

April 21, 2016

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: *Technology Transitions*, GN Docket No. 13-5; *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)*, WC Docket No. 15-1; *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; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247

Dear Ms. Dortch:

On behalf of Windstream Services, LLC (“Windstream”), I write in response to CenturyLink’s letter dated April 7, 2016, filed in the above-referenced proceedings.<sup>1</sup>

**I. CenturyLink Misconstrues Section 251(b)(1) of the Communications Act, the Commission’s Regulations, and the Administrative Procedure Act’s Requirements.**

Windstream has consistently advocated that the Commission use its statutory authority under Section 251(b)(1), in addition to other remedial tools, to curb anticompetitive discrimination against carrier customers in the pricing of business data services.<sup>2</sup> Section 251(b)(1) imposes on every local exchange carrier (“LEC”) “[t]he duty . . . not to impose unreasonable or discriminatory conditions or limitations on[] the resale of its

---

<sup>1</sup> Letter from Russell P. Hanser, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, at 3-4, GN Docket Nos. 13-5 and 12-353, WC Docket No. 05-25, RM-10593, WC Docket No. 15-247 (filed Apr. 7, 2-016) (“CenturyLink April 7, 2016 Ex Parte”)

<sup>2</sup> See Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 7-8, WC Docket No. 05-25, RM-10593, WC Docket No. 15-247 (filed Mar. 14, 2016) (“Windstream March 14, 2016 Ex Parte”); Comments of Windstream Services, LLC, at 60-63, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (filed Jan. 27, 2016) (“Windstream Dedicated Services Comments”).

telecommunications services.”<sup>3</sup> The Commission’s implementing regulations, as CenturyLink pointed out, also require LECs to make their “telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.”<sup>4</sup> CenturyLink nonetheless insists that this mandate against discrimination actually *permits* the discriminatory practice of charging carrier customers more than retail customers for the same services.<sup>5</sup> Taking this tortured reading one step further, CenturyLink now argues that any Commission action against such discrimination on pricing terms would require notice-and-comment rulemaking because it would constitute an entirely new rule.<sup>6</sup> CenturyLink is wrong about what the statute and the existing regulation already require, and CenturyLink is also wrong that the Commission would have to undertake a new rulemaking in order to state its interpretation of existing law.

First, CenturyLink continues to misdirect the Commission’s attention by conflating two different requirements contained in Section 251(b)(1) and Section 251(c)(4). As Windstream explained, the Commission’s *Local Competition Order* drew a distinction between the nondiscrimination requirement of Section 251(b)(1), and the wholesale discount requirement of Section 251(c)(4), which requires wholesale service to be priced *below* retail service.<sup>7</sup> CenturyLink’s latest assertion, that Windstream’s explanation “simply confirms that Section 251(b)(1) imposes no wholesale pricing requirement,”<sup>8</sup> obstinately ignores the clear division set out in the statute between the “floor” set by the nondiscrimination requirement and the additional, affirmative obligation to provide wholesale discounts. CenturyLink’s meritless argument that applying Section 251(b)(1)’s nondiscrimination requirement to prices “would render Section 251(c)(4)’s express wholesale pricing requirement superfluous” follows from the mistaken premise that the two provisions impose the same obligation.<sup>9</sup> They do not. This argument also fails because Section 251(b)(1), which applies to all LECs and all of their telecommunications services, and Section 251(c)(4), which applies only to incumbent LECs and to some of their telecommunications services, are directed at two different categories of carriers, an obvious distinction that CenturyLink conveniently fails to note.<sup>10</sup>

---

<sup>3</sup> 47 U.S.C. § 251(b)(1).

<sup>4</sup> 47 C.F.R. § 51.603(a).

<sup>5</sup> See Reply Comments of CenturyLink at 76, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016).

<sup>6</sup> CenturyLink April 7, 2016 Ex Parte at 3-4.

<sup>7</sup> See Windstream March 14, 2016 Ex Parte at 8.

<sup>8</sup> CenturyLink April 7, 2016 Ex Parte at 2.

<sup>9</sup> See *id.* at 3.

