

**REDACTED – FOR PUBLIC INSPECTION**

April 7, 2016

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

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593; *Technology Transitions*, GN Docket No. 13-5; *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247

Dear Ms. Dortch:

This letter responds to Windstream's *ex parte* filing dated March 14, 2016 ("Windstream Letter"), which (among other things) reiterated claims relevant to CenturyLink and responded to arguments CenturyLink asserted in its prior pleadings.<sup>1</sup> Although CenturyLink and others have thoroughly rebutted the legal and policy bases of the pleas for relief that Windstream's recent letter tries to salvage, CenturyLink submits this response to ensure that the record for rejecting Windstream's requests is complete.

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<sup>1</sup> Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (Mar. 14, 2016) ("Windstream Letter"). Windstream's letter also addresses various arguments and issues raised by other parties, to which CenturyLink does not respond herein.

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**I. The Commission Should Reject Windstream’s Request to Expand Section 251’s Resale Obligations.**

Windstream repeats its price squeeze claims and argues (incorrectly) that CenturyLink misstates the law in concluding that Section 251(b)(1) of the Communications Act does not impose a wholesale pricing requirement. As an initial matter, Windstream has not substantiated the factual basis for its price squeeze claim, at least with regard to CenturyLink’s rates. The only reference in Windstream’s initial comments regarding the alleged difference between CenturyLink’s wholesale and retail Ethernet rates asserted that CenturyLink’s retail Ethernet prices were substantially lower than its wholesale “Guidebook” rates.<sup>2</sup> As CenturyLink and other ILECs have repeatedly pointed out, Ethernet “rack” rates bear little relationship to the prices customers actually pay pursuant to contractual discounts.<sup>3</sup>

In any event, Windstream concedes CenturyLink’s point that the Commission stated in the *Local Competition Order* that “section 251(b)(1) clearly omits a wholesale pricing requirement.”<sup>4</sup> It claims, however, that the 1996 Commission “merely” meant that “Section 251(b)(1) does not have a *standalone* wholesale pricing requirement” pursuant to which “wholesale service . . . be priced *below* retail service.”<sup>5</sup> This, of course, is no response at all – it simply confirms that Section 251(b)(1) imposes no wholesale pricing requirement.<sup>6</sup>

Windstream falls back on an *ipse dixit* claim that Section 251(b)(1)’s language prohibiting discriminatory resale conditions must forbid charging a wholesale customer a higher

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<sup>2</sup> Comments of Windstream Services, LLC at 39, 50, WC Docket 05-25 (Jan. 27, 2016) (“Windstream Comments”).

<sup>3</sup> Reply Comments of CenturyLink at 64, WC Docket No. 05-25 (Feb. 19, 2016) (“CenturyLink Reply Comments”).

<sup>4</sup> *Id.* at 8 (quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499, 15981 ¶ 976 (1996) (“*Local Competition Order*”) (subsequent history omitted)).

<sup>5</sup> *Id.* (emphasis in original)

<sup>6</sup> Windstream also concedes that this holding in the *Local Competition Order* was reaffirmed in *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19460 ¶ 89 (2005), *aff’d sub nom. Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) (cited in Windstream Letter at 8 n.31).

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price than a similarly situated retail customer.<sup>7</sup> However, neither of the resale orders it cites (both of which preceded the *Local Competition Order*) supports Windstream’s contention or indeed says anything about wholesale pricing. Of course, Section 251(b)(1) could not be interpreted in the manner Windstream suggests in any event, because such a reading would render Section 251(c)(4)’s express wholesale pricing requirement superfluous.<sup>8</sup>

Finally, as CenturyLink has pointed out, even if Windstream’s arguments were correct on the merits (which they are not), the Commission could not act on them in any case, because it has not provided adequate notice under the Administrative Procedure Act that this proceeding might expand carriers’ Section 251 resale obligations.<sup>9</sup> Citing the Supreme Court’s 2015 *Perez* decision, Windstream asserts that “additional notice-and-comment procedures are not required,” because its approach merely “clarifies and interprets existing obligations in the Commission’s rules.”<sup>10</sup> That case, however, expressly *distinguished* situations in which an agency “interprets” a regulation in a manner that conflicts with the regulation’s text.<sup>11</sup> In those circumstances, the agency, “under the guise of interpreting a regulation,” would be “creat[ing] *de facto* a new regulation.”<sup>12</sup> In *Perez*, the parties agreed that the challenged action was an interpretive, not a

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<sup>7</sup> See Windstream Letter at 8 & n.31; see also *id.* at 7 & n.28.

<sup>8</sup> See *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts “should hesitate” to “treat[ ]” statutory language “essentially as surplusage – as words of no consequence,” and are reluctant “to interpret statutory provisions ‘so as to render superfluous other provisions in the same enactment’” (quoting *Pennsylvania Dep’t of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)). See also *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”).

<sup>9</sup> In *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (subsequent history omitted), the Commission addressed only whether and how price cap regulation and the pricing flexibility rules, as applied to special access services, might be modified, not how special access rates should relate to comparable retail service rates. See CenturyLink Reply Comments at 81-83, 87-88.

