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OCT - 1 2015

Federal Communications Commission
Office of the Secretary

October 1, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Technology Transitions*, GN Docket No. 13-5; *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

On September 24, 2015, an ex parte letter was filed by Windstream Services, LLC in the above matters. The filing inadvertently duplicated a sentence of footnote 8 in a sentence in footnote 9. The only change is to delete the duplicative sentence and accompanying citation from footnote 9. The deleted material contains no Confidential or Highly Confidential information. The corrected version is attached and replaces, in its entirety, the version that was filed previously.

Please contact me if you have any questions.

Sincerely yours,

John T. Nakahata
Counsel to Windstream Services, LLC

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September 24, 2015

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Re: *Technology Transitions*, GN Docket No. 13-5; *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

On September 22, 2015 Jennie Chandra and Malena Barzilai of Windstream Services, LLC ("Windstream") and John Nakahata of Harris, Wiltshire, & Grannis LLP, counsel to Windstream, spoke by telephone with Deena Shetler, Pamela Arluk, David Zesiger, Eric Ralph, and William Layton regarding the above-referenced proceedings.

Windstream urged the Commission to act on TDM special access volume commitments in the near term. Contrary to large ILECs' efforts to portray TDM services as merely historical offerings, Windstream explained that many business service customer locations continue to rely on TDM special access services for network connectivity, especially given those same ILECs charge far more for basic connectivity when in IP versus TDM (e.g., eight times higher in Kings Point, Florida).[1] And while proclaiming the desire to shift their own retail customers to IP-based services, these large ILECs impose hefty volume commitments that lock competitive carriers and other wholesale purchasers into continuing to purchase TDM-based customer connections, or force those wholesale purchasers to pay large penalties for services they neither want nor need. These lock-up provisions both slow the wholesale purchasers' IP transitions and raise their costs—which then allow the large ILECs to ward off competition and raise their own retail

[1] *See* Attachment to Letter from Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 12-353 & 13-5 (filed June 10, 2014) (comparing AT&T wholesale charges for capacity when provisioned as Ethernet versus TDM special access); *see also* TeleGeography Local Access Pricing Service, *2014 Local Access Market Summary*, at 2-4 (finding the United States has some of the lowest prices worldwide for DS1s, but some of the highest prices worldwide for 10 Mbps Ethernet).

prices. State and local governments, schools, libraries, healthcare providers, and many small- and medium-sized businesses come out on the short end of the large ILECs' special access stick.

It is simply not true that TDM services are irrelevant. Many TDM special access circuits remain in use today. According to TeleGeography, T-1s, smaller legacy circuits, remain the most prominent access circuit type in the United States.[2] Windstream observed that market data show that, in particular, ***BEGIN CONFIDENTIAL*** [redacted] ***END CONFIDENTIAL***.[3] This is consistent with Windstream's own experience and data showing that many small, medium-sized, and multi-location businesses with more modest bandwidth needs continue to use TDM-based inputs.[4] Windstream continues to use a substantial amount of legacy DS1 and DS3 last-mile inputs, including TDM special access services, to connect its fiber network to individual customers. DS1 and DS3 connectivity currently constitutes approximately ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL*** of Windstream's total annual expense on last-mile access. And in fact, ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL*** Thus, migration of customer connections from TDM-based to IP-based services remains an important concern for customers and carriers in the business services marketplace.

Moreover, there can be little doubt that the large ILECs maintain hammerlock control over last-mile access to the vast majority of business locations. Out of 20 million business

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2 *See* TeleGeography Local Access Pricing Service, January-June 2014, https://www.telegeography.com/research-services/local-access-pricing-service/index.html. The same holds true in other countries. *See* TeleGeography Local Access Pricing Service, *2014 Local Access Market Summary*, at 2-4 (reporting "[s]maller legacy TDM circuits, T-1s in the U.S. & Canada, and E-1s elsewhere in the world, remain the most prominent circuit types globally").

3 ATLANTIC-ACM, *Local Wholesale Transport Analysis*, Second Quarter 2014, Executive Summary (Oct. 2014) (estimating market share based on 2013 data).

4 *See* Comments of Windstream Corporation at 17, GN Docket No. 13-5, WC Docket Nos. 05-25 & 15-1, RM-11358, and RM-10593 (filed Feb. 5, 2015).

buildings[5]—of which 3.5 million house more than one business[6]—CLECs have their own last-mile facilities reaching only a small fraction. According to Current Analysis, Level 3 has approximately 30,000 lit buildings, and XO has approximately 4,000.[7] And with more last-mile ownership, the ILECs hold far greater control of the local wholesale transport market: in 2013 ILECs and their affiliates made up nearly 82 percent of the local wholesale transport market, which includes last-mile connectivity for wireless cell towers, commercial building connections, and data center and aggregation point connections.[8] Since commercial buildings usually are 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 is even higher. Indeed, *****BEGIN CONFIDENTIAL***** [redacted] *****END CONFIDENTIAL*****.[9] This

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5 This includes home businesses.

