**REDACTED - FOR PUBLIC INSPECTION**

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

February 5, 2016

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

Re: *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247

Dear Ms. Dortch:

In accordance with the Tariff Investigation Protective Order and Business Data Services Data Collection Protective Order for the above-referenced proceedings, Windstream Services, LLC ("Windstream") herein submits a redacted version of the attached comments in WC Docket No. 15-247.

Windstream has designated for highly confidential and confidential treatment the marked portions of the attached documents pursuant to the Tariff Investigation Protective Order and Business Data Services Data Collection Protective Order in WC Docket No. 15-247.[1]

Pursuant to the protective orders, Windstream is filing a redacted version of the document electronically via ECFS, one copy of the Highly Confidential version with the Secretary, and sending two copies of the Highly Confidential version to Marvin Sacks, Pricing Policy Division, Wireline Competition Bureau.

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

Sincerely,

John T. Nakahata
*Counsel to Windstream*

Attachment

cc: Marvin Sacks

[1] *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order and Protective Orders, DA 15-1387 (Wireline Comp. Bur 2015).

**REDACTED - FOR PUBLIC INSPECTION**

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Investigation of Certain Price Cap Local | ) | WC Docket No. 15-247 |
| Exchange Carrier Business Data Services | ) | |
| Tariff Pricing Plans | ) | |

# OPPOSITION OF WINDSTREAM SERVICES, LLC


Jennie B. Chandra
Malena F. Barzilai
WINDSTREAM SERVICES, LLC
1101 17th St., N.W., Suite 802
Washington, D.C. 20036
(202) 223-7664 (phone)
(330) 487-2740 (fax)

John T. Nakahata
Henry Shi
Elizabeth B. Uzelac
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

*Counsel to Windstream Services, LLC*


February 5, 2016

## TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY ..... 1

II. ILECS CONTINUE TO HAVE MARKET POWER FOR LAST-MILE DEDICATED SERVICES CONNECTIONS, INCLUDING DS1s AND DS3s. ..... 3

III. ILECS' TARIFF PRICING PLANS PENALIZE COMPETITIVE PROVIDERS SEEKING TO TRANSITION TO IP-BASED INPUTS. ..... 12

A. ILECs Are Leveraging Existing Infrastructure, Built Out with Monopoly Rents, to Gain the Benefits of the IP Transition. ..... 13

B. ILECs' Tariff Pricing Plans Do Not Permit This Same Migration by Carrier Customers. ..... 14

IV. THE COMMISSION SHOULD MANDATE THAT CARRIER CUSTOMERS BE PERMITTED TO MEET TDM TERM- AND VOLUME-BASED DISCOUNT COMMITMENTS USING PURCHASES OF ETHERNET SERVICES. ..... 18

V. ILECS HAVE NO LEGITIMATE BUSINESS REASON THAT WOULD JUSTIFY THE COMMISSION NOT TAKING WINDSTREAM'S SUGGESTED ACTION. ..... 20

VI. THIS INVESTIGATION HIGHLIGHTS THE NEED FOR THE COMMISSION TO CONFIRM UNBUNDLING OBLIGATIONS FOR DS1 AND DS3 CAPACITY LOOPS REMAIN DURING AND AFTER TECHNOLOGY TRANSITIONS. ..... 23

VII. CONCLUSION ..... 24

## OPPOSITION OF WINDSTREAM SERVICES, LLC

## I. INTRODUCTION AND SUMMARY

Windstream Services, LLC ("Windstream"), on behalf of its affiliates and subsidiaries, files this opposition to the Direct Cases submitted by AT&T, Verizon, CenturyLink, and Frontier (collectively "Large ILECs") with respect to the Commission's investigation of certain of their dedicated services tariff pricing plans. Windstream brings a unique and balanced perspective to the competitive access, technology transition, and deregulation debates, with its interests nearly evenly weighted between incumbent and competitive operations. The company is the fifth largest incumbent local exchange carrier ("ILEC") in the nation, and provides broadband, voice, and video services to residential consumers across 18 states, as well as wholesale access to competing providers. Windstream also provides advanced communications and technology solutions, including managed services and cloud computing, to hundreds of thousands of business service locations nationwide—as both an ILEC and a competitive local exchange carrier ("CLEC").

Windstream's opposition focuses on a subset of the issues raised by the Commission in its *Designation Order*.[1] As demonstrated in Windstream's dedicated services rulemaking comments filed last week, the ILECs retain market power with respect to last-mile dedicated service connections, including TDM special access and Ethernet connections. This market power flows directly from ILECs' position as the sole provider of dedicated last-mile connections to a substantial majority (collectively nationwide *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] ********END HIGHLY CONFIDENTIAL***** percent) of business

[1] *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, DA 15-1194, 30 FCC Rcd. 11,417 (Wireline Comp. Bur. 2015) ("*Designation Order*").

locations, and one of only two providers in nearly all (all but *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** percent) of the rest. The fact that the quantities of TDM special access services sold may be declining is irrelevant, because, with respect to the locations at which they are the sole or one of two providers of dedicated last-mile connections, ILECs can exercise market power over those TDM and Ethernet connections. And TDM special access services remain important wholesale inputs for competitive carriers to provision the sophisticated communications solutions needed by small, medium, and large businesses; governmental entities; and nonprofit organizations.

