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Electronic Filing

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

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; High-Cost Universal Service Support, WC Docket No. 05-337; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Universal Service Contribution Methodology, WC Docket No. 06-122; Intercarrier Compensation for ISP-Bound Traffic, WC Docket No. 99-68; Petition of AT&T for Declaratory Ruling and Limited Waivers Regarding Access Charges and “ESP Exemption,” WC Docket No. 08-152; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135

Dear Ms. Dortch:

Windstream Communications, Inc., on behalf of itself and its affiliates (collectively “Windstream”), submits the following response to AT&T’s letter filed October 13, 2008, in the above-captioned proceedings.¹ In its letter, AT&T attempts to outline a cost calculation to support a \$0.0007 per minute terminating rate as being reasonable and cost justified for all price cap carriers. This letter, however, falls well short of its mark. AT&T altogether fails to establish a rational justification for why mid-sized price cap carriers’ access charges should be based on the cost of an IP-enabled “softswitch.” In fact, widespread deployment of softswitch technology would impose huge costs on Windstream’s rural customer base, and therefore would not be economically viable. Indeed, even if deployment of softswitches were viable, AT&T relies on implausible assumptions that grossly underestimate the costs of providing service under a softswitch architecture. Given that it makes no economic sense for Windstream to widely deploy such technologies in the regular course of business, and that AT&T’s assumptions fail to reflect the realities of rural telephony in any event, rates based on AT&T’s softswitch presumption would be contrary to the governing statutes and may even be unconstitutionally confiscatory.

¹ Letter from Henry Hultquist, Vice President-Federal Regulatory, AT&T Services, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 05-337, 99-68, 07-135 (filed Oct. 13, 2008) (“AT&T Letter”).

I. WIDESPREAD DEPLOYMENT OF SOFTSWITCH TECHNOLOGY TO SERVE RURAL VOICE CUSTOMERS WOULD NOT BE ECONOMICALLY VIABLE.

As a mid-sized price cap carrier serving rural areas, Windstream cannot justify the costs of significant deployment of softswitches in its network. Softswitches, accordingly, are used in less than 1 percent of Windstream’s exchanges, and are providing switching functions for less than 1 percent of Windstream’s incumbent local exchange carrier (“ILEC”) residential access lines. Windstream also has not identified any significant opportunities for new revenues or reduced costs that would warrant future material changes to the composition of its switching architecture.²

A. Deployment of Softswitches to Serve Voice Customers Would Impose Immense and Unnecessary Costs on Rural Carriers and Their End Users.

Windstream is a mid-sized price cap carrier focused primarily on serving rural areas. Offering telecommunications services to 3.1 million access lines across 16 states, Windstream’s service territory, on average, has a subscriber density of approximately 20 access lines per square mile. Approximately 70 percent of its exchanges are comprised of 2,000 access lines or less.

In rural areas such as those served by Windstream, widespread deployment of softswitches for service to voice customers is uneconomic and irrational. AT&T provides no reason for why Windstream would begin switching its voice traffic with softswitches, rather than continuing to use its fully functional TDM switches. Across Windstream’s service territory, these measures – whether for Voice over Internet Protocol (“VoIP”) or TDM traffic (AT&T does not specify)³ – would cause Windstream to incur hundreds of millions of dollars in new costs. These burdensome costs, moreover, would yield little or no benefit to its customers.

Unwarranted Replacement of Working TDM Plant.

It makes no economic sense for an ILEC like Windstream, a mid-sized price cap carrier focused on serving rural customers as a carrier of last resort, to deploy a significant number of softswitches to route TDM traffic. Windstream’s TDM switches are providing its customers with high-quality voice and broadband offerings. Moreover, given the expanse of Windstream’s rural service territory, it would be economically infeasible for Windstream to deploy softswitch technology through centralized switching points and aggregate enough lines to achieve the necessary switching synergies.⁴ Windstream would need to replace equipment in almost all of

² Because the market does not demand and will not support the costs of softswitching, Windstream currently deploys softswitching technology only in particularized situations (e.g., when necessary to satisfy the special requests of an anchor tenant customer).

³ AT&T provides no guidance as to how a carrier would use softswitch technology, which can be used for both VoIP or TDM voice traffic. AT&T’s letter merely states that “[i]n next generation networks, it is likely that end-office switching functions will eventually be performed by general purpose packet routers.” AT&T Letter at 1. Such abstract, general speculation about how “likely” and “eventually” these next generation networks could be deployed in rural areas is hardly the factual foundation for the FCC to determine that costs are as low as \$0.0007.