6 GeoResults Q3/2014 GeoAnalytic Report. *See also* Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, at 6 n.18, GN Docket Nos. 13-5 & 12-353, WC Docket Nos. 15-1 & 05-25, and RM-10593 (filed July 20, 2015).

7 *Id.* at n.16.

8 ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report* (Sept. 2014) (estimating market share based on 2013 data). AT&T, Verizon, and CenturyLink alone hold 70 percent of this market. *Id.*

9 ATLANTIC-ACM, *Local Wholesale Transport Analysis*, Second Quarter 2014, Executive Summary (Oct. 2014) (estimating market share based on 2013 data). For Windstream in particular, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****. Prospects for changing these conditions are limited. When Windstream actively sought to diversify its wholesale suppliers by *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****. *See also* Letter from Tamar E. Finn, Counsel to TelePacific, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 13-5 & 12-353 and WC Docket No. 10-188 (filed Feb. 27, 2015) ("TelePacific reiterated that its surveys of

overwhelming control gives the large ILECs the ability to dictate terms and conditions to disadvantage and raise the costs of their competitors that must purchase the large ILECs' last-mile services in order to bring an integrated competitive service package to the small or medium-sized business or governmental customer.

As an example of these restrictive and cost-raising conditions, Windstream explained that competitive carriers may be penalized under large ILECs' volume commitments when transitioning purchases from TDM special access to IP-based Ethernet services. For example, Verizon tariffs do not permit competitive carriers' wholesale Ethernet purchases to count toward meeting these commitments if Ethernet is purchased to serve a new customer or location.[10] Likewise, in Windstream's current commercial agreement with ****BEGIN HIGHLY CONFIDENTIAL**** [redacted] ****END HIGHLY CONFIDENTIAL**** Moreover, even when an ILEC arrangement theoretically permits some Ethernet purchases to be counted toward spend commitments, Windstream has concerns about a competitive carrier's ability to meet ILEC-prescribed manual conversion processes successfully and in a timely fashion.

In light of these conditions, and to address a problem that will only become more significant as the IP Transition accelerates, Windstream recommends that the Commission require all ILECs offering volume-based discount commitments (or thresholds for early termination penalty relief) for TDM special access services to permit wholesale customers to meet those commitments or thresholds using purchases of Ethernet as well as TDM special access services.[11] Without a regulatory backstop to negotiations, competitive carriers—which

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alternative fiber providers show *there is no alternative to the ILEC for more than 80%* of TelePacific's business customer locations.") (emphasis added).

10 *See* Verizon Tel. Cos. FCC Tariff No. 1 § 2.9; Verizon Tel. Cos. FCC Tariff No. 11 § 2.10; Verizon Tel. Cos. FCC Tariff No. 14 § 2.10; Verizon Tel. Cos. FCC Tariff No. 16 § 2.9.

11 The requirement would not prohibit private negotiations between carriers and their customers on ways of addressing the issue—either during contract negotiation or during the transition to

are already in these long-term contracts and must be to obtain wholesale prices that allow them to compete with the large ILECs when serving enterprise users—have no sufficient recourse when an ILEC decides to discontinue a TDM circuit in the middle of the contract, and would be penalized for encouraging their own customers to transition to IP-based solutions.[12] AT&T's assurance that "effective contracts and tariffs" will "adequately address any issues" ignores the obvious fact that contracts and tariffs impose early termination penalties in the first instance.[13]

Finally, we noted the Commission should also inquire as to whether the large ILECs are failing to tariff some services for which they have not received forbearance, and thus practices with respect to those services should also be within the scope of any review of special access terms and conditions. When the FCC granted forbearance, it did so only with respect to packet-switched services that the requesting ILEC (i) offered at the time of forbearance and (ii) specified in its petition.[14] The Commission should ensure that the large ILECs have not now engaged in "self-help" with respect to newer technologies and service offerings (including

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IP—that are more advantageous for both parties. However, such negotiations are far more likely to be fruitful with a default rule in place.

12 The competitive carrier will incur this penalty either in the form of lost TDM special access discounts or by the cost of maintaining unused TDM special access circuits to meet volume-based discount commitments. *See* Comments of XO Communications at 27 n.47, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25 & 15-1, RM-11358, and RM-10593 (filed Feb. 5, 2015) ("The term discount plans that XO and other CLECs enter into with incumbents for DS1 and DS3 special access circuits include volume commitments and extremely high shortfall penalties for failure to meet these commitments. These plans generally prevent the use of Ethernet services as substitutes for TDM services under those commitments.") (citation omitted).

