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October 29, 2015

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## Ex Parte

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

**Re: Technology Transitions, GN Docket No. 13-5; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593**

Dear Ms. Dortch:

Tim Vogel and I of Verizon on October 27, 2015, met with Deena Shetler, Pam Arluk, William Kehoe, William Layton, Joseph Price, Eric Ralph, Marvin Sacks, Doug Slotten, and David Zesiger of the Wireline Competition Bureau to discuss special-construction practices and charges. Verizon over many months has discussed with its customers some of the concerns they raised to the Commission about special construction. As a result, we revised our special-construction procedures so we can better serve both our retail and wholesale customers. And, despite recent allegations to the contrary, Verizon applies the same special-construction policies to retail and wholesale customers.

Over the last couple of years, Verizon made several changes to its special-construction practices to respond to feedback from our customers. Our changes substantially reduced the volume of special-construction quotes for DS1 services and enabled customers to obtain additional details if they have questions about special-construction quotes. And we are continuing our longstanding practice of absorbing significant portions of the costs required to deliver services even when we do quote special construction.

In addition, we discussed a May 2015 proposal by Incompas (f/k/a Comptel) that would allow for special-construction charges in situations where ILECs do not have facilities and ILECs certify that they will not use facilities paid for through special construction to serve a retail customer or an affiliate.<sup>1</sup> Windstream now says even that proposal does not go far enough.<sup>2</sup>

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<sup>1</sup> See Letter from John Nakahata, Harris, Wiltshire & Grannis, LLP, Counsel for Comptel, to Marlene Dortch, FCC, GN Docket No. 13-5 *et al.* (May 27, 2015) (“Incompas Ex Parte”).

Disguised as a clarification of Incompas's proposal, Windstream's latest proposal materially changes the Incompas proposal. Windstream adds to the Incompas proposal many scenarios under which an ILEC could never charge special construction, regardless of facilities availability or a willingness to certify to no future re-use for retail.

We mentioned that Windstream and others now also appear mainly focused on special construction of deregulated Ethernet facilities. Construction cases for Ethernet arise when a building is not served with the fiber or other equipment needed to provision service. Verizon already absorbs much of the costs of constructing Ethernet facilities to respond to customer requests and often absorbs all of those costs. But Windstream and others want to shift as much of any remaining construction costs as possible to the ILECs. At the same time, Windstream and others are *not* asking ILEC competitors, such as cable companies, to operate that way. Cable companies are aggressively introducing Ethernet services as alternatives to ILEC services, and Time Warner Cable, Comcast, and Cox now are the fifth, sixth, and eighth largest providers of Ethernet services in the United States, respectively.<sup>3</sup> In Verizon's experience, many cable companies do not absorb all of the construction costs required to provide Ethernet to a building that is not already connected to their fiber network. And if a cable provider does not already have facilities at or near a particular building, that provider often is not willing to construct facilities to fulfill a wholesale Ethernet service order.

In the meeting we also took the opportunity to make clear that special construction for Ethernet is not a common-carrier service—just like Verizon's Ethernet service itself.<sup>4</sup> In 2006, Verizon received forbearance from common-carrier regulations for its Ethernet services.<sup>5</sup> Verizon is under no obligation to provide Ethernet services under any circumstances, and Incompas's argument that Ethernet special construction remains a common-carrier offering<sup>6</sup> is wrong for several reasons.

First, that some ILECs maintain a standalone special-construction tariff does not mean special construction is a common-carrier service. Tariffs sometimes are filed for services offered on an individual case basis, which are considered private-carrier services.<sup>7</sup> Whether a service is a common-carrier or private-carrier service turns on the specifics of how a service is offered, not

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<sup>2</sup> See Letter from Malena F. Barzilai, Wiltshire & Grannis, LLP, Counsel for Windstream, to Marlene Dortch, FCC, GN Docket No. 13-5 *et al.* (Oct. 6, 2015) (“Windstream Oct. Ex Parte”)

<sup>3</sup> See Vertical Systems Group, Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD (Aug. 24, 2015) <http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/>.