<sup>10</sup> Compare 47 U.S.C. § 251(b)(1) (referring to “[e]ach local exchange carrier” and “its telecommunications services”) with *id.* § 251(c)(4) (referring to “additional obligations of incumbent local exchange carriers” and “telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers” (emphasis added)). Indeed,

Second, CenturyLink erroneously asserts that “even if Windstream’s arguments were correct on the merits”—i.e., that Section 251(b)(1) and the Commission’s rules prohibit discriminatory pricing against carrier customers—the Commission must nonetheless go through notice-and-comment rulemaking to “expand carriers’ Section 251 resale obligations.”<sup>11</sup> This is so, CenturyLink asserts, because clarifying that charging carrier customers wholesale prices that exceed retail prices constitutes unreasonable discrimination against resale amounts to “the expansion of the existing regulations.”<sup>12</sup> The plain meaning of the existing regulation refutes CenturyLink’s position. Section 51.603(a) of the Commission’s rules currently states that “[a] LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.”<sup>13</sup> The Commission has consistently construed “terms and conditions” as including price terms, evidenced by the use of “non-price term” as a distinct subcategory.<sup>14</sup> If the price asked is not part of the “terms” of an offer, then there would be no need to specify that some terms are “non-price” terms. CenturyLink also overstates the relevance of dictum from *Perez v. Mortgage Bankers Association*, which notes that an agency interpretation that “conflict[s] with the text of the regulation the agency purported to interpret” would be invalid under the Supreme Court’s precedents.<sup>15</sup> As explained above, CenturyLink has not demonstrated any conflict between the existing regulations promulgated under either Sections 251(b)(1) or

---

Congress explicitly stated that the obligations in Section 251(c) are “[i]n addition to the duties contained in subsection (b) of this section.” *Id.* § 251(c). Absent forbearance pursuant to Section 10 of the Communication Act, the statutory requirements of Sections 251(b)(1) and 251(c)(4) apply whether or not the Commission makes a determination about market dominance or the existence of competition for rate regulation purposes.

<sup>11</sup> CenturyLink April 7, 2016 Ex Parte at 3.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> 47 C.F.R § 51.603(a).

<sup>14</sup> See, e.g., *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 19 FCC Rcd. 21522, 21583 ¶ 157 (2004) (discussing parties’ ability to “reach agreement on terms . . . including on *non-price terms*” (emphasis added)); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd. 5267, 5308 ¶ 82 (1997) (“Moreover, cable operators may provide in their leased access contracts that any sublessees are subject to the *non-price terms and conditions* that apply to the initial lessee.” (emphasis added)); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd. 20,730, 20,752 ¶ 42 (1996) (discussing “nondominant carriers’ *non-price terms and conditions* (emphasis added)).

<sup>15</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 (2015).

251(c)(4) and the clarifying interpretations that Windstream seeks.<sup>16</sup> Moreover, as the Court explicitly stated in *Perez*, the existence of a conflict goes to the substantive validity of the interpretation, and does not mean that “an agency interpretation is *procedurally* invalid” for want of notice-and-comment procedures.<sup>17</sup>

CenturyLink cites no authority and offers no reason for its interpretation that, in this particular case, “terms and conditions” has to mean terms and conditions for everything *except* price. Indeed, as Windstream pointed out—and to which CenturyLink offers no response—such an interpretation would nullify the nondiscrimination requirement in Section 251(b)(1), because LECs would be able to prevent the resale of their telecommunications services by charging carrier customers, and only carrier customers, prohibitively high prices.<sup>18</sup> That result would mean that Congress effected a repeal *sub silentio* of pre-1996 FCC decisions concluding that discrimination against resellers violates Sections 201 and 202, and thus repudiate a long-standing Commission policy to facilitate market-entry.<sup>19</sup> This interpretation turns on its head the Telecommunications Act of 1996, which expanded the competition-enabling duties of local exchange carriers to include intrastate telecommunications services, which would otherwise have been beyond the scope of Sections 201 and 202.<sup>20</sup> Ignoring the plain meaning of the statute and the Commission’s regulation, CenturyLink fixates on what Section 251(b)(1) does and does not require of “wholesale” prices. Whether or not one calls a price charged for services that are to be resold a “wholesale” price, under Section 251(b)(1), a LEC cannot insist on worse pricing terms for carrier customers.