In particular, Windstream has found that some ILEC requirements, including through tariffs and applicable agreements, as a practical matter, make it difficult to transition from wholesale purchases of TDM special access services to Ethernet. These restrictive provisions, are impeding the transition for wholesale purchasers from TDM to IP, because wholesale purchasers must continue to purchase large volumes of TDM services on extended terms or be subject to steep penalties—even when they are substantially increasing Ethernet purchases, as Windstream has been doing. The best way for the Commission to address this is to find that it is unjust and unreasonable and unreasonably discriminatory for ILECs to penalize carrier customers when transition from TDM to IP inputs. Specifically ILECs should be required to count Ethernet purchases toward the attainment of legacy TDM volume commitments. In addition, the Commission should prevent ILEC application of early termination liability to instances where a TDM special access connection is prematurely disconnected and replaced with Ethernet of at least equal capacity to the end of the previously committed term (or if the

remaining TDM term is longer than the longest Ethernet term commitment, to the end of that Ethernet term commitment).[2]

This investigation, like the dedicated services rulemaking, also highlights the importance of clarifying that ILECs must continue to make unbundled DS1 and DS3 capacity loops available pursuant to Section 251(c)(3) of the Communications Act after transitioning from TDM to IP electronics (which may or may not be accompanied by a transition from copper to fiber) or when using fiber. UNEs continue to provide a partial, but nonetheless important, constraint on dedicated service prices for business customers with lower bandwidth needs.

## II. ILECS CONTINUE TO HAVE MARKET POWER FOR LAST-MILE DEDICATED SERVICES CONNECTIONS, INCLUDING DS1s AND DS3s.

This investigation is important to protect competition because DS1s and DS3s, including those sold under the tariffs at issue, continue to be necessary inputs for the provision of competitive services to business customers, including governments, schools, health care providers, and nonprofits. Whether using their own facilities or using ILEC facilities to reach the customer in the last mile, CLECs have been the ILECs' principal competitors in offering complex communications solutions provided through dedicated services to these business, governmental, and non-profit customers. As Windstream has observed in prior filings, customers appreciate and have benefitted from the innovative options and individualized service that competition in the dedicated services markets has bred.[3] The charts below show that CLECs are the primary source of competition to the ILECs for non-residential customers, and

---

[2] Of course, in cases in which the TDM commitment included circuit portability, any Ethernet purchase should be able to substitute for the prematurely disconnected TDM circuit without incurring termination liability.

[3] *See* Comments of Windstream Corporation at 10-12, GN Docket No. 13-5, RM-11358, WC Docket Nos. 05-25 & 15-1, RM-10593 (filed Feb. 5, 2015).

particularly so for larger customers with 50 or more employees, who are more likely to have complex communications needs that require dedicated services.