13 *See* Comments of AT&T Services, Inc. at 64, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, and RM-10593 (filed Feb. 5, 2015).

14 *See, 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 Services; 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 Services*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18,705, 18,730 ¶ 44 (2007) (restricting the forbearance grant to AT&T and "the existing services as specified in its petitions"), 18,714 n.59 (recognizing "Verizon restricted its forbearance request to ten of its then-existing telecommunications services offerings"). *See also* CenturyLink Petition for Forbearance at 5, WC Docket 14-9 (filed Dec. 13, 2013) (CenturyLink Petition) (recognizing temporal and petition-specific limitations on packet-switched services previously subject to forbearance).

service tiers targeted at small and medium businesses and other lower bandwidth users) that did not exist at the time forbearance was granted, or with respect to any other types or levels of services that were not specifically addressed in the large ILECs' forbearance petitions.[15] Furthermore, as COMPTEL previously explained, special construction, including with respect to the specified Ethernet services, was not itself specified and thus fell within none of the large ILEC packet-service forbearance petitions.[16]

Windstream seeks confidential and highly confidential treatment of marked portions of this document pursuant to the Protective Order and Second Protective Order in GN Docket Nos. 13-5 and 12-353 and the Modified Protective Order and Second Protective Order in WC Docket No. 05-25 and RM-10593;[17] the redacted version for public inspection is being filed on ECFS.

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[15] The large ILECs' petitions were not comprehensive in their scope as to the specific listed services. In AT&T's and BellSouth's forbearance petitions, for example, the Ethernet services addressed by the petitions "typically operate[] at speed in the range of 50 Mbps to 10 Gbps" or "operate[] from mid-band to higher speeds in the range of 50 Mbps to 10 Gbps," and not at other speeds. 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 at Appendix A, WC Docket No. 06-125 (filed July 13, 2006); 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 Services at Attachment A, WC Docket No. 06-125 (filed July 20, 2006). In its petition, Frontier used the same language as BellSouth to describe its Ethernet services subject to the petition. Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services at Attachment A, WC Docket No. 06-147 (filed Aug. 4, 2006). Qwest (now CenturyLink), in its petition listed just two specific types of Ethernet services: "Metro Optical Ethernet" and "Ethernet Ports over SONET." Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services at Attachment A, WC Docket No. 06-125 (filed Sept. 12, 2007). The 2013 CenturyLink petition, which was granted by operation of law, did not seek additional forbearance with respect to the former Qwest ILECs. *See* CenturyLink Petition at Attachment 1.

[16] *See* Letter from John T. Nakahata, Counsel to COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, PS Docket No. 14-174, WC Docket No. 05-25, and RM-10593 (filed May 27, 2015) (describing the Commission's ample authority to regulate ILEC special construction practices regardless of any forbearance granted for packet-based services).

[17] *Tech. Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, Protective Order, DA 14-272, 29 FCC Rcd. 2014 (Wireline Competition Bur.

Highly confidential treatment is required to protect information about Windstream's wholesale purchases, costs, and expenses, including the terms and conditions of such purchases.[18] Confidential treatment is needed to protect market data attained from proprietary Atlantic ACM research that is not available for public use.[19]

2014) (IP Transition Protective Order); *Tech. Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, Second Protective Order, DA 14-273, 29 FCC Rcd. 2022 (Wireline Competition Bur. 2014) (IP Transition Second Protective Order); *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Servs.*, Modified Protective Order, DA 10-2075, 25 FCC Rcd. 15,168 (Wireline Competition Bur. 2010) (Special Access Modified Protective Order); *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Servs.*, Second Protective Order, DA 10-2419, 25 FCC Rcd. 17,725 (Wireline Competition Bur. 2010) (Special Access Second Protective Order); *see also* Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, WC Docket No. 05-25 and RM-10593 (filed Feb. 13, 2012) (Letter to Donna Epps) (further supplementing the Special Access Second Protective Order).

