Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
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
	)	

REPLY COMMENTS OF WINDSTREAM SERVICES, LLC

Windstream Services, LLC ("Windstream"), on behalf of its affiliates and subsidiaries, herein submits reply comments in response to the *Further Notice of Proposed Rulemaking* ("*FNPRM*") released August 7, 2015, in the above-referenced proceedings.[1] The *FNPRM* seeks comment on what changes, if any, should be made to procedural rules governing Section 214 discontinuance applications.

In the *Report and Order* accompanying the *FNPRM*, the Commission took important steps to ensure that the transition from TDM to IP network electronics would not become a pretense for reducing competitive choices for state and local governments, schools, health care facilities, and small and medium-sized businesses with complex communications needs.

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[1] *Technology Transitions et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, 30 FCC Rcd. 9372 (2015) ("*FNPRM*").

Recognizing that "competition provided by competitive carriers that often rely on wholesale inputs offers the benefits of additional choice to an enormous number of small- and medium-sized businesses, schools, government entities, healthcare facilities, libraries, and other enterprise customers,"[2] the Commission clarified that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the change will impact an end user, including the wholesale carrier-customer's retail end users.[3] The Commission also adopted an interim rule, pending completion of the Commission's special access proceeding, that as a condition of any such approval with regard to a legacy TDM-based service used as a wholesale input by competitive providers, an incumbent LEC must provide competitive carriers wholesale access on reasonably comparable rates, terms, and conditions.[4]

The Commission here should ensure the essential safeguards adopted in the *Report and Order* are not undermined. First, the large incumbent LECs should not be able to truncate Section 214 review, and frustrate the requirement to provide reasonably comparable wholesale service alternatives, through a broad "safe harbor"—such as proposed by Verizon—that would automatically grant discontinuance even in situations in which non-residential end users in that community are receiving service through a competitor using wholesale inputs slated for discontinuance. Were Verizon's proposed "safe harbor" to be adopted, discontinuance could be granted without reasonably comparable special access wholesale inputs, disrupting service to businesses, nonprofits, and government customers in the community. Second, the Commission, as many commenters urged, should reaffirm that considering affordability of (or cost increases for) replacement services is an essential part of the five-prong public interest test for approval of

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2 *Id.* at ¶ 101.

3 *E.g., id.* at ¶ 113.

4 *Id.* at ¶ 132.

a Section 214 discontinuance. Finally, the Commission should modify its rules to recognize that technology migrations require active intercarrier engagement and cooperation as well as sufficient time for multi-party coordination to ensure that customers, including the retail customers of wholesale purchasers, experience a smooth transition.

I. LARGE INCUMBENT LECS SHOULD NOT BE PERMITTED TO UNDERMINE ESSENTIAL PROTECTIONS MADE CLEAR IN THE *REPORT AND ORDER*.

As the Commission considers revisions to the mechanics of the Section 214 process in this rulemaking, it should be sure to prevent the large incumbent LECs from undermining the essential protections outlined in the *Report and Order* that govern the transition from TDM-based to IP-based special access services. The Commission recognized that "the continued existence of [] competitive options" provided using TDM special access services as wholesale inputs "enhances the ability of enterprise customers to choose the most cost-effective option for their business or organization."[5] Thus the Commission required, without exception, that wholesale inputs must continue "to be offered on reasonably comparable rates, terms, and conditions until the Commission develops longer-term policies for [special access] services after a full analysis of the special access market."[6]

Yet Verizon now is proposing measures that would undercut the important protections instituted in the *Report and Order*. In particular, Verizon's recommended "safe harbor" test could permit a substantial number of Section 214 discontinuance applications of TDM special access services to be automatically granted, without examination or an assurance of the continued availability of wholesale special access services at reasonably comparable rates, terms,

[5] *Id.* at ¶ 134.

[6] *Id.* at ¶ 136.

and conditions or any of the Commission's five prongs of its public interest test for discontinuances.[7] The Commission should reject Verizon's proposal.

Specifically Verizon asserts that the Commission should automatically grant a Section 214 discontinuance if discontinuing the service will not terminate the end user's ability to call 911 and if *only one* of a list of additional conditions is met. Included in the list is "the service is not used as a wholesale input by other providers;"[8] so, in other words, Verizon contemplates that the Commission should automatically grant a Section 214 discontinuance—even if a service *is* used as a wholesale input by other providers—if at least one of the other conditions is fulfilled. Such a framework could easily be manipulated to prevent the Commission from ensuring that competition and consumers are being served by the continued availability of reasonably comparable wholesale special access inputs and services.