⁴ Replacing each TDM switch with a softswitch would be more efficient than trying to use a single softswitch to support multiple wire centers spread across rural regions. If it opted to aggregate traffic at a single location,

its 1,087 exchanges, together comprising thousands of switching devices. Installing softswitches would cost Windstream approximately \$300,000 per switch, and replacing adjacent proprietary remotes and Digital Loop Carriers would cost it approximately \$250,000 per switching complex. To support the new softswitches, Windstream also would need to rebuild its back office systems, which address provisioning, billing, monitoring, trouble resolution, and fault management of the switching network. When all these costs are considered, Windstream estimates it would spend hundreds of millions of dollars to install and operate the softswitches – to route traffic just like the TDM switches already in place in its network today.

Inefficient Investment in Facilities Needed to Support VoIP.

It makes even less sense for a rural LEC like Windstream to offer VoIP service over softswitches. The use of softswitches to serve VoIP customers would require a massively inefficient expansion of its network capabilities. Consistent with common practice for mid-sized price cap carriers, Windstream installs broadband ports sufficient to support the percentage of its customers forecasted to subscribe to its broadband service (as opposed to competitive cable, wireless, satellite, or other broadband service offerings) in the reasonably foreseeable future. This practice sufficiently meets Windstream customers' broadband demands. The use of softswitch technology for voice traffic, however, would require *all* voice lines to be supported by broadband ports. Thus, in areas where it already offers broadband, Windstream would need to augment existing broadband facilities with additional DSLAMs and other equipment.⁵ These upgrades likely would cause Windstream to spend about the same amount to deploy additional broadband facilities to its remaining access lines as it did for existing broadband-capable access lines – or in the aggregate, hundreds of millions of dollars. These costs, moreover, would play no role in expanding the availability of broadband service to meet consumer demands. This new investment would not be used to reach areas in Windstream's service territory where it does not offer broadband (encompassing approximately 15 percent of Windstream's customers).⁶ Rather, this investment merely would facilitate the provision of IP voice service to areas already offered Windstream's broadband services (which cover approximately 85 percent of Windstream's customers).

backhauling traffic to a centralized location would require tremendous expense to build (or lease) the fiber needed to make this solution "as good as" a TDM Class 5 switch with 911 standalone capabilities. AT&T's simple example does not appear to represent any of the interoffice transport cost to backhaul this traffic for a centralized switching assumption.

⁵ Such other equipment would include, but is not limited to, the following: routers; aggregators; analog terminal adapters at customers' homes; Session Border Controllers; Ethernet-based transport equipment; additional fiber and copper facilities; test equipment; and new back office systems to provide authentication and support for Windstream's network.

⁶ In areas where Windstream does not offer broadband service, significant additional capital costs would be required for installation of broadband facilities. Windstream anticipates that it would need to spend between \$250 million and \$400 million to offer broadband service to the 15 percent of its customer base that currently is not capable of purchasing Windstream's broadband service. These costs would be over and above additional costs that would need to be incurred when installing broadband ports sufficient to support all voice lines.

No Significant Opportunities for New Revenues or Reduced Costs.

Windstream is constantly looking for new revenue streams and means to reduce its costs. But there are no material operational savings or revenue generation opportunities that would warrant significant migration to softswitches for either TDM or VoIP traffic in rural areas served by mid-sized price cap carriers like Windstream. So, for the foreseeable future, the most prudent and economically efficient approach is for Windstream to maintain its existing TDM switches, by relying on its existing knowledge base to service these switches.

Given the sizable, unrecoverable costs described above, state commissions have a longstanding practice – as AT&T concedes – of calculating “the traffic sensitive portion of end-office switching based on the assumption that the terminating carrier employs traditional circuit-switched network technology.”⁷ Consistent with this practice, AT&T, just last year, argued that it would be improper to model costs based on the assumed use of softswitches or other IP-based network technologies. Specifically, in the course of a Texas proceeding evaluating modifications to the Hatfield Associates Inc. (“HAI”) cost model for possible use in calculating state universal service support, AT&T argued that assumptions based on IP technology would be inappropriate even in the context of an expressly forward-looking cost mechanism.⁸ What was true in November 2007 (when AT&T was the largest recipient of Texas Universal Service Fund support and looking to retain or expand its subsidy) remains true today: It is unreasonable for carriers in rural areas to deploy softswitches to serve their end users, and cost models assuming use of those technologies in rural areas have no legitimate factual basis.

B. Even if Rural Carriers Could Widely Deploy Softswitches to Serve Customers, AT&T Dramatically Underestimates Switching Costs Under Its Architectural Presumptions.

Even if it were appropriate to assume that rural carriers could or would install softswitches to serve their customers (and, as described above, it is not), AT&T’s filing misrepresents the cost of switching traffic through softswitches in rural markets. AT&T’s estimates are based on assumptions that grossly overstate the number of rural lines likely to be served through a given switch. Moreover, AT&T’s model simply assumes away transport costs and unreasonably classifies only 20 percent of all switching costs as traffic-sensitive, thereby leaving rural customers to face gargantuan rate increases as carriers struggle to cover these ignored expenses.

