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**VIA ECFS**

***EX PARTE***

October 6, 2015

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

Re: *Technology Transitions*, GN Docket No. 13-5; *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 October 2, 2015, Jennie Chandra, Peggy Rubino, and Malena Barzilai from Windstream Services, LLC (“Windstream”), and John T. Nakahata, Counsel to Windstream, spoke with Deena Shetler, Pam Arluk, Eric Ralph, Vienna Jordan, Bill Kehoe, Dick Kwiatkowski, Jim Lichford, Joe Price, and Doug Sloten, all of the Wireline Competition Bureau, regarding the need for the Commission to address incumbent LEC (“ILEC”) special construction practices for TDM special access and Ethernet services. Unjustified ILEC special construction charges erect an unduly high cost barrier to competitive carriers’ and their customers’ migration to new services, and often cause customers to forego orders with competitive carriers.<sup>1</sup> The result of this loss (or at least significant impairment) of competition is

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<sup>1</sup> See Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, at 3, GN Docket Nos. 13-5 & 12-353, WC Docket No. 05-25, and RM-10593 (filed June 8, 2015) (noting that special construction assessments often can cause a competitive carrier to lose existing and new retail customers and estimating the impact of such lost sales for Windstream in particular). See also *id.* at Attachment B (providing Windstream data on the number and amounts of special construction quotes, as well as the number and amounts accepted, for Q4 2014 and Q1 2015). Intolerably long delays due to battling the ILEC over special construction charge amounts and/or installation of new facilities also may cause a retail customer to walk away from its service request. A retail customer may look far more favorably on an ILEC’s own retail offerings when the ILEC offers its own services without such additional costs and/or delays.

less choice and higher prices for government entities, nonprofits, and business customers that seek to use IP-based services over fiber.

Windstream urged the staff to confirm that ILECs' special construction practices should be consistent with COMPTTEL's proposed policy principles.<sup>2</sup> Those principles address two of the most prevalent sources of unjustified ILEC special construction charges – when facilities allegedly are “not available to meet an order for service,” and when an ILEC claims it has “no other requirement for the facilities” requested.<sup>3</sup> The Commission could address these concerns through a public notice providing compliance guidance, or more formally through a declaratory ruling. Moreover, Windstream noted that the Commission has statutory authority to regulate special construction charges both for TDM-based and IP-based special access services, as special construction charges do not fall within any of the grants of forbearance with respect to regulation of specific packet-based special access services. COMPTTEL set forth the basis for the Commission's continued jurisdiction and authority with respect to special construction practices for facilities that will carry, *inter alia*, Ethernet services in its May 27, 2015 *ex parte*.<sup>4</sup>

Windstream reiterated its and other CLECs' position that an ILEC cannot assess special construction charges on the purchasing CLEC (or its end-user customer) that the ILEC would not assess on its own retail customer requesting the same service for the same location. As COMPTTEL has previously explained, the Commission has long recognized that charges for facilities construction can be a source of impermissible unreasonable discrimination, and a means to attempt to avoid the “basic common carrier responsibility” for “planning and investing in facilities” to respond to reasonable requests for service.<sup>5</sup> Special construction charges, in particular, are *not* justified simply because existing facilities so far have only been used for a different type of service, or “simply because existing facilities are fully utilized and additional

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<sup>2</sup> See Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, at 2, GN Docket Nos. 13-5 & 12-353 and WC Docket No. 05-25 (filed Apr. 23, 2015); Letter from John T. Nakahata, Counsel to COMPTTEL, to Marlene H. Dortch, Secretary, FCC, at 2-3, GN Docket No. 13-5, PS Docket No. 14-174, WC Docket No. 05-25, and RM-10593 (filed May 27, 2015) (“May 27, 2015 COMPTTEL Ex Parte Letter”).

<sup>3</sup> See, e.g., Verizon Tel. Cos. Tariff F.C.C. No. 21 § 2.6.2; Southwestern Bell Tel. Co. Tariff F.C.C. No. 69 § 2.6.2; BellSouth Telecomms. Tariff F.C.C. No. 2 § 2.6.2; CenturyLink Operating Cos. Tariff F.C.C. No. 12 § 2.6.2; Nat'l Exch. Carriers Assoc. Tariff F.C.C. No. 3 § 2.6.2.

<sup>4</sup> For COMPTTEL's detailed discussion of this statutory authority, see May 27, 2015 COMPTTEL Ex Parte Letter at 3-6.

<sup>5</sup> See *id.* at 2 (quoting *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, FCC 84-31, 97 FCC 2d 1082, 1213 (1984)).

facilities are necessary.”<sup>6</sup> Indeed, the Commission has long held that, if a “facility is fungible,” and “if a long term customer ceases to use it the facility would become available to serve other long term or occasional customers,” special construction charges are improper.<sup>7</sup> Nevertheless, ILECs continue to impose unwarranted and/or excessive special construction charges, which become de facto last-mile price increases.

