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April 21, 2016

VIA ECFS

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 112th St., S.W.
Washington, DC 20554

Re: EX PARTE PRESENTATION - Petition for Declaratory Ruling to Clarify that Technology Transitions Do Not Alter the Obligations of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. §251(c)(3), WC Docket No. 15-1 and GN Docket No. 13-5

Dear Ms. Dortch:

The Midwest Association of Competitive Communications (“MACC”)¹ respectfully files this letter in support of Windstream Corporation’s Petition for a declaratory ruling in the above-referenced matter.²

The Commission should grant the Petition to confirm that Section 251 of the Federal Communications Act (“Act”) and the Commission’s unbundling rules implemented thereunder obligate Incumbent Local Exchange Carriers (“ILECs”) to provide DS1 (1.544 Mbps) and DS3 (45 Mbps) capacity loops on an unbundled basis regardless of the underlying transmission technology or medium. Small- and medium-sized business customer locations rely significantly on access to these unbundled high capacity loops to attain affordable TDM-based and Ethernet

¹ MACC is a leading midwest trade association of Competitive Local Exchange Carriers (“CLECs”) formed to support an environment that fosters competition in the communications marketplace. MACC members supporting this filing include Birch Communications, Dish Network, First Communications, Global Capacity, Granite Telecommunications, Integra Telecom, Level 3 Communications, Socket, TDS Metrocom, Windstream Communications, and XO Communications.

² Petition of Windstream Corporation for a Declaratory Ruling to Clarify that Technology Transitions Do Not Alter the Obligations of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. §251(c)(3), WC Docket No. 15-1 and GN Docket No. 13-5 (filed Dec. 29, 2014) (“Petition”).

services from competitive carriers. These CLEC-provided services represent one of the most significant sources of competition to ILEC services in the marketplace for such customers.

By way of background, the ILECs' obligation to provide these unbundled high capacity loops derives from Section 251 of the Act, which requires ILECs to provide eligible requesting carriers with "non-discriminatory access to network elements on an unbundled basis."³ To implement this requirement, the Act requires that the Commission consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."⁴ In 2005, the Commission determined that CLECs are generally impaired without Commission-required access to unbundled DS1 and DS3 capacity loops.⁵ The Commission found that "the barriers to entry impeding competitive deployment of loops are substantial," and noted that CLECs "face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities."⁶ The Commission emphasized that the availability of unbundled network elements also places an important check on special access pricing.⁷ These same conditions still apply today.

Critically, nothing in the text of Section 251 of the Act or the Commission's implementing rules and orders limits the ILECs' DS1 and DS3 unbundling obligations to copper or TDM-based facilities. In fact, the express language of the Commission's rules is technology neutral.⁸ Thus, ILECs are obligated, under the Commission's existing rules, to provide competitors with unbundled access to DS1 and DS3 loops where fiber loops (legacy or new) are used.

Further, technology transitions do not alter the economics of last-mile deployment or the facts or policy rationales underlying the Commission's existing rules. Indeed, fiber is not a novel mode of transmitting DS1 and DS3 levels of traffic; fiber has been in existence since the 1970s, and many legacy loops are comprised of fiber. Moreover, as the Commission recently recognized, the "passage of time has [not] lowered [the] barriers" to deployment of competitive loop facilities,

³ 47 U.S.C. § 251(c)(3).

⁴ 47 U.S.C. § 251(d)(2)(B).

⁵ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2536, ¶ 5 (2005).

⁶ *Id.* at 2616-17, ¶¶ 150, 153; *see also* n.419 (explaining that "these costs include the costs of obtaining rights of way and other necessary legal permissions, the cost of the actual fiber-optic facilities, and the costs of physical deployment itself").

⁷ *Id.* at 2563, ¶ 52.

⁸ *See* 47 C.F.R. § 51.319(a)(4)(i) (providing that a "DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, *but are not limited to*, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services") (emphasis added); 47 C.F.R. § 51.319(a)(5)(i) (providing that a "DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second").

nor has it lessened the danger of “downstream” customer impacts that can arise where a single party holds substantial market power in the upstream wholesale market.⁹

Despite the clarity of the existing rules, Commission action is nonetheless necessary. Large ILECs now are disclaiming their obligation to provide unbundled DS1 and DS3 capacity where loops are comprised of fiber and/or transmit traffic in an IP format,¹⁰ which has unfairly created uncertainty for CLECs and their customers and frustrates their ability to enter into multi-year agreements with extremely competitive rates that customers require.¹¹ If ILECs persist in avoiding their obligations, ILECs will be able to stifle competition in the marketplace for lower capacity business services, which will likely lead to higher prices and less choice for customers. Wholesale price hikes could even force CLECs to exit segments of the market altogether, such that customers would lose the ability to purchase the affordable and tailored services currently available to them.

Notably, granting the Petition does not mean that ILECs would be obligated to retain copper or TDM-based technologies; it would simply reaffirm the obligation to provide unbundled access to DS1 and DS3 *capacity* at current prices and regardless of the technology of facility used. The Commission should therefore grant the Petition to ensure the continued availability of unbundled DS1 and DS3 capacity loops so that CLECs may continue to provide important competitive choices to business customers.

Respectfully submitted,

/s/ Philip J. Macres

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⁹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8670, ¶ 90 (2010).

¹⁰ *See, e.g.*, Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, FCC, GN Docket No. 13-5, *et al.*, attachment at 11 (filed May 30, 2014); Reply to Comments of AT&T Services, Inc., GN Docket Nos. 13-5, 12-353, at 40-41 (filed Apr. 10, 2014); *see also* Verizon Public Notice of Network Change Under Rule 51.333(a) for Midlothian, VA, available at <http://www.verizon.com/about/networkdisclosures/> (last visited Apr. 13, 2016) (stating that “Verizon will...no longer be required to offer UNEs or other services over copper facilities” as a result of transition of facilities from copper to fiber).

¹¹ Because business customers generally purchase services under multi-year contracts, CLECs typically must bid on services that they will be providing three to five years in the future. Uncertainty as to the continued availability of unbundled DS1 and DS3 capacity loops harms competitors’ ability to control the quality and attributes of the services they provide and to offer the lowest possible prices.