**Figure 1**

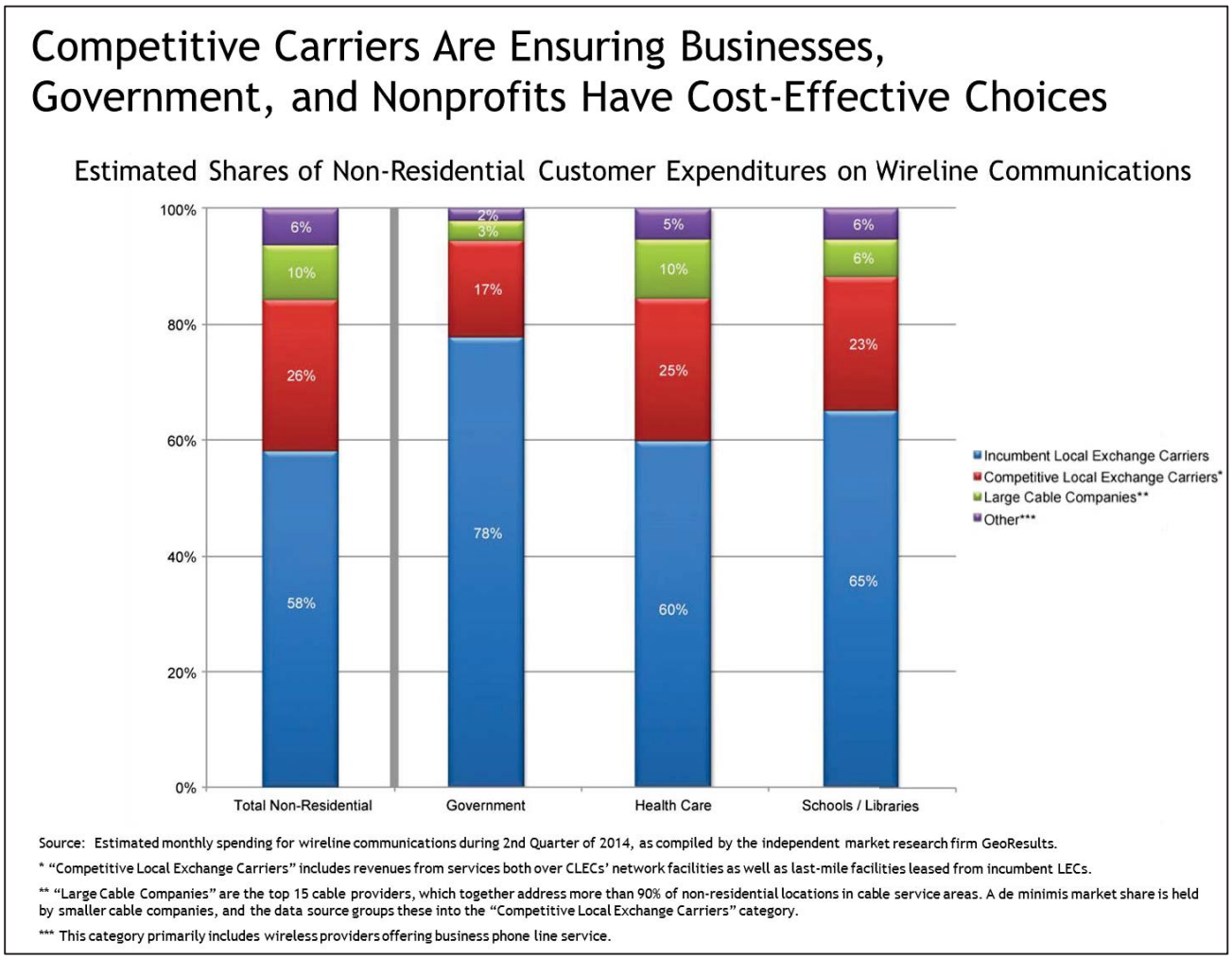
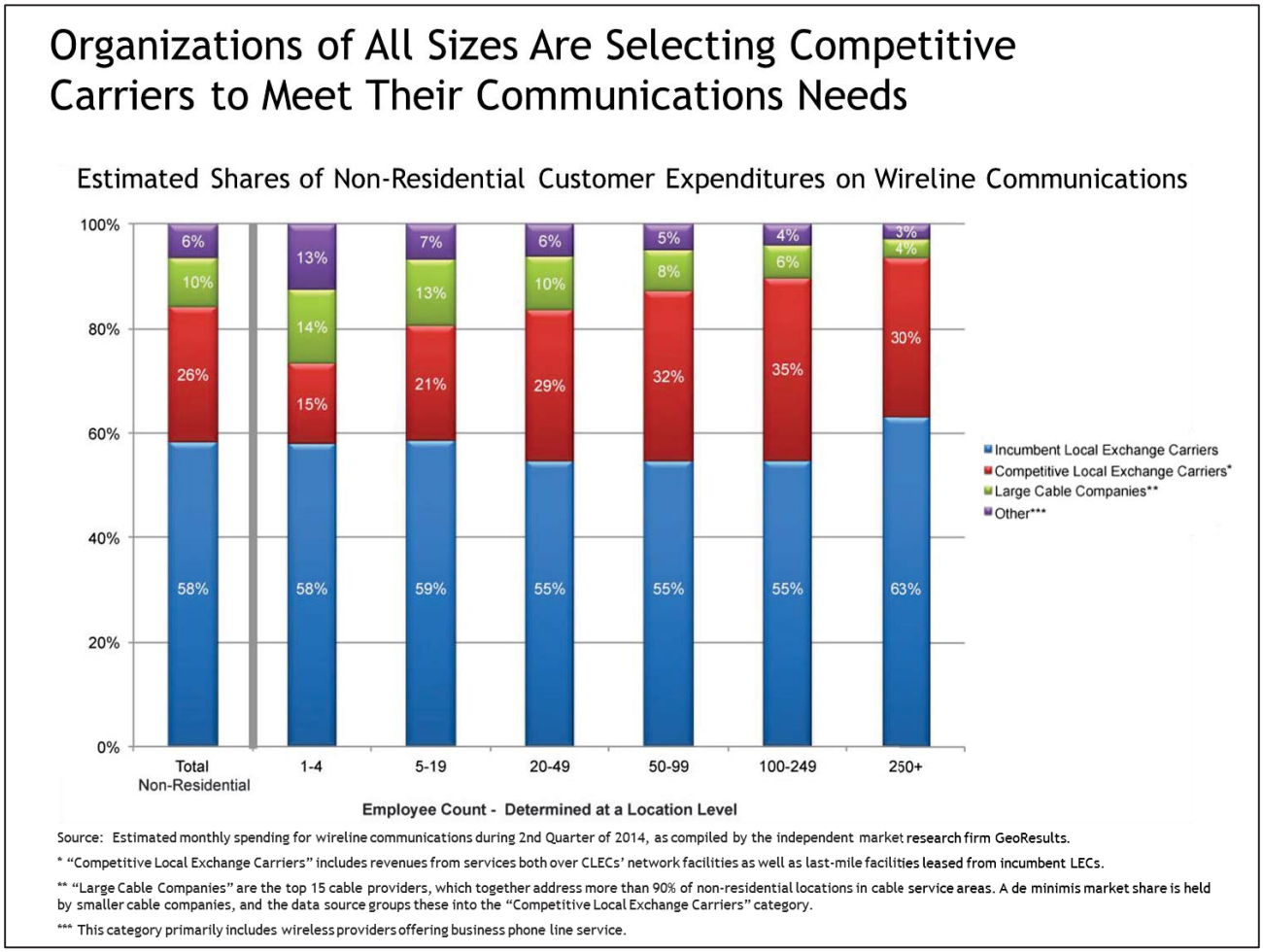


**Figure 2**




Providing the complex communications solutions these customers need to manage and run their organizations requires high-quality connections to the customers' building. Last-mile connectivity and local transport to the building are necessary inputs for the services provided to customers by all complex solution providers, whether or not they own those last-mile facilities.

While the Large ILECs claim that this investigation "makes little sense"[4] because technology transitions are rendering these tariff pricing plans "increasingly moot,"[5] DS1s and

---

4 Direct Case of Verizon at 1, WC Docket No. 15-247 (filed Jan. 8, 2016) ("Verizon Direct Case").

5 CenturyLink White Paper on Discount Plan Terms and Conditions at 2, WC Docket No. 15-247 (filed Jan. 8, 2016) ("CenturyLink White Paper").

DS3s, in fact, still represent a large share of wireline wholesale local transport revenue. *****BEGIN CONFIDENTIAL***** [redacted] *****END CONFIDENTIAL*****[6] Likewise, Windstream's experience and data show that many small and medium-sized multi-location businesses with more modest bandwidth needs continue to use TDM-based connections in the last mile. Windstream uses a substantial amount of legacy DS1 and DS3 inputs, including TDM special access services, to connect its fiber network to individual customers. As of December 2015, DS1 and DS3 connectivity constituted approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** percent of Windstream's total annual expense on last-mile inputs (special access and UNE loops) leased by Windstream, with *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** percent of Windstream's total last-mile expense allocated to DS1 and DS3 special access services in particular. And in fact, ***** BEGIN HIGHLY CONFIDENTIAL ***** [redacted] *****END HIGHLY CONFIDENTIAL***** Furthermore, as the Ad Hoc Telecommunications Users Committee points out in its dedicated services rulemaking comments, "AT&T itself reported [in its Data Request responses] that, of the *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in special access services that AT&T's affiliates buy from AT&T ILECs,