Windstream also elaborated on application of the COMPTTEL principles. For clarity, Windstream explained these principles, with respect to an ILEC, should operate as follows:

**Facilities Unavailability.** COMPTTEL’s first principle provides that the facilities unavailability requirement would be met in places where existing ILEC facilities, even with routine maintenance and conditioning, do not have capacity available at or above the level requested by the CLEC.<sup>8</sup> As COMPTTEL explained, this means the ILEC potentially may apply special construction charges to provision capacity where (i) the ILEC in theory could use copper to meet a wholesale request but has tested and found that no spare copper loop facilities would be capable of fulfilling the CLEC customer’s order, even with routine maintenance and conditioning (e.g., the removal of bridge taps and load coils); or (ii) the ILEC does not have fiber, subject also to the ILEC having no other use for the facility, as discussed further below.<sup>9</sup>

Under COMPTTEL’s first principle, an ILEC, however, cannot charge for construction of duplicative fiber if the ILEC already has fiber with capacity available at the customer location. This includes instances where an ILEC has fiber running to the building, but the fiber’s Optical Line Terminal may not then connect to the appropriate port to support the requested service (e.g., a GPON network that does not connect from the OLT to an Ethernet port). Permitting otherwise would allow the ILEC to block competitors’ entry in a building by requiring them to pay for unnecessary, redundant network facilities – resulting in loss of competitive choice for retail customers in the building. To the extent new electronics must be added at either the Central Office or on the customer’s premises, or additional intra-building cabling must be installed, that work may be subject to special construction charges if the next condition is satisfied.

**No Charges for Facilities That the ILEC Will Also Use.** As COMPTTEL set forth, an ILEC cannot assess special construction charges for network delivery infrastructure that the

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<sup>6</sup> *Id.* (quoting *Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 258 & 260, & the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Servs.*, Memorandum Opinion and Order, FCC 82-52, 88 FCC 2d 1656, 1665 ¶ 16 (1982)).

<sup>7</sup> *Id.* (quoting *Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 258 & 260, & the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Servs.*, Memorandum Opinion and Order, FCC 82-52, 88 FCC 2d 1656, 1665 ¶ 15 (1982)).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

ILEC will use for its own operations.<sup>10</sup> Accordingly, COMPTTEL proposed that an ILEC should certify that its special construction charges do not address costs of network delivery infrastructure, including supporting infrastructure (such as conduit or poles), that the ILEC may use for its own or its affiliates' operations, either at that time or in the future.<sup>11</sup>

This ILEC certification is consistent with – and, indeed, cannot and should not override – the basic requirement that the ILEC cannot charge for any facilities that it can use to serve other customers. In application, this means the ILEC cannot charge special construction for any of the following:

- Construction and interconnection of a link between the GPON ONU and, as applicable, an ILEC's serving Ethernet or TDM node;
- Poles that are not limited to the CLEC customer's exclusive future use;
- Any costs for conduit, subduct, buried or aerial infrastructure when
  - This infrastructure is located in a public right-of-way, except in circumstances where the ILEC certifies that it will not have any other future use for the infrastructure (e.g., the infrastructure runs to a single customer at a particular location, and no other customers are located along the route or at the terminus point of the infrastructure); or
  - The infrastructure traverses private property but will serve a multi-tenant location;
- Fiber or cable that is not limited to the CLEC customer's exclusive future use;
- Any splitters, amplifiers, or other passive infrastructure that have the capability to serve more than the CLEC's customer at the same location or locations that could be served from the same fiber;
- Any network electronics and/or equipment that have the capability to serve more than the CLEC's customer;
- Any intra-building cable that could be used to serve more than the CLEC's customer;
- Power plant augmentation (e.g., battery backup, commercial power feed, rectifiers, uninterruptable power supply) required for electronics that have the capability to serve more than the CLEC's customer; or
- Labor for which an ILEC would derive any benefit other than that needed to fulfill the CLEC's order (for example, an ILEC should not be able to charge all the way from a central office to a building when the bulk of the fiber on the run from a central office to a splice box, or place where a splice box could be placed, will support service to other customers, either at that location or at locations passed en route).

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<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

The Commission in *Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 258 & 260, & the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Servs.*, clearly established that future reuse counts as the telephone company's "requirement for the facilities requested."<sup>12</sup> This makes sense. If in three years, for example, the customer rebid its contract for services at its location, the ILEC could use the facility it installed at the CLEC's request as the basis for the ILEC's own bid – a benefit which, if special construction had been charged, would have been underwritten by the CLEC. In addition, as COMPTTEL explained, if "no other requirement" were to be interpreted to the time of the order, "special construction would always apply when a wholesale order was the first placed for a location, but the ILEC could then sell services utilizing those facilities to others, and effectively obtain a double recovery of the costs of the facilities."<sup>13</sup> And even if the ILEC did not set its retail price to recover those costs from its end users, the ILEC would be recovering 100 percent of joint or common costs from the wholesale purchaser and none from its retail purchasers, which is both unreasonably discriminatory and anticompetitive.<sup>14</sup>

Finally, with respect to transparency, COMPTTEL's principles and requested guidance would require ILECs to provide upon CLEC request detailed back-up for cost estimates and to agree to a reasonable number of audits per year. Such details on quotes should be provided within five days of a CLEC's request for such details, and include the following:

- Whether the building already has a GPON and/or Ethernet connection;
- Explanation of the circumstances that allow the ILEC to charge for special construction, including an acknowledgement that none of the charges are for the facilities enumerated in the list above;
- The specific route designed between the serving ILEC central office and Windstream's customer location;
- Labor hours and associated tasks included in the quotation; and
- Proposed installation location (central office or end-user location) and description of any electronics included in the quotation.

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<sup>12</sup> See *Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 258 & 260, & the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Servs.*, Memorandum Opinion and Order, FCC 82-52, 88 FCC 2d 1656, 1665 ¶ 16 (1982).

<sup>13</sup> May 27, 2015 COMPTTEL Ex Parte Letter at 8.

<sup>14</sup> See *id.*

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The Commission has the authority to declare the refusal to agree to provide such back-up or to perform such audits to be unreasonable.

Please contact me if you have any questions.

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

cc: Deena Shetler  
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