

March 18, 2016

**VIA ECFS**

*EX PARTE NOTICE*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

**Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593***

Dear Ms. Dortch:

On March 16, 2016, Chip Pickering,<sup>1</sup> Angie Kronenberg, and the undersigned from INCOMPAS met with Jon Sallet, Bill Dever, Matt DelNero and Deena Shetler.

INCOMPAS urged the Commission to act quickly to find that the incumbent local exchange carriers (“ILECs”) possess market power in the special access marketplace, and to adopt remedies to ensure just and reasonable rates for both TDM and Ethernet special access services. INCOMPAS submitted that, to the extent the Commission requires more time to establish a comprehensive rate mechanism to curb the exercise of the ILECs’ market power, it would be appropriate for the Commission to immediately make market findings and implement interim measures.<sup>2</sup> Additionally, as discussed in our filings, the egregious terms and conditions at issue in the tariff investigation must be addressed.<sup>3</sup>

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<sup>1</sup> Mr. Pickering participated via teleconference.

<sup>2</sup> Section 214 requirements adopted in the *Technology Transitions Order* will remain in effect while comprehensive reform is still pending. The Commission should clarify this fact. *See Technology Transitions, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, 30 FCC Rcd. 9372, 9443 ¶ 132 (2015)* (stating that the interim rules will remain in effect until the “(1) [the Commission] identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective”).

<sup>3</sup> *See* Comments of Birch, BT Americas, Earthlink, INCOMPAS, Integra, and Level 3, WC Docket No. 05-25, RM-10593 (filed Jan. 28, 2016).

First, the record clearly demonstrates that the marketplace for special access (*a.k.a.* dedicated services) is broken. Specifically, the ILECs—being the only providers of dedicated services to the vast majority of business locations<sup>4</sup>—have market power. Their market power over dedicated services is not dependent on the technology of the service (TDM or packet-based). It is based on the lack of a viable economic case for facilities-based competitors to deploy last-mile connections to most individual business locations.<sup>5</sup> Moreover, as discussed in the record, and indicated by both the Commission and Department of Justice, a duopoly is an insufficient number of providers to ensure just, and reasonable rates, terms and conditions and does not represent a competitive marketplace.<sup>6</sup> The Commission should act swiftly in adopting a conclusion as to the ILECs’ market power for both TDM and packet-based special access services.

Second, the record demonstrates that the large ILECs charge supracompetitive prices for both packet-based (*e.g.*, Ethernet) and TDM special access services as a result of their market power.<sup>7</sup> The record also demonstrates that the large ILECs engage in price squeezes, charging

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<sup>4</sup> See Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, at 3 - 4, ¶ 6, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2010) (“[M]ost dedicated services markets are monopolies, and most of the rest are duopolies. When there is one provider, it is nearly always an incumbent local exchange carrier (ILEC). Most duopoly markets are served by an ILEC . . . . Moreover, the prospect of entry is unlikely to deter incumbents from charging supracompetitive prices.”); Declaration of Stanley M. Besen and Bridger M. Mitchell (“Besen/Mitchell Declaration”), *attached to* Comments of Sprint Corporation (“Sprint”), at 25 and 28, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“[I]n the case of special access, the ILEC is the only service provider in the vast majority of building locations and there are no more than two facilities-based providers in the vast majority of significantly larger census block areas. . . . On the basis of this evidence, it is reasonable for the Commission to conclude that the structures of most special access product and geographic market are unlikely to result in the prices that would prevail in a competitive marketplace.”)

<sup>5</sup> Given the lack of certainty in the continued availability of alternative wholesale access arrangements, the Commission’s focus should be limited to facilities-based competition.

<sup>6</sup> See *e.g.*, INCOMPAS Reply Comments at 14, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016). Besen/Mitchell Declaration at ¶ 31.

<sup>7</sup> See Letter of John Nakahata, on behalf of Windstream, to Marlene H. Dortch, Secretary FCC, at 5-7 WC Docket No. 05-25, RM-10593, GN Docket No. 13-5, WC Docket No. 15-247 (filed Mar. 14, 2016)(“Windstream 3/14/16 Ex Parte”) (“Industry analyst price comparisons have found higher-than-expected wholesale Ethernet prices over time, and indicate that prices vary at the building level based in part on the number of competitors.”); Letter of Sheba Chacko, BT Americas, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Feb. 29, 2016); Comments of TDS Metrocom, WC Docket No. 05-25, RM-10593, at 25-29 (filed Jan. 27, 2016)(“TDS Comments”) (stating that RBOCs are offering TDS CLEC wholesale Ethernet at above-retail prices and a comparison with NECA retail rates shows that RBOCs are offering Ethernet at wholesale at unjust and unreasonable rates); Comments of COMPTTEL, WC Docket

wholesale purchasers rates that are higher than the ILECs offer on a retail basis for the same capacity.<sup>8</sup> While the Commission determines the appropriate comprehensive mechanism to ensure just and reasonable rates, *at a minimum*, the Commission should:

- (1) Ensure that the rates for TDM and packet-based services do not increase; and
- (2) Confirm and ensure that the ILECs' wholesale rates for dedicated services (TDM and packet-based) must be lower than their lowest retail rates for the same capacity, at least by avoided costs.<sup>9</sup>

Finally, the Commission has clear authority to address Ethernet services in its market power analysis and the remedies under consideration.<sup>10</sup> In particular, the Commission has the

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No. 05-25, at 10-11 and Attachment (filed Apr. 16, 2013) (discussing an analysis that compared Ethernet prices of AT&T and CenturyLink to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in the NECA Access Service FCC Tariff #5(NECA Tariff #5) that revealed that prices charged by AT&T and CenturyLink were often greater by an order of magnitude); Comments of Sprint, WC Docket No. 05-25, RM-10593, at 46 and 75 (filed Jan. 27, 2016) (“[I]ncumbent LECs set ‘rack rates’ for special access plans that are unmoored from commercial reality—a business-killing ‘MSRP’ that few customers do or could ever pay. . . . One estimate calculates the annual amount of unreasonable special access overcharges to be at least \$10 billion.”); Comments of Birch, Earthlink, and Level 3, WC Docket No. 05-25, RM-10593, at 59-60 (filed Jan. 27, 2016) (“Joint CLEC Comments”) (finding the forbearance granted on Ethernet-based services “yields excessive and unpredictable prices, impedes the development of competition, and harms the public”).