---

[6] ATLANTIC-ACM, *Local Wholesale Transport Analysis, Second Quarter 2015*, at 5 (Oct. 2015) (accounting for both TDM special access and unbundled DS1 and DS3 capacity loops in DS1 and DS3 revenues). *See also* TeleGeography Local Access Pricing Service, *2014 Local Access Market Summary*, at 1 (noting that "[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").

only a tiny *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** is for packet services. In other words, an eye-popping *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of AT&T's interexchange and wireless affiliates' purchase of special access services were for the very TDM services that it claims are in a state of permanent decline."[7]

These high levels of TDM demand persist in part because—while the Large ILECs find it rhetorically convenient to link DSx connections to the "sepia-tinged" days of yore[8]—competitive providers actually use "legacy" DS0, DS1, and DS3 connections, including tariffed special access services, as inputs to offer retail packet-switched dedicated services like Ethernet.[9] When it does not have its own connections to a building and cannot utilize UNEs, Windstream uses tariffed special access DS1s and DS3s to provision both TDM and Ethernet last-mile connections to its retail end users, particularly when necessitated by Large ILECs' pricing of Ethernet services and limits to other wholesale providers' Ethernet availability.[10]

It remains true that while ILECs have connections to nearly every business location, no other provider—nor all other providers together—come close, which gives ILECs market power with respect to these last-mile connections. As former FCC Chief Economist Dr. Jonathan Baker found in examining the Data Request, ILECs possess the sole dedicated access facilities to the vast majority of business locations (*****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END**

---

7 Comments of the Ad Hoc Telecommunications Users Committee at 10, WC Docket No. 05-25, RM-10593 (filed Jan. 28, 2016).

8 CenturyLink White Paper at 4.

9 Comments of Windstream Services, LLC at 29, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (filed Jan. 27, 2016) ("Windstream Dedicated Services Comments").

10 Windstream Dedicated Services Comments at Attachment A ¶ 69 ("Windstream Declaration").

**HIGHLY CONFIDENTIAL***** percent). Of the remainder, all but a tiny fraction of the buildings (*****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** percent) have at best two providers with these facilities.[11] *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** As Dr. Baker concludes, "the structure of these markets raises competitive concerns. In markets for dedicated services with a single provider – the majority of markets – the dedicated services monopolist would have the incentive and ability to charge a supracompetitive price."[12] Moreover, "[m]arkets with only two providers – most of the rest – are also unlikely to perform competitively."[13] And, as Dr. Baker points out, this is not just a concern for prices charged: "the exercise of market power may also harm competition on non-price dimensions, as through reduced product quality, reduced product variety, reduced service, or diminished innovation."[14]

---

[11] *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

[12] Declaration of Dr. Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 47, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) ("Baker Declaration").

[13] *Id.* ¶ 48.

[14] *Id.* ¶ 51. Section II of Windstream's dedicated services comments and Dr. Baker's declaration further detail the bases for concluding the ILECs possess market power with respect to dedicated last-mile connections to buildings, and for concluding that best efforts services are not part of the same product market. Both those comments and Dr. Baker's declaration are incorporated by reference herein.

Furthermore, although competitive providers would prefer to offer their retail services using packet-based dedicated services provided entirely over their own fiber facilities, there is no reasonable basis for concluding that ILEC market power over last-mile connectivity will be dissipated through construction of alternative fiber networks. The reality is that the vast majority of business locations present no economically feasible case for competitive overbuilding in the last mile. As the Commission recognized in 2005 in its *Triennial Review Remand Order*, entrants are not likely to build to a location simply to serve a few DS1s or a DS3; the revenues are simply not sufficient to justify the deployment.[15]

In their dedicated services rulemaking comments, Windstream and other CLECs reaffirm the Commission's finding—and even the Large ILECs acknowledge—that providers will only build new alternative fiber connections where the revenue opportunity exceeds the build-out costs.[16] The Large ILECs seek to have the Commission believe that these costs and operational barriers to extending a lateral from a nearby fiber into the customer's building are nearly non-

---

[15] *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2618-19 ¶ 154 (2005) ("*Triennial Remand Review Order*" or "*TRRO*").

[16] *See* Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking at 11, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) ("XO Rulemaking Comments"); Comments of Birch, BT Americas, Earthlink, and Level 3 at 7, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) ("Joint CLEC Comments"); Windstream Dedicated Services Comments at 36-37; Comments of TDS Metrocom, LLC at 21, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) ("After performing thorough analysis, TDS CLEC concluded that deployment of TDS CLEC fiber to AT&T remote terminal locations in Madison, Wisconsin (sub loop unbundling) would not be economically viable because of insufficient density of customer locations and the capital that would be required to deploy feeder facilities . . . ."). *See also* Comments of Verizon at 35, WC Docket No. 05-25, RM-10593 (filed Jan. 28, 2016) ("[C]able companies . . . evaluate these opportunities [to extend their network to serve a customer] case-by-case, to determine whether potential revenue opportunities are likely to exceed costs.").

existent.[17] But the record shows otherwise. As Windstream discussed in its dedicated services rulemaking comments, it has found that the cost of self-provisioning last-mile connectivity as a CLEC in most cases is prohibitively expensive, both because of the cost of extending fiber from its existing network and because of other significant barriers to building entry, as compared with the revenue opportunity in the building.[18] *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****[19] XO, in its rulemaking comments, details the manifold practical impediments and costs in obtaining necessary rights-of-way and building access, including the reluctance of some building owners to permit additional facilities to enter the building.[20] And as Windstream further explains in its comments, these experiences are validated by third-party investor analyses, which recognize that last-mile access is a key barrier to competitive entry in the dedicated services markets.[21] A

---

[17] *See, e.g.*, AT&T Rulemaking Comments at 3 (citing purported percentages of census blocks with competitor facilities that contain special access demand).

[18] *See* Windstream Dedicated Services Comments at 36-37; Windstream Declaration ¶¶ 50-52.

[19] *See* Joint CLEC Comments at 33-37; XO Rulemaking Comments at 10-15. *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

[20] *See* XO Rulemaking Comments at 12-13.