---

<sup>16</sup> In *Perez*, the Department of Labor had reached opposing conclusions in 2006 and 2010 regarding in interpretations of the same regulation as applied to the classification of mortgage-loan officers. *See id.* at 1204-05.

<sup>17</sup> *Id.*

<sup>18</sup> *See* Windstream March 14, 2016 Ex Parte at 8.

<sup>19</sup> *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 FCC 2d 167, 168 ¶ 1 (1980) (“[R]estrictions of any kind on the resale and sharing of domestic public switched network services are unjust, unreasonable, and unreasonably discriminatory, and hence unlawful under Sections 201(b) and 202(a) of the Communications Act.”). *See also Application of Craig O. McCaw and American Telephone and Telegraph Company*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 11,786, 11,800 ¶ 27 (1995) (concluding that “Section 202(a) of the [Communications] Act and the Commission’s resale policies also apply,” and that “[a]ccordingly, the same *terms and rates* that apply to the sale of the component services among AT&T/McCaw’s affiliates must also be available to other customers, *including unaffiliated resellers*” (emphases added)).

<sup>20</sup> *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 367 (1999) (holding that the Telecommunications Act of 1996 expanded the authority of the Commission to, among other things, make rules governing intrastate telecommunications services).

## **II. The Commission Should Grant Windstream’s Petition to Confirm the Continued Availability of Unbundled DS1 and DS3 Capacity Loops.**

As the Commission works in the coming months to address persistent market-power problems in the business data services markets, it should use this opportunity to resolve Windstream’s declaratory ruling petition to confirm the continued availability of unbundled DS1 and DS3 capacity loops.<sup>21</sup> Windstream has explained how these loops continue to be important for competition in business data services, particularly for small businesses and government customers.<sup>22</sup> Uncertainty about their availability in the near future harms competitors’ ability to control the quality and attributes of the services they provide and to offer the lowest possible prices.<sup>23</sup>

CenturyLink’s letter reiterates points about broad trends related to “the broadband marketplace,” “DSn equipment manufacturers,” “the shift to Ethernet,” and the replacement of “TDM networks with fiber.”<sup>24</sup> None of these observations bears on the core arguments raised in Windstream’s petition: that the Commission’s regulations set forth technology-neutral unbundling obligations that are unaffected by the transition from TDM to IP or the use of copper versus fiber (legacy or new),<sup>25</sup> and that unbundled DS1 and DS3 capacity loops remain important inputs for competitive providers that help discipline incumbent LEC monopoly pricing.<sup>26</sup>

---

<sup>21</sup> See Windstream March 14, 2016 Ex Parte at 4-5.

<sup>22</sup> *Id.* at 2-3. See also Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, at 1, GN Docket No. 13-5, WC Docket No. 15-1 (filed June 18, 2015).

<sup>23</sup> See Petition for Declaratory Ruling of Windstream Corporation, at 2, GN Docket No. 13-5, (filed Dec. 29, 2014) (noting that “[b]ecause small and medium-sized enterprises generally purchase services under multiyear (often three- to five-year term) contracts, CLECs today must bid on services that they will be providing three to five years from now”).

<sup>24</sup> See CenturyLink April 7, 2016 Ex Parte at 4-5.

<sup>25</sup> See Windstream Dedicated Services Comments at 79-80; Reply Comments of Windstream Services, LLC With Respect to Its Petition for a Declaratory Ruling, at 9, GN Docket No. 13-5, WC Docket No. 15-1, at 9 (filed Mar. 9, 2015) (“Windstream Petition Reply Comments”). CenturyLink’s reference to Windstream’s recent announced fiber expansion *supports* Windstream’s petition by demonstrating that the availability of unbundled DS1 and DS3 capacity loops enables, rather than discourages, competitive fiber builds. See Windstream Petition Reply Comments at 25-26 (“[I]t is the large ILECs’ positions, not Windstream’s straightforward reading of Sections 51.319(a)(4) and (5), that would suppress network investment and innovation. CLECs’ ability to access UNEs to connect to some locations enables CLECs to build fiber to other locations, especially for serving multilocation customers.”).