<sup>8</sup> See Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-4, at 49-56 (filed Jan. 27, 2016) (“Windstream Comments”) (describing large ILEC price squeezes); TDS Comments at 3 (“RBOCs are and have been abusing their market power in the market for wholesale Ethernet services in second and third tier markets, demanding rates that are plainly not ‘just and reasonable’ because the wholesale rates significantly exceed retail rates with no legitimate business reason for doing so. This imposition of a price squeeze, abusing power in the wholesale market, has ripple effects in the retail market. Wholesale customers, including TDS CLEC, who must pay unjust, unreasonable, above-retail rates for wholesale inputs cannot apply any competitive pressure on the RBOCs’ retail rates.”)

<sup>9</sup> See Windstream 3/14/16 Ex Parte at 14-15; Windstream Comments at 69-77 (discussing ILECs’ obligation under Section 251(c)(4) to provide wholesale discounts and the avoided costs that should be excluded in calculating the discount). As Windstream has explained in its comments, the Commission’s authority to clarify its rules implementing Section 251(c)(4) applies to the large ILECs that have received limited forbearance for certain packet-based services, including Verizon. See Windstream Comments at 72-73, 92-93.

<sup>10</sup> The Commission has also provided sufficient notice for purposes of the Administrative Procedure Act. See Reply Comments of BT Americas *et al*, pp. 15-25, WC Docket No. 05-25, RM-10593 (filed May 31, 2016). See also INCOMPAS Comments at 11, WC Docket No. 05-25 (filed Jan. 27, 2016) (The Commission recognizes this in the *Technology Transitions Order* and,

authority to apply Section 251(c)-(4)<sup>11</sup> and the existing price cap regime to packet-based services, even those for which ILECs received forbearance. As the U.S. Court of Appeals for the D.C. Circuit stated, the forbearance relief “is not chiseled in marble...[T]he FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area.”<sup>12</sup> Moreover, with regard to the forbearance requests that were granted by the Commission, the relief does not apply to the extent the Commission adopts an alternative pricing mechanism<sup>13</sup> or on services not specified in the forbearance requests and/or not in existence at the time of the forbearance grant by the Commission.<sup>14</sup>

Comprehensive reform of the special access marketplace to prevent the exercise of market power will stimulate investment in facilities and technology by competitors and incumbents alike. Accordingly, the Commission should adopt appropriate remedies to prevent the exercise of market power in the special access marketplace. By doing so, the Commission will unleash a virtuous cycle of investment and innovation for wired and wireless networks alike.

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accordingly, conditioned the discontinuance of incumbent LEC TDM-based special access services on the offering of reasonably comparable wholesale inputs during the pendency of this special access proceeding. In doing so, the Commission firmly established that the comprehensive evaluation of the special access market is not limited to TDM DS1 and DS3 special access services.); Letter of Thomas Jones, to Marlene Dortch, WC Docket No. 05-25, dated Aug. 28, 2015 (“Nor is there any question that incumbent LECs have been on notice that the Commission could (1) reverse forbearance and (2) adopt rate regulation of their packet-based special access services. . . . [T]he agency has provided more than sufficient notice under APA to take both these actions.”). AT&T acknowledges it has been put on notice. AT&T Public Policy Blog, “The War on Infrastructure Investment,” posted by Bob Quinn on Nov. 3, 2015 (“ . . . the massive special access review the Commission opened back in 2012 to examine the level of competition in the special access services marketplace (including asking for enormously broad amounts of data on pricing) – even for services like Ethernet . . .”).

<sup>11</sup> As Windstream has explained in its comments, no ILEC, including Verizon, has been granted or received forbearance from Section 251(b)(1) or (c)(4). *See* Windstream Comments at 72-73, 92-93.

<sup>12</sup> *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (2009).

<sup>13</sup> Letter of Karen Reidy, INCOMPAS, to Marlene Dortch, WC Docket No. 05-25 (filed Jan. 12, 2016).

<sup>14</sup> *See* Windstream Comments at 92-97; Letter of Karen Reidy, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket No. 05-25, (filed Dec. 1, 2015) (explaining that the forbearance relief does not apply to AT&T’s Switched Ethernet service); Letter from John T. Nakahata, Counsel to INCOMPAS, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, PS Docket No. 14-174, WC Docket No. 05-25, and RM-10593 (filed May 27, 2015) (describing the Commission’s ample authority to regulate ILEC special construction practices regardless of any forbearance granted for packet-based services).

Competition will flourish, spurring more investment by both competitors and incumbents. Businesses of all sizes and mobile broadband consumers will benefit, and customers will be more satisfied with their ability to choose their broadband provider.

Respectfully submitted,

*/s/ Karen Reidy*

cc: Jon Sallet  
Bill Dever  
Matt DelNero  
Deena Shetler