[21] *See* Windstream Dedicated Services Comments at 35 (citing Sanford C. Bernstein & Co., LLC, U.S. Telecom: Friday's Announcement of an FCC Investigation into Data Pricing (A Three Page Summary and Assessment) at 2, Vertical Systems Group, *Year End 2014 Service Provider Survey Ethernet/IP VPN/Fiber and LEADERBOARD*). *See also* Vertical Systems Group, *Service Provider Competitive Landscape*, 2015 (reporting that two key differentiation

recent CostQuest study underscores the economic obstacles faced by a competitive carrier as a second entrant in a market, as compared to the ILEC that built its networks initially as the monopolist, and even today can count on its facilities usually being used either to support its own retail operations, or by a wholesale purchaser to reach the same building.[22] Thus, Windstream and other competitive providers are left with no choice but to purchase dedicated last-mile connectivity from the ILEC for the vast majority of locations.

This ILEC market power is evident in the ILECs' approach to pricing wholesale last-mile inputs in instances where they claim Commission deregulation. In particular, despite the fact that capacity is less costly to provision with IP technologies like Ethernet,[23] ILECs charge *substantially more* for Ethernet than for TDM special access at lower levels of bandwidth (generally less than 10 Mbps).[24] A comparison of the prices for TDM and Ethernet services at the AT&T IP trial wire center in Kings Point, Florida shows that the tariffed monthly price for a DS1 circuit (1.5 Mbps) is $126 per month under a 36-month commitment plan.[25] In contrast,

---

factors for the major retail Ethernet provider segments are scope of the target market and geographic coverage).

[22] *See* Windstream Dedicated Services Comments at 37-39 (citing Letter from Jennie B. Chandra, Vice President, Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 & 12-353, RM-10593, WC Docket Nos. 05-25 & 15-1 (filed June 8, 2015)); *id.* at Attachment A.

[23] *See* Reply Comments of Windstream Services, LLC at 18 n.59, 48 n.157, GN Docket No. 13-5, RM-11358, WC Docket Nos. 05-25 & 15-1, RM-10593 (filed Mar. 9, 2015); *Technology Transitions*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, 30 FCC Rcd. 9372, 9462 ¶ 159 n.551 ("*Technology Transitions Order*"); Windstream Declaration ¶ 99.

[24] That Large ILECs are able to charge in some instances higher prices for wholesale service than for comparable retail service is further evidence of their market power. *See* Windstream Dedicated Services Comments at 49-56.

[25] *See* Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 & 12-353, at Attachment 1 (filed June 10, 2014). *See also* Windstream Declaration ¶ 98.

according to AT&T's wholesale Guidebook, a 2 Mbps Ethernet connection (Switched Ethernet – Interactive Class of Service) is $1,075 per month on a 36-month term plan.[26] *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****[27] These market conditions—with ILECs possessing substantial control over dedicated last-mile connectivity and using it to impose supra-competitive pricing on Ethernet special access services—show it is essential for the Commission to pursue this tariff investigation and take action to ensure that the terms and conditions of ILEC tariff pricing plans for TDM-based special access services are not unreasonable or anticompetitive.

## III. ILECS' TARIFF PRICING PLANS PENALIZE COMPETITIVE PROVIDERS SEEKING TO TRANSITION TO IP-BASED INPUTS.

As recognized by their direct cases and previous filings, the Large ILECs are taking advantage of the benefits of the transition to fiber- and IP-based networks, and are able to leverage their existing network infrastructure and customer base—cultivated in the monopoly era—to do so. At the same time, ILECs' tariff pricing plans are hindering carrier customers from making the same transitions by locking them into high levels of TDM-based expenditures.

---

[26] *See* AT&T Switched Ethernet Guidebook, Part 5—Special Access Services, Common, Section 4—AT&T Switched Ethernet Service, at § 4.6(1)(A), (C), *available at* http://cpr.att.com/pdf/is/0005-0004.pdf.

[27] Windstream Declaration ¶ 97. To shield retail customers from these large price differentials, Windstream avoids purchasing ILEC Ethernet inputs at low bandwidths. *Id.*

Specifically, in Windstream's experience, Verizon and AT&T can impose penalties if Windstream fails to reach minimum committed terms and volumes based on historic TDM special access purchase levels, and provisions that ostensibly provide the ability to migrate from a DS1 or DS3 special access service to Ethernet are in practice narrowly applicable and difficult to invoke and implement.[28]

### A. ILECs Are Leveraging Existing Infrastructure, Built Out with Monopoly Rents, to Gain the Benefits of the IP Transition.

The Large ILECs recognize the operational and financial benefits of the transition to fiber and IP-based networks and are fully engaging in an "ongoing shift to Ethernet services."[29] AT&T, which has stated that "the transition to all-IP networks will greatly enhance the efficiency of telecommunications services and provide a far more capable platform for future innovation,"[30] announces in its direct case its plans to "retire the copper TDM network used to provide the DS1s at issue early in the next decade."[31] Similarly, Verizon has noted that fiber offers increased reliability, better performance, and improved energy efficiency, and referenced "operational savings from the lower costs associated with serving customers over fiber . . . ."[32]

---

[28] Windstream Declaration ¶ 104, 83.

[29] Brief of AT&T, Inc. in Support of Its Direct Case at 12, WC Docket No. 15-247 (filed Jan. 8, 2016) ("AT&T Direct Case"). *See also* CenturyLink White Paper at 1; Verizon Direct Case at 1 (noting industry is in the midst of a dramatic transition).

[30] Comments of AT&T Services, Inc., on Notice of Proposed Rulemaking at 62, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (filed Feb. 5, 2015).

[31] AT&T Direct Case at 50 n.155.

[32] Comments of Verizon at 7, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (filed Feb. 5, 2015).