Examination of Verizon's other alternative conditions for satisfying its "safe harbor" reveals the test's overbreadth. Verizon's first alternative condition is that fewer than five percent of customers in the affected geographic area subscribe to the service. But how is this counted? For example, if all servable residential and business locations are included, a service (for instance, a DS3 or and OCn service) could be used by a large (for that service) number of business customers and still be subject to the automatic grant. Similarly, Verizon's proposed safe harbor would apply to instances where "there [have] been no new orders for the service during the past six months," even if a wholesale provider has an existing, long-term order for the

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7 *See Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation,* WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, ¶ 8 (2003) (*Verizon Expanded Interconnection Order*) (stating the five factors that the Commission considers in evaluating an application for Section 214(a) discontinuance).

8 Comments of Verizon, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 4 (October 26, 2015).

service. This provision also would permit the automatic grant of Section 214 discontinuance in cases where a competitor is not currently using a wholesale input, but may seek to do so in the future (or has done so in the past) to serve an end user that currently receives special access services from the incumbent—or even worse, has had an order held up for more than six months because of disputes over special construction charges.[9]

This framework is patently contradictory to the Commission's requirement that reasonably comparable wholesale access be offered, on an ongoing basis, pending completion of the special access proceeding. It directly undermines the Commission's core ruling in the *Report and Order*—that "a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service to end users, including a carrier-customer's retail end users."[10] Verizon seeks to make that Commission approval one of form, without review of substance.

Finally, Verizon proposes that an automatic Section 214 discontinuance be granted where "there is another provider that offers substantially the same service in the same area"—a concept that the Commission expressly rejected in the *Report and Order* after it was proposed by CenturyLink.[11] As the Commission noted, it "evaluates a range of factors to determine whether to grant a discontinuance application" and does not see "a reason to deviate from these longstanding and clearly articulated criteria by which [it] evaluate[s] section 214(a) applications."[12] Verizon's "safe harbor" test is anathema to this exercise, permitting the large

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9 Without further clarification, Verizon's seemingly innocuous recommendation that its safe harbor should apply when "the service is not used as a wholesale input by other providers," likewise, may be construed to deny Commission oversight in similar instances, as an incumbent may read this condition to mean that Section 214 reviews can be avoided if a TDM special access service is not *currently* being used as a wholesale input.

10 *FNPRM* at ¶ 102.

11 *See FNPRM* at ¶ 145 ("We also decline to adopt a presumption in favor of approving discontinuance of a retail service if at least one competitive alternative is available.").

12 *Id*.

incumbent LECs to discontinue service with little or no oversight and leaving competitive LECs to ask questions later about the availability of a reasonably comparable wholesale alternative.

Business, nonprofit, and government customers should continue to benefit from the innovative choices and lower prices generated by meaningful competition, including where the customer happens to be purchasing TDM-based special access retail service from the incumbent LEC at the precise time of the technological migration, or one of the other conditions in Verizon's "safe harbor" list is met. With application of the Section 214 process, the Commission can ensure this competition is preserved by requiring large incumbent LECs to provide a reasonably comparable alternative for wholesale TDM special access purchasers. This framework does not prevent the large incumbent LECs from discontinuing TDM-based special access services and inputs; it merely ensures that competition and business, nonprofit, and government customers are not harmed in the process.

II. THE COMMISSION SHOULD CONFIRM THAT AFFORDABILITY REMAINS AN ESSENTIAL CONSIDERATION IN THE SECTION 214 DISCONTINUANCE REVIEW PROCESS BOTH FOR RETAIL AND WHOLESALE PRODUCTS.

Windstream, like many other commenters, urges the Commission to reaffirm that affordability is a key consideration in the Section 214 process.[13] As NASUCA noted, "[f]rom the perspective of customers, whether a service is affordable *is* part of the nature of the service . . . ."[14] Similarly, the Michigan Public Service Commission expressed concern that cheaper

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[13] *See* Comments of Public Knowledge, Virginia Rural Health Association, National Consumer Law Center, Center for Rural Strategies, Turn, and the Benton Foundation, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 4-5 (October 26, 2015); Comments of the Utilities Telecom Council, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 6 (October 26, 2015); Comments of the Disability Coalition of Technology Transition, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 15 (October 26, 2015).

[14] Comments of the National Association of State Utility Consumer Advocates, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 14 (October 26, 2015).

services may be discontinued and replaced with “big-package bundles” that are more expensive and give customers more than they want.[15]

The Commission’s tentative conclusion in paragraph 234—that it will not consider affordability as a part determining whether there is available in the community an adequate substitute service—is confusing.[16] If what the Commission meant is that it will not consider it as part of the adequate alternative factor because it is already considered as a separate factor (“increase charges for alternative services, although this factor may be outweighed by other considerations”), then its tentative conclusion is unremarkable. If the Commission meant that it would not consider affordability at all, then that ignores one of its five factors.[17] Windstream applauds the Commission for reinforcing this factor in the wholesale context by requiring reasonably comparable pricing for alternative services as a condition of discontinuance of a wholesale TDM special access service.[18] The Commission should confirm that it takes a similar approach with regard to TDM special access in the retail context, to provide comparable protections to end users regardless of whether they are currently served by the incumbent LEC or a competitor.