18 *See* IP Transition Second Protective Order at Appendix A, numbers 2-3 (declaring eligible for highly confidential treatment "information that discusses in detail . . . future procurement strategies" and "[i]nformation that provides granular information about a Submitting Party's current or future costs, revenues, marginal revenues or market share" and "information"); Letter to Donna Epps at 2-3 (declaring eligible for highly confidential treatment "[e]xpenditures, including dollar volumes of purchases of intrastate and interstate *DS1* and *DS3* services, and expenditures under certain rate structures and discount plans," "Request for Proposals ('RFPs') including responses received to RFPs parties have issued," and "Information and data related to terms and conditions contained in a carrier's *Contract-Based Tariff*, *Tariff*, *Tariff Benefit Plan*, or *Tariff Discount Plan* that, whether alone or in combination with other confidential or non-confidential information, would reveal the identity of a customer, the services purchased by a customer, the geographic area in which such services were bought, or other information and data designated as Highly Confidential in the *Second Protective Order* or its amendments").

19 *See* IP Transition Protective Order at 2015 (defining "Confidential Information" as information that is not otherwise available from publicly available sources and that is subject to protection under the Freedom of Information Act); Special Access Modified Protective Order at 15,169 (defining "Confidential Information" as information contained in a Stamped

In addition, pursuant to Sections 0.457 and 0.459(b) of the Commission's rules, Windstream requests confidential and highly confidential treatment, respectively, for the marked portions of the enclosed submission with respect to RM-11358 and WC Docket No. 15-1.[20] Windstream asserts the following in support of this request, which concerns materials that are already covered by protective orders in other dockets:

1. Identification of the specific information for which confidential treatment is sought.

Windstream requests confidential treatment of text marked as "confidential" and "highly confidential" in this submission.

2. Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.

Confidential treatment is requested in conjunction with Windstream's ex parte in response to its meeting with Wireline Competition Bureau staff and the information elicited by staff.

3. Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.

The information for which Windstream is seeking confidential or highly confidential treatment includes commercially sensitive information relating to Windstream's wholesale purchases, costs, and expenses. Windstream also seeks confidential treatment for market data attained from proprietary Atlantic ACM research that is not available for public use. None of this information is available to the general public and disclosure could affect competitive standing in the marketplace. The Commission has recognized that disclosure of information relating to market plans and business strategies can cause substantial competitive harm.[21]

Confidential Document or derived therefrom that is not otherwise available from publicly available sources); 5 U.S.C. § 552(b)(4) (exempting from release under FOIA "trade secrets or commercial or financial information obtained from a person and privileged or confidential").

20 47 C.F.R. §§ 0.457, 0.459(b).

21 *See Southwestern Bell Tel. Co., Cost Support Filed Under Request for Confidential Treatment*, DA 99-178, 14 FCC Rcd. 987, 990 ¶ 7 (Competitive Pricing Div. 1999).

4. Explanation of the degree to which the information concerns a service that is subject to competition.

The information for which Windstream is seeking confidential or highly confidential treatment includes information about its wholesale expenditures and purchases, and market data attained from proprietary Atlantic ACM research that is not available for public use.

5. Explanation of how disclosure of the information could result in substantial competitive harm.

Disclosure of this information could hinder Windstream's ability to negotiate commercial agreements and purchase wholesale products and inputs, and could hinder Atlantic ACM's ability to perform its proprietary market research.

6. Identification of any measures taken by the submitting party to prevent unauthorized disclosure.

The information provided includes confidential or highly confidential business information and is treated as such. The information is not ordinarily shared with unauthorized individuals, entities, or other third parties. The market data obtained from proprietary Atlantic ACM research was provided to Windstream with a no-public-use proviso.

7. Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

To the best of Windstream's knowledge, the information for which Windstream is seeking confidential or highly confidential treatment has not been disclosed to the general public or to any particular third parties, unless subject to confidentiality protections.

8. Justification of the period during which the submitting party asserts material should not be available for public disclosure.

Windstream requests that the information remain confidential or highly confidential indefinitely, because its disclosure would negatively affect Windstream's future wholesale purchasing and commercial agreements, and Atlantic ACM's research activity.

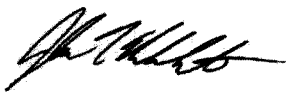
9. Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Data subject to this request also would qualify for Exemption 4 of the Freedom of Information Act. Exemption 4 protects information that is (i) commercial or financial; (ii) obtained by a person outside of the government; and (iii) privileged or confidential.[22]

Pursuant to the four Protective Orders, this redacted version of the document is being filed electronically via ECFS. Windstream also is sending two copies each of the confidential version and highly confidential version and a cover letter to the Wireline Competition Bureau's Jonathan Reel (Competition Policy Division) and Marvin Sacks (Pricing Policy Division).

Please contact me if you have any questions or require any additional information.

Sincerely yours,



John T. Nakahata
Counsel to Windstream Services, LLC

cc: Deena Shetler
Pam Arluk
David Zesiger
Eric Ralph
William Layton

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22 *See* 5 U.S.C. § 552(b)(4); *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979).