

cc: Daniel Kahn

¹⁶ See Windstream July 20 Ex Parte at 10.