<sup>4</sup> See Windstream Oct. Ex Parte; *see also* Incompas Ex Parte.

<sup>5</sup> *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (Mar. 20, 2006).

<sup>6</sup> See, e.g., Incompas Ex Parte.

<sup>7</sup> 47 U.S.C. § 211(b). See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6810 ¶ 193 (1990) (“ICB offerings are those offered on a contract-type basis. While ICB offerings appear in LEC tariffs, they are not tariffed as generally-available, common carrier services.”).

on the mere existence of a filed tariff.<sup>8</sup> The D.C. Circuit held in *Southwestern Bell v. FCC* that it would be improper for the Commission “simply to deduce from the filing of any service contract that the service had been offered on a common carrier basis.”<sup>9</sup> There, the Commission had held dark-fiber services offered on an individual-case basis, even when offered by a common carrier who files tariffs setting forth the terms of those individual-case-basis offerings, were properly classified as private-carrier offerings, not common-carrier services.

Second, the Commission has not found special construction is a common-carrier service. Incompas’s sole authority for this claim is a 1984 Special Construction Notice of Proposed Rulemaking.<sup>10</sup> But the very purpose of that NPRM was to consider this question. And in that NPRM the Commission tentatively concluded special construction *was not and should not be* classified as a common-carrier service.<sup>11</sup> The Commission explained that there is no “legal compulsion for a carrier to provide special activities to the public indifferently under the Communications Act or [the FCC’s] regulatory policies.”<sup>12</sup> It further explained special construction bore all the hallmarks of a private-carrier service, not a common-carrier service.

Third, it is irrelevant that Verizon’s forbearance petition and subsequent clarifications did not specifically mention that Verizon was including “special construction” in the relief sought. Verizon’s petition specifically enumerated the Ethernet services for which it sought relief,<sup>13</sup> which included relief from the common-carrier obligations of Sections 201 and 202. Once that relief was granted, Verizon no longer had a duty to furnish Ethernet service at all. If Verizon can turn down requests for service even where it maintains facilities, it certainly may do so where it

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<sup>8</sup> *National Association of Regulatory Utility Commissioners vs. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1979).

<sup>9</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994).

<sup>10</sup> *Special Construction of Lines and Special Service Arrangements Provided by Common Carriers*, Notice of Proposed Rulemaking, 97 FCC 2d. 978 (1984) (“1984 Special Construction NPRM”).

<sup>11</sup> *See id.* ¶ 16 (“[W]e propose to find that the nature of most offerings of special construction and special service arrangements does not cause us to expect an indifferent holding out to the eligible user public.”); *id.* ¶ 20 (“We propose to treat as non-common carriage only extraordinary, customer-requested, individually-tailored construction and services, not offerings which are or should be general.”).

<sup>12</sup> *Id.* ¶ 5.

<sup>13</sup> Verizon’s forbearance petition requested forbearance from traditional common-carrier regulation for all broadband services. *See Verizon Petition, Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. 5 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (Dec. 20, 2004). In a subsequent ex parte, Verizon specified it was seeking relief for “packet switched services capable of 200 kbps in each direction,” and “[t]his category includes Frame Relay services, ATM services, IP-VPN services, and Ethernet services.” Letter from Edward Shakin, Verizon, to Marlene Dortch, FCC, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. 5 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, at 2 (Feb. 7, 2006). This ex parte listed and described several specific Ethernet-based services for which Verizon sought forbearance.

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has no facilities. If it decides it wants to offer Ethernet services where it does not have facilities, Verizon offers them on a privately negotiated commercial basis, can condition that offer on the customer's payment of some or all of the construction costs, and can negotiate with the customer concerning an acceptable price. That is particularly true because the prices for special construction have never been generally tariffed, but are instead determined on an individual-case basis. The Commission cannot have greater authority to regulate these prices following forbearance than it had before.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Curtis Beavey".

Copies: Deena Shetler  
Pam Arluk  
William Kehoe  
William Layton  
Joseph Price  
Eric Ralph  
Marvin Sacks  
Doug Slotten  
David Zesiger