<sup>26</sup> See Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket No. 05-25, RM-10593 (filed Apr. 5, 2016) (“Windstream April 5, 2016 Ex Parte”).

CenturyLink also repeats the incorrect assertion made by the incumbent LECs that continued application of the Commission's unbundling rules requires "that ILECs retrofit next-generation loops."<sup>27</sup> As Windstream has explained, granting its petition only means that the incumbent LEC would need to continue to provide DS1 and DS3 *capacity*, at current prices, absent forbearance or a finding of non-impairment.<sup>28</sup> The format of that capacity is left to the incumbent LEC's discretion. Currently, Windstream purchases both copper- and fiber-based unbundled DS1 and DS3 capacity loops, where available.<sup>29</sup>

While CenturyLink continues to ignore the compelling legal and policy grounds for granting Windstream's petition, more supporters have urged the Commission to act.<sup>30</sup> Two additional state government agencies have recently written the Commission in support of Windstream's petition, adding their perspectives to the state agencies, competitive carriers, and consumers of business data services that have already done so.<sup>31</sup> In contrast, opponents have not

---

<sup>27</sup> CenturyLink April 7, 2016 Ex Parte at 5.

<sup>28</sup> See Windstream Petition Reply Comments at 26.

<sup>29</sup> See Windstream April 5, 2016 Ex Parte at 1.

<sup>30</sup> Just today, the Midwest Association of Competitive Communications submitted a letter in support of Windstream's petition. See Letter from Philip J. Macres, Counsel for Midwest Association of Competitive Communications, to Marlene H. Dortch, Secretary, FCC, at 1-2, GN Docket No. 13-5, WC Docket No. 15-1 (filed Apr. 21, 2016) (noting that "[s]mall- and medium-sized business customer locations rely significantly on access to these unbundled high capacity loops to attain affordable TDM-based and Ethernet services from competitive carriers," and that "CLEC-provided services represent one of the most significant sources of competition to ILEC services in the marketplace for such customers").

<sup>31</sup> See Letter from Gregory J. Doyle, Telecommunications Manager, Minnesota Department of Commerce, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket No. 15-1 (filed Mar. 28, 2016) ("In Minnesota, Competitive Local Exchange Carriers (CLECs) are a significant source of competition, primarily serving small and medium size businesses. CLECs lease unbundled DS1 and DS3 capacity loops of the ILEC in the provision of that competitive service."); Letter from Karen Charles Peterson, Commissioner, Massachusetts Department of Telecommunications, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket No. 15-1 (filed Mar. 16, 2016) ("[T]he MDTC concurs with its fellow state commissions and urges the Commission to act promptly on Windstream's petition and clarify an ILEC's obligation to provide DS1 and DS3 capacity loops on an unbundled basis."). See also Letter from David E. Screven, Assistant Counsel, Pennsylvania Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, at 1-2, WC Docket No. 15-1 (filed Mar. 11, 2016); Letter from James Volz, Chairman, et al., Vermont Public Service Board, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Mar. 3, 2016); Letter from Crystal Rhoades, Commissioner, et al., Nebraska Public Service Commission, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Feb. 23, 2016); Letter from Steven V. King, Executive Director and Secretary, Washington Utilities and Transportation Commission, to

Ms. Marlene H. Dortch

April 21, 2016

Page 7 of 7

identified any unaddressed legal issues that would prevent the Commission from promptly reaching a resolution. Accordingly, the Commission should grant Windstream's petition.

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

Sincerely yours,



John T. Nakahata

*Counsel to Windstream Services, LLC*

cc:

Madeleine Findley	Virginia Metallo
Eric Ralph	Thom Parisi
Deena Shetler	Joseph Price
Pamela Arluk	Peter Saharko
Daniel Kahn	Christine Sanquist
William Kehoe	David Zesiger
Christopher Koves	