<sup>10</sup> Windstream Letter at 15 (citing *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) (“*Perez*”). Windstream makes this statement in the course of its discussion of Section 251(c)(4), but the absence of notice and comment would be fatal to any effort to expand resale obligations under Section 251 more broadly.

<sup>11</sup> *Perez*, 135 S. Ct. at 1208-09.

<sup>12</sup> *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (quoted in *Perez*, 135 S. Ct. at 1215).

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legislative, rule.<sup>13</sup> Here, in contrast, Windstream seeks to amend an existing rule. Whether or not Windstream is calling for an amendment to the Code of Federal Regulations, its comments expressly recognized that its request would require the expansion of the existing regulations.<sup>14</sup> As *Perez* makes clear, this is not the same as the issuance of an interpretation, and requires notice and comment under the APA.<sup>15</sup>

**II. The Commission Should Deny Windstream’s Petition to Require ILECs to Unbundle Next-Generation DS1/DS3 Loops.**

Windstream repeats its request that the Commission require ILECs to make unbundled DS1- and DS3-capacity loops available even after they have migrated to IP or other post-TDM technologies to serve the location at issue. Windstream asserts that **[[[BEGIN HIGHLY CONFIDENTIAL]]]** [REDACTED]

**[[[END HIGHLY CONFIDENTIAL]]]** and that UNEs are not available to replace TDM special access services in all locations.<sup>16</sup> Windstream neglects, however, to note the very small proportion of the overall marketplace attributable to these facilities. As CenturyLink has stated, by next year, DS1 and Dedicated Internet Access services combined will account for only three percent of the broadband marketplace for small and medium businesses, the market that is the focus of Windstream’s concern.<sup>17</sup> Moreover, DS<sub>n</sub> equipment manufacturers have begun to discontinue the facilities used to provide these archaic services. That is, the reason why ILECs are migrating away from legacy DS<sub>n</sub>-capacity loops is not simply that they have found next-generation means

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<sup>13</sup> *Perez*, 135 S. Ct. at 1210.

<sup>14</sup> Windstream Comments at 74 (stating that, in applying the wholesale pricing requirement in Section 251(c)(4), “the Commission’s rules that detail certain cost savings as the basis for avoided cost discounts [in Section 51.609 of the Commission’s rules] should not be viewed as exhaustive”); *see also id.* at 60-61 & nn.193, 196 (asking Commission to add a wholesale pricing requirement to the terms of Section 51.603 of the Commission’s rules, which implements Section 251(b)(1) of the Act).

<sup>15</sup> *See Perez*, 135 S. Ct. at 1206, 1208. *See also National Family Planning and Reproductive Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992) (agency “may not constructively rewrite [a] regulation . . . and effect a totally different result” in the guise of an interpretation); *id.* at 239 (such “an attempt to supplement or amend [a] regulation” is a legislative rule, which must be preceded by notice and comment).

<sup>16</sup> Windstream Letter at 3-4.

<sup>17</sup> CenturyLink Reply Comments at 80.

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by which to satisfy legacy demand, but that demand itself is shifting. This shift in demand is further promoting the shift to Ethernet and other technologies, as well as expanded reliance on non-ILEC alternatives, including cable and fixed wireless.<sup>18</sup> Indeed, Windstream has been quite successful in building out its on-net fiber network and using fixed wireless facilities and wholesale carrier partnerships in expanding its Ethernet growth outside its ILEC service territory. As Fierce Telecom recently reported:

In mid-February, Windstream announced plans to expand its fiber network in Charlotte, N.C., and is planning additional network builds in Tennessee and Virginia. The service provider has been expanding its on-net fiber footprint, adding new facilities in areas like Charlotte, N.C., for example.... But fiber is just one element of its Ethernet growth strategy. The service provider is also extending Ethernet and other IP-based services to businesses via its fixed wireless assets that it gained when it purchased Business Only Broadband in 2014. Windstream uses the fixed wireless assets to deliver wireless-based Ethernet and MPLS-based services in various markets including Chicago, New York City, northern New Jersey and Milwaukee.<sup>19</sup>

Under circumstances in which Windstream, ILECs, cable providers, and many others are racing to replace TDM networks with fiber and other successor technologies, a backward-looking requirement that ILECs retrofit next-generation loops to provide unbundled DSn capacity service would be senseless and contrary to public policy, as the Commission recognized more than 12 years ago when it sharply curtailed unbundled access to fiber loops.<sup>20</sup>

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Please contact the undersigned if you have any questions about this filing.

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<sup>18</sup> *Id.* at 6-13, 16-18, 80.

<sup>19</sup> See, e.g., Sean Buckley, *Windstream enhances Ethernet position by expanding on-net fiber, network partnerships*, Fierce Telecom (Mar. 1, 2016), available at <http://www.fiercetelecom.com/story/windstream-enhances-ethernet-position-expanding-net-fiber-network-partnersh/2016-03-01>.

<sup>20</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53 ¶¶ 272-95 (2003), vacated in part on other grounds *sub nom. USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004).

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Sincerely,

/s/ Russell P. Hanser  
Russell P. Hanser

cc: Madeleine Findley  
Eric Ralph  
Deena Shetler  
Pamela Arluk  
Daniel Kahn  
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