First, AT&T grossly overestimates the number of subscribers a rural carrier could serve through a given switch. The AT&T Letter relies extensively on cost claims made by the softswitch manufacturers. Specifically, AT&T cites an “investment per line” figure assuming a

⁷ AT&T Letter at 1.

⁸ AT&T took up this position in its witness testimony and informal workshops held by the state commission. *See, e.g.*, Direct Testimony of Steven E. Turner on Behalf of AT&T Texas at 14 (Nov. 16, 2007) (opposing the use of IP switching for the purpose of calculating investments). *See also* Direct Testimony of Michael Mathews and Jason Zhang on Behalf of Verizon Southwest at 20-21 (Nov. 30, 2007) (explaining why Verizon declined to account for softswitch capabilities when modeling switching costs and noting that a “‘scorched earth’ approach has not been approved for any [such] costing methodology of which [it is] aware”).

range between \$34 and \$80 per line.⁹ On several occasions, however, the letter reveals disquieting assumptions underlying these claims. For example, AT&T notes that “modular softswitches may support 70,000 subscribers in standalone installations, or up to 250,000 subscribers in distributed installations,”¹⁰ and that the Taqua 7000 “can serve up to 42,000 subscribers.”¹¹ To the extent these assumptions drive the manufacturers’ (and thus AT&T’s) per-line investment figures, these figures fail to reflect the realities of rural telephony. Like other mid-sized price cap carriers serving rural regions, Windstream’s average wire center service areas include substantially fewer customers than those of larger carriers. Windstream serves 1,087 exchanges with an average of approximately 2,700 lines per exchange – several orders of magnitude below the line-count figures on which AT&T’s “investment per line” figures appear to be based.¹²

Second, AT&T’s cost calculation altogether disregards *tandem switched transport* costs. These costs are incurred to support tandem switching and interoffice transport (miles of cable and wire) connecting tandem switches to the end offices. Tandem switched transport costs currently are accounted for in the existing intercarrier compensation regime. But without any justification, AT&T ignores these costs in its cost calculation. This is a significant omission: With respect to interstate traffic alone, Windstream currently recovers \$.0048 per minute for tandem switched transport costs in a TDM environment – which amount to tens of millions of dollars per year. If it were to move to a VoIP-based regime, Windstream expects its transport costs could increase, because VoIP trunking requirements and quality of service provisioning would require inherently more bandwidth on its network.

Third, in its calculation of per-minute switching costs, AT&T allocates only 20 percent of the softswitch investment per line to traffic-sensitive costs, which can be recovered from network users.¹³ This allocation is a significant departure from TDM switching cost models, which in Windstream’s experience assign anywhere from 80 to 91 percent of switching investment to traffic-sensitive costs. But due to the altogether unverified cost allocation AT&T puts forth, carriers, going forward, could seek to recover 80 percent of their per-line investment only from other sources – presumably end user customers.

II. IT WOULD BE UNLAWFUL TO BASE MID-SIZED PRICE CAP CARRIERS’ RATES ON ASSUMED USE OF A NETWORK ARCHITECTURE THAT IS NOT VIABLE IN THE VAST MAJORITY OF THEIR SERVICE TERRITORIES.

Given that deployment of softswitches to serve Windstream’s voice customers is generally uneconomic, ratemaking decisions based on AT&T’s softswitch assumption would be

⁹ AT&T Letter at 3.

¹⁰ *Id.* at 2, n.6.

¹¹ *Id.* at 4.

¹² See *supra* note 4 (explaining why it would not be more efficient to aggregate traffic for multiple rural areas at a single location).

¹³ In contrast, costs that are not traffic sensitive typically are recovered directly from end users rates.

flatly unlawful. Recent reports indicate that the Commission is considering a holding that all termination – whether associated with local, intrastate, or interstate traffic – is subject to “reciprocal compensation” under Section 251(b)(5) of the Act.¹⁴ Section 252(d)(2), in turn, prescribes that “reciprocal compensation” rates must “provide for the mutual and reciprocal recovery by each carrier of costs associated with the *transport* and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier,” and must “determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.”¹⁵ Section 201(b) similarly states that all charges associated with interstate and international traffic must be “just and reasonable.”¹⁶

In Windstream’s case, however, the proposed \$0.0007 rate – grounded in counterfactual technological assumptions – would *not* “provide for ... recovery ... of costs associated with ... transport and termination” of calls, nor would it represent a “reasonable approximation of the additional costs of terminating such calls.” To the contrary, the rate defended by AT&T effectively would bear no relationship whatsoever to the costs of mid-sized price cap carriers serving rural consumers. Even if it were the case that a softswitch would be more efficient once deployed – and AT&T substantially overstates its case for those efficiencies – the costs of deploying and operating additional network elements and functions would themselves be massive, running to hundreds of millions of dollars or more for Windstream alone. The proposed \$0.0007 would leave carriers completely unable to recoup such costs, and thus would violate Section 252(d)(2) and any other pertinent pricing provision.