III. SMOOTH TECHNOLOGY TRANSITIONS REQUIRE ACTIVE INTERCARRIER ENGAGEMENT AND COOPERATION AS WELL AS SUFFICIENT TIME FOR MULTI-PARTY COORDINATION.

Finally, the Commission should modify its rules to recognize that technology switches, whether from copper to fiber or from TDM-based to IP-based services, can be complex and

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15 Comments of the Michigan Public Service Commission, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 11-12 (October 26, 2015).

16 *See FNPRM* at ¶ 234 (stating “cost is not part of the equation in determining whether an available alternative service constitutes an adequate substitute for the service sought to be discontinued”).

17 *FNPRM* at fn.656 (*citing Verizon Expanded Interconnection Order* at ¶ 8).

18 *FNPRM* at ¶ 132.

require active intercarrier engagement and cooperation, and to ensure there is sufficient time for preparations enabling customers, including the retail customers of wholesale purchasers, to experience a smooth transition. Windstream, in particular, supports adoption of measures to ensure good faith communications between incumbent LECs and their wholesale customers concerning network changes.[19] About a year ago, Windstream received a copper retirement notice from Cincinnati Bell but the incumbent LEC was unwilling to provide information sufficient for Windstream's end users to make informed decisions about replacement services, and for Windstream to understand whether Cincinnati Bell was complying with the companies' interconnection agreement.[20] While this particular situation ultimately was resolved with Commission engagement, it underscores the importance of there being protections in place to ensure that migrations do not occur until wholesale customers "have the information needed to allow them to accommodate the transition with no disruption of service to their end user customers."[21] Thus, Windstream supports the objective criteria proposed by INCOMPAS for evaluating whether there has been a per se breach of the incumbent's obligation to act and communicate in good faith, and INCOMPAS's suggestion for an additional 90-day delay, on top of the 180-day notice period for network changes, when the incumbent fails to fulfill the good faith communication requirement.[22]

Moreover, Windstream agrees with the many commenters noting that the current Section 63.71(d), which provides that applications shall be automatically deemed granted after one or

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[19] *See FNPRM* at ¶ 241.

[20] *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, WC Docket No. 15-1, Cincinnati Bell Telephone Company LLC's Short Term Network Change Notification, Report No. NCD-2411 (Jan. 7, 2015).

[21] *See FNPRM* at ¶ 241.

[22] Comments of INCOMPAS, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 11-12 (October 26, 2015).

two months unless the Commission affirmatively states otherwise, provides insufficient notice and opportunities for intercarrier cooperation in the case of the transition from TDM-based to IP-based services, particularly special access services.[23] For example, INCOMPAS detailed various steps involved in such a transition for the customers of wholesale purchasers, and thus proposed that "incumbent LECs should be required to identify their replacement product(s); provide sufficiently detailed notification to wholesale purchasers with regard to the discontinuance of service and replacement product(s); have an active functioning replacement product; and allow for sufficient time for competitors to perform all the necessary functions for transitioning customers—at least one year—*prior to filing an application* with the Commission."[24] XO supports a similar regime and notes that a one-year notice requirement would also "facilitate the process ILECs must undertake to evaluate whether a Section 214 application will be necessary 'using all information available, including information obtained from carrier-customers.'"[25] In light of these concerns, the Commission should, at a minimum, align the timeline for discontinuances of TDM-based services to carrier customers with the timeline adopted in the *Report and Order* for notices of copper retirement to interconnecting carriers and non-residential customers.[26]

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[23] *See* Comments of Utilities Telecom Council at 4-5; Comments of NASUCA at 11; Comments of the National Rural Electric Cooperative Association, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 8 (October 26, 2015); Comments of Edison Electric Institute, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 11-12 (October 26, 2015).

[24] Comments of INCOMPAS at 4.

[25] Comments of XO Communications, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 10 (October 26, 2015) (*citing FNPRM* at ¶ 119).

[26] *See FNPRM* at ¶ 238.

IV. CONCLUSION

Windstream urges the Commission, in its consideration of the questions presented in this *FNPRM* and the comments filed in response, to ensure the essential safeguards adopted in the *Report and Order* are not undermined. First, the Commission should decline to adopt a "safe harbor" test that would permit a substantial number of automatic Section 214 grants for TDM special access services. Special access services are critical to ensure businesses, nonprofits, and government entities continue to benefit from competition, and the Commission should not cede its oversight of these inputs. Second, the Commission, as many commenters recommended, should reaffirm that affordability of replacement services is an essential consideration in the Section 214 approval process. Finally, the Commission should modify its rules to recognize that technology migrations require active intercarrier cooperation and sufficient time to ensure that customers, including the retail customers of wholesale purchasers, experience a smooth transition.

Respectfully submitted,

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