With their protestations that "there are no 'incumbents'" in the Ethernet market,[33] and their assertions of robust competition for the provision of Ethernet,[34] the Large ILECs seek to obfuscate the fact that the IP transitions planned for their own operations are largely underwritten by their position as the historical monopolist because they can leverage their existing network infrastructure and substantial customer base. Fiber communications networks have existed since the 1970s, and as Windstream well knows in its capacity as an incumbent, many legacy loops used to transmit DS1 and DS3 services are composed of fiber. Even "new" fiber builds repurpose legacy unbundled network infrastructure, such as buried conduit, pole attachments, and building entry portals.[35] In addition, as XO discusses, ILECs have distinct advantages over other providers in obtaining building entrance permission for new construction.[36] Moreover, CLECs do not possess a massive customer base like ILECs, whose first-to-market historical advantage as the designated monopolist allows the ILEC to spread network costs over a larger number of locations within the same ring distance.[37]

### B. ILECs' Tariff Pricing Plans Do Not Permit This Same Migration by Carrier Customers.

Yet while ILECs themselves are taking advantage of the benefits of technology transitions, including lower costs, their tariff pricing plans essentially prevent carrier customers

---

[33] Comments of CenturyLink at 12, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (filed Feb. 5, 2015). *See also* AT&T Direct Case at 12 ("When Ethernet first became available, no provider had a nationwide network, including the incumbent LECs, and thus all carriers were starting from scratch with no incumbent advantage.").

[34] *See* Verizon Direct Case at 18-22; AT&T Direct Case at 12-13; CenturyLink White Paper at 7-17.

[35] *See* Windstream Dedicated Services Comments at 82.

[36] *See* XO Rulemaking Comments at 13.

[37] *See* Windstream Dedicated Services Comments at 39.

from making the same transitions by locking them into high levels of TDM-based expenditures.[38] As Windstream noted in its dedicated services rulemaking comments, certain Large ILEC tariffed commitment plans impose punitive shortfall charges if a wholesale customer fails to meet the minimum committed volumes based on historic TDM special access purchase levels, and disallow that customer to "count" purchases of Ethernet circuits from the same ILEC toward that minimum commitment.[39] As the IP Transition advances, a competitive provider locked into such a plan would have to continue to pay for TDM circuits *it does not use* to provide customers with the Ethernet services they increasingly demand, or face potentially staggering penalties under its TDM special access discount agreement.[40] This regime substantially raises wholesale input costs—either through the purchase of unneeded circuits or through penalties—for rivals that are seeking to expand their offerings using Ethernet inputs, and makes it increasingly difficult for competitive providers to compete with the ILEC's retail offerings even when continuing to purchase last-mile inputs from the same ILEC.

Verizon asserts that its "technology-transitions provisions" permit carrier customers to "move to new technologies."[41] However, Windstream has found that these provisions, while ostensibly providing the ability to migrate from a DS1 or DS3 special access service to Ethernet, are very narrow and difficult to invoke and implement.[42] First, no new customer location can qualify for the transition and count toward Windstream's commitment level. Second, any

---

38 *See Designation Order* at 11,437-38, 11,440 ¶¶ 41-42, 46.

39 Windstream Dedicated Services Comments at 57.

40 *Id.*

41 *See* Verizon Direct Case at 38.

42 The Verizon commitments are expressed in terms of DS1s, and DS3s are converted to DS1 equivalents for the purpose of fulfilling the commitments.

Ethernet circuit that Windstream leases at the same location to replace a DS1 or DS3 circuit will not qualify as a migration unless it has a term commitment at least as long as, if not longer than, the prior circuit, which means that Windstream often has to sign up for a longer term and potentially incur a larger early termination liability. (Usually the potential term of the wholesale input is misaligned with the term of the retail service provided by Windstream, so Windstream either would have to renegotiate its customer contract or pay for an unused circuit.) Third, the replacement circuit has to cost at least as much as, or more than, the DS1 or DS3 circuit, even though Ethernet is more cost-efficient than TDM. Fourth, the tariff imposes short timeframes for notifications and disconnections, and the failure to meet any of these timing requirements disqualifies the Ethernet circuit from counting toward the commitment.[43]

Thus, under the Verizon *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] ***** END HIGHLY CONFIDENTIAL *****[44] *****BEGIN HIGHLY**

---

43 Windstream Declaration ¶ 104.

44 *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

**CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL***[45]

AT&T similarly asserts that its tariff pricing plans "obviously are not deterring massive investment in Ethernet alternatives,"[46] but Windstream's experience is that allowances for migration of circuits to IP are limited as a practical matter. Windstream purchases both DS1 and DS3 circuits from AT&T under tariffed term commitment plans that lock Windstream into multi-year spends on individual TDM circuits. Windstream also agrees to meet aggregate DS1 and DS3 volume commitment levels under AT&T's tariffed volume plans ***** BEGIN HIGHLY CONFIDENTIAL***** [redacted]. ***** END HIGHLY CONFIDENTIAL *****

These tariff provisions mean Windstream may be subject to penalties for not maintaining individual TDM circuit terms as well as aggregate TDM-specific volumes. In particular, if Windstream wishes to migrate a DS1 or DS3 special access circuit to AT&T's Switched Ethernet Service, AT&T's term plans only permit avoidance of early termination liability charges for disconnection of individual circuits if Windstream meets several conditions.[47] First, the TDM service must have been in service for at least 12 months and must serve the same end user location as the IP replacement. Second, the length of the term commitment for the IP

---

[45] Windstream Declaration ¶ 105.

[46] AT&T Direct Case at 43.

[47] In the case of DS1s, Windstream would not be subject to these termination liability charges under the term commitment plan if it is able to meet its aggregate DS1 volume commitments.

replacement service must be at least as long as the remainder of the term commitment for the TDM circuit being replaced. Third, Windstream must issue a disconnect order for the replaced TDM circuit to be effective within 90 days after the Ethernet installation date. *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

## IV. THE COMMISSION SHOULD MANDATE THAT CARRIER CUSTOMERS BE PERMITTED TO MEET TDM TERM- AND VOLUME-BASED DISCOUNT COMMITMENTS USING PURCHASES OF ETHERNET SERVICES.