Indeed, application of the \$0.0007 rate at issue here could rise to a violation of the Fifth Amendment to the United States Constitution, which states that “private property [shall not] be taken for public use, without just compensation.”¹⁷ As the Supreme Court has explained: “[T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.... If the rate does not afford sufficient compensation, the [regulator] has taken the use of utility property without paying just compensation and so violated the Fifth ... Amendment[.]”¹⁸ Under this standard, rates must permit the recovery of the regulated company’s costs, including a reasonable return on investment: “From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.”¹⁹ Indeed, “return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”²⁰ As described above,

¹⁴ See, e.g., Adam Bender, *Martin Unveils USF, Intercarrier Compensation Overhaul*, COMM. DAILY 3 (Oct. 16, 2008).

¹⁵ 47 U.S.C. § 252(d)(2)(A) (emphasis added).

¹⁶ *Id.* § 201(b).

¹⁷ U.S. CONST. AMD. V.

¹⁸ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989). See also *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974) (noting that the Constitution requires “that the rates fixed by the [regulator] be higher than a confiscatory level”).

¹⁹ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

²⁰ *Id.* at 602. See also *Duquesne Light*, 488 U.S. at 310 (“[W]hether a particular rate is ‘unjust’ or ‘unreasonable’ will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting system, and

rates based on a softswitch presumption would fail to cover the costs of carriers such as Windstream, for whom broad deployment of such facilities would not be economic. Depending on how they are applied, such rates not only could be inconsistent with the applicable statutory provisions, but also could be unconstitutional to boot.

Notably, the use of a hypothetical “most-efficient network” assumption for purposes of pricing unbundled network elements (“UNEs”) under the Total Element Long-Run Incremental Cost (“TELRIC”) standard provides no support for reliance on hypothetical network components here. Although the Commission initially determined that Section 252(d)(1) (which governs UNE pricing) and Section 252(d)(2) (which governs reciprocal compensation pricing) were “sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions,”²¹ the Supreme Court decision upholding TELRIC was limited to the UNE pricing provision, which it held represented an “explicit disavowal of the familiar public-utility model of rate regulation.”²² As AT&T itself argued last year, the application of similar “most-efficient network” assumptions to intercarrier compensation rates “would hurt not just price cap LECs, but consumers everywhere because [the resulting] prices would dampen investment and facilities-based competition and thereby undercut a principal goal of the 1996 Act and this Commission.”²³ Unlike the 1996 Act’s network-opening local competition provisions, designed “to reorganize markets,”²⁴ intercarrier compensation rates must – as described above – cover carriers’ costs.

In short, while a softswitch presumption may at first glance offer a convenient basis for the \$0.0007 per minute rate that AT&T supports, it does not accord with the economic facts faced by mid-sized price cap carriers. For providers such as Windstream, which cannot identify any economically viable reason to deploy a significant number of softswitches in the foreseeable future, application of softswitch-based rates to services that currently rely on the existing circuit-switched network would be baseless and financially disastrous. As AT&T put it in the special access context last year, “[a]ny attempt to mandate potentially confiscatory multi-billion dollar rate decreases on the basis of such transparently arbitrary short-cut measures would have no hope of surviving judicial review.”²⁵

on the amount of capital upon which the investors are entitled to earn that return.”); *Bluefield Water Works & Improvement Co. v. Public Service Comm’n of West Virginia*, 262 U.S. 679, 692-693 (1923) (“A public utility is entitled to such rates as will permit it to earn a return ... equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.”); *Alabama Cable Telecommunications Assoc., Comcast Cablevision of Dothan, Inc., et al. v. Alabama Power Company*, 16 FCC Rcd 12209, 12230 ¶ 47 (2001) (discussing same).

²¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16023 ¶ 1054 (1996).

²² *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 489 (2002).

²³ Reply Comments of AT&T, WC Docket No. 05-25 at 31 (filed August 15, 2007) (“AT&T Special Access Reply Comments”).

²⁴ *Verizon*, 525 U.S. at 489.

²⁵ AT&T Special Access Reply Comments at 42.

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In conclusion, AT&T's filing fails to provide adequate support to justify a \$0.0007 uniform rate, particularly in rural areas. Imposing such a rate would be contrary to the statute and may even be unconstitutionally confiscatory. The Commission, therefore, should not rely on AT&T's filing as a basis for setting intercarrier compensation rates for mid-sized price cap carriers.

Respectfully submitted,

/s/ Eric N. Einhorn

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