The Commission should act to reduce the harm caused by these types of terms and conditions that unreasonably penalize carrier customers and those carriers' retail customers by requiring all ILECs offering term- and volume-based discount commitments 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, without onerous conditions like the ones in the ILEC tariffs' "migration" provisions.[48] In light of the ongoing transition of all service providers and many retail users to IP, it should be considered unjust and unreasonable to

[48] *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, and RM-10593 (filed Sept. 24, 2015).

exclude a CLEC's purchase of Ethernet circuits from counting toward the attainment of those commitments.

Because a carrier customer can use one Ethernet circuit to replace multiple TDM special access circuits, it would be impractical—and potentially unfair to both the ILEC and CLEC, depending on the situation—to implement this backstop by assuming a new Ethernet circuit supports the same amount of capacity as disconnected TDM special access circuit. Instead, the Commission should specify that ILEC volume commitments for a specified number of TDM circuits be translated into a total spend commitment and allow expenditures on Ethernet to apply toward that total. In particular, the Commission should require ILECs to count purchases of Ethernet toward the TDM special access spend commitment.[49] Early termination liability also should not apply to any instance where a TDM special access connection is prematurely disconnected and replaced with Ethernet of at least equal capacity to the end of the previously committed term (or if the remaining TDM term is longer than the longest Ethernet term

[49] If the ILEC has established separate volume commitments for DS1 and DS3 special access services, the Commission could permit wholesale providers to count purchases of Ethernet at bandwidths of 12 Mbps or less toward the DS1 spend commitment, and purchases of Ethernet at bandwidths of more than 12 Mbps but less than or equal to 100 Mbps toward any DS3 spend commitment. The rationale for using these Ethernet thresholds—12 Mbps or less symmetrical capacity for DS1 commitments, and more than 12 Mbps but less than or equal to 50 Mbps symmetrical capacity for DS3 commitments—would be similar to the approach the Commission adopted in the *Technology Transitions Order* for examining whether the pricing for IP replacement services is reasonably comparable to the price of the TDM services being eliminated. *See Technology Transitions Order* at 9465 ¶ 165. In particular, the Commission "adopt[ed] a 12 Mbps threshold for calculating comparable rates for replacement services based on DS1 pricing because it most closely replicates the options that exist today since it is technologically infeasible to bond DS1 special access services to provide more than 12 Mbps in capacity." *Id*. With respect to DS3 services, it is appropriate to consider Ethernet inputs with symmetrical capacity up to 100 Mbps, given two DS3 circuits may be bonded together to provision 90 Mbps of symmetrical capacity to an end user location. Windstream Declaration ¶ 65.

commitment, to the end of that Ethernet term commitment).[50] Of course, in cases in which the TDM commitment included circuit portability, any Ethernet purchase would be able to substitute for the prematurely disconnected TDM circuit without incurring termination liability.

The D.C. Circuit's 2006 decision in *BellSouth v. FCC* does not preclude the Commission from requiring this accommodation in response to technology transitions.[51] In that case, which focused on whether volume discount plans were discriminatory in favor of Bell affiliates (a question that has not been raised in this investigation), the Court noted an "absence of record evidence"[52] and criticized the Commission for not sufficiently showing how carrier customers had been "harmed in the past five years" and not "offer[ing] some reason for believing the future is likely to differ from the past."[53] Here, in contrast, there is ample record evidence demonstrating harm resulting from these punitive and anticompetitive terms and conditions, particularly as the transition for TDM to IP services advances for all carriers.

## V. ILECS HAVE NO LEGITIMATE BUSINESS REASON THAT WOULD JUSTIFY THE COMMISSION NOT TAKING WINDSTREAM'S SUGGESTED ACTION.

Commission action to ensure that wholesale customers are permitted to meet discount plan commitments using purchases of Ethernet as well as TDM special access services is further warranted because it does not undermine the ILECs' stated business justifications for implementing discount plans. As observed by CenturyLink, multiple court decisions have found that business justifications are an important consideration when determining whether a discount

---

[50] A reduced termination liability would be appropriate if the replacement Ethernet purchase was discontinued prior to the end of original term of the TDM circuit not subject to portability, but only for the time between the end of the customer's Ethernet purchase and the end of the original term of the TDM circuit.

[51] *See BellSouth Telecomms. Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

[52] *Id.* at 1060.

[53] *Id.*

plan is on balance beneficial or harmful to competition.[54] The Eleventh Circuit, for example, observed that the party whose conduct harms competition bears the burden of showing "procompetitive justifications for its conduct," and that "[s]uch justifications . . . cannot be merely pretextual."[55]

Here the Large ILECs proffer that their restrictive discount plan commitments are justified because they provide the ILECs with necessary stability and predictability. For example, CenturyLink asserts it "essentially 'purchases' a degree of certainty that allows it to marshal network resources to accommodate anticipated demand, plan informed network expansion, and reduce marketing and other transaction costs that it would incur in the absence of customer commitments."[56] Verizon notes that term discount plans enable it to "plan its business operations more accurately," because it gains revenue certainty.[57] And AT&T concludes, "an

---

[54] *See* CenturyLink White Paper at 29-30 (discussing legal frameworks for considering seller's business rationale even after complaining parties have made a prima facie case that a practice is anticompetitive). CenturyLink-cited legal authorities include *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 334-35 (1961) (noting the business benefits of discounts from the seller's perspective); *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 111 (3d Cir. 1992) (concluding that "[t]he existence of legitimate business justifications for the contracts . . . supports [their] legality"); *McWane, Inc. v. FTC*, 783 F.3d 814, 833 (11th Cir. 2015) (observing that, under one procedural approach, once "anticompetitive harm" is demonstrated, "the burden then shifts to the defendant to present procompetitive justifications for the exclusive conduct" and if "the court accepts the defendant's proffered justifications, it must then decide whether the conduct's procompetitive effects outweigh its anticompetitive effects"); *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 123 (1st Cir. 2011) (finding that business justifications may be a factor in a court's determination of whether exclusive dealing arrangements result in anticompetitive harm); and *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000) ("A[n antitrust] defendant's proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits").

[55] *McWane*, 783 F.3d at 840-41 (citation omitted).

[56] *Id.* at 31. *See also id.* at 33 (noting plans provide "benefits of revenue predictability"); *id.* at 46 (long-term commitments fulfill "CenturyLink's need to recoup its investment and maintain . . . facilities").

[57] Verizon Direct Case at 5.

ILEC is entitled to establish terms that promote the stability and predictability of utilization of its network."[58]

These business justifications, however, fail to support ILEC provisions that penalize a carrier customer when it maintains predictable levels of dedicated service expenditures, but seeks to use a newer transmission format for its communications. Windstream is concerned specifically about penalties that focus on one form of dedicated services purchases (TDM) but do not account for increases in other forms of dedicated services purchases (particularly Ethernet). By accounting for all dedicated services purchases without changing the essential substance of any discount commitments, Windstream's proposed remedies would continue to provide the ILECs revenue certainty and the ability to plan for investment in last-mile infrastructure, which supports both IP-based and TDM-based communications.[59]

This consideration further distinguishes the present scenario from that in *BellSouth v. FCC*. In that case the D.C. Circuit found the discount plan at issue served as a "bargain containing terms that both benefit and burden its customers,"[60] but recognized that its holding would not preclude the Commission from invalidating a discount structure if it "forced [customers] into a one-sided bargain,"[61] which is exactly what is occurring with TDM-specific penalties as the IP Transition proceeds. Windstream's suggested relief would benefit wholesale customers without undermining to the Large ILECs' state justifications for their discount plans.

---

[58] AT&T Direct Case at 47.

[59] Alternatively, if there is sufficient "headroom" in competitive carriers' contracts to avoid such penalties as AT&T suggests (*see, e.g.*, AT&T Direct Case at 3, 5, 19), then Windstream's proposed remedy would have no impact and thus cannot be thought to undermine the ILECs' business objectives.

[60] *BellSouth*, 469 F.3d at 1060.

[61] *Id*. at 1058.

## VI. THIS INVESTIGATION HIGHLIGHTS THE NEED FOR THE COMMISSION TO CONFIRM UNBUNDLING OBLIGATIONS FOR DS1 AND DS3 CAPACITY LOOPS REMAIN DURING AND AFTER TECHNOLOGY TRANSITIONS.

Information provided in this investigation highlights that the Commission should grant Windstream's petition for a declaratory ruling that ILECs' obligations to provide access to unbundled DS1 and DS3 capacity loops ("UNEs") are unaffected by a change in transmission protocol from TDM to IP or by use of fiber.[62] In particular, AT&T states that it continues to lease "hundreds of thousands" of UNE loops to competitive providers,[63] and attempts to minimize the importance of issues related to DS1 special access commitments by citing statistics for its DS1 sales under tariff pricing plans relative to sales of all "special access services," apparently including all forms of UNEs.[64] This discussion is intended to support AT&T's position that additional regulation of TDM special access commitments is unwarranted. However, Windstream and other competitors cannot replace all current TDM special access purchases with UNEs,[65] and as the Commission has recognized, DS1 and DS3 capacity UNE loops when available supplement, but do not replace, special access services as a market-opening tool.[66] *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]

---

[62] Windstream's 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 (filed Dec. 29, 2014).

[63] AT&T Direct Case at 11.

[64] *See id.* at 15.

[65] Based on price, Windstream prefers to use UNEs whenever possible to serve customers at lower bandwidth levels but regulatory, contractual, and technical constraints prevent it from doing so in many cases. Windstream Declaration ¶¶ 56-59.

[66] *See TRRO* at 2570-71 ¶ 63 (finding that without UNEs there would be "an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market").

[redacted]

[redacted]

[redacted]

[redacted]*****END HIGHLY CONFIDENTIAL*****[67] The statistics that AT&T provides, therefore, should not be read to diminish the importance of Commission oversight of TDM special access tariff pricing plans. Instead, these statistics are best viewed simply as more evidence showing the continued importance of UNEs in the marketplace and the need for the Commission to grant Windstream's petition and confirm that ILECs' obligations to provide access to unbundled DS1 and DS3 capacity loops apply to transmitting traffic in an IP format and to both fiber and copper loops.

## VII. CONCLUSION

One aspect of ILEC abuse of market power with respect to dedicated last-mile connections is their ability to extract penalties associated with TDM-specific services, even as wholesale customers are correspondingly increasing their total last-mile expenditures as they migrate from TDM to IP-based services. Yet Ethernet purchases offsetting TDM special access declines provide the ILECs with the revenue stability that they had sought in establishing these penalties. In response, the Commission should declare unjust and unreasonable ILEC penalties imposed on CLECs when transitioning to IP services, including clauses that exclude expenditures on Ethernet from counting toward the attainment of volume commitments. Furthermore, the Commission should prevent ILEC application of early termination liability when a TDM special access connection is prematurely disconnected and replaced with Ethernet of at least equal capacity to the end of the previously committed term (or if the remaining TDM

[67] Baker Declaration ¶ 58.

term is longer than the longest Ethernet term commitment, to the end of that Ethernet term commitment).[68]

Respectfully submitted,

John T. Nakahata
Henry Shi
Elizabeth B. Uzelac
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

*Counsel to Windstream Services, LLC*

Jennie B. Chandra
Malena F. Barzilai
WINDSTREAM SERVICES, LLC
1101 17th St., N.W., Suite 802
Washington, D.C. 20036
(202) 223-7664 (phone)
(330) 487-2740 (fax)

[68] As noted above, in cases in which the TDM commitment included circuit portability, any Ethernet purchase should be able to substitute for the prematurely disconnected TDM circuit without incurring termination liability.