Eric N. Einhorn
Senior Vice President, Government Affairs
Windstream Corporation
1101 17th Street, N.W., Suite 802
Washington, DC 20036

(202) 223-7668
eric.n.einhorn@windstream.com

windstream

VIA ECFS ***EX PARTE***

November 22, 2013

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

Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, RM-10593; Technology Transitions Policy Task Force, GN Docket No. 13-5; Petitions to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Connect America Fund, WC Docket No. 10-90*

Dear Ms. Dortch:

Windstream Corporation ("Windstream") writes to share the concerns raised by other purchasers of AT&T's special access services regarding AT&T's plans to cease offering new term plans longer than 36 months for TDM services.[1] Windstream urges the Commission to suspend and investigate any tariff revision filed by AT&T designed to effectuate AT&T's announced plans, and then take any actions needed to avoid anticompetitive effects.

Despite investing billions of dollars in recent years to expand and upgrade its network throughout its incumbent (ILEC) and competitive (CLEC) local exchange areas, Windstream's substantial CLEC operations still rely on AT&T's ILEC facilities for last-mile access to serve consumers in AT&T operating territories. In many cases, it is not economically feasible for Windstream, or any other competitive provider, to extend its non-incumbent facilities over the "last-mile," especially when addressing single-tenant buildings. Windstream, therefore, purchases large quantities of last-mile access from AT&T under special access tariffs.[2]

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1 *See, e.g.*, Letter from Cbeyond *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and 10-90, RM-10593, GN Docket Nos. 13-5, 12-353, filed Oct. 18, 2013 ("Cbeyond Oct. 18, 2013 Ex Parte"); Letter from CALTEL *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and 10-90, RM-10593, GN Docket Nos. 13-5, 12-353, filed Nov. 7, 2013 ("CALTEL Nov. 7, 2013 Ex Parte").

2 This focus on special access, rather than DS1 and DS3 unbundled network element (UNE) loops, is in large part due to AT&T's implementation of the *Triennial Review Remand Order* that provides limitations on DS1 and DS3 unbundled network element (UNE) loops in many urban wire centers. *Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-290, WC Docket

AT&T currently offers DS1 and DS3 special access circuits at substantial "discounts" based on the length of the term commitment the purchaser is willing to make. Special access customers, such as Windstream and other CLECs, must buy special access circuits under five- or seven-year term commitments to qualify for AT&T's lowest pricing – far less than shorter-term (or month-to-month) pricing – regardless of whether or not the underlying end-user customers are willing to sign up for matching five- or seven-year retail contracts. In addition to individual circuit term commitments, these contract tariff volume discount plans require carriers to maintain paid circuit volumes at levels attained prior to the execution of these agreements over the full term of the contract (often three to seven years) to continue to qualify for any of these discounts (also referred to as the "lock-up" provisions).[3] Not only does AT&T receive a relatively guaranteed revenue stream from the CLEC over the term of each individual circuit due to the customary large early termination liability that applies to breaking a term commitment, these "lock-up" provisions also assure AT&T of maintaining the aggregate revenue stream over the full term of the tariff discount plans.

AT&T has made its desire to retire its TDM services by 2020 well known.[4] Under the guise of unilateral efforts to effectuate this result through eliminating the possibility that AT&T would be bound to provide DS1 and DS3 service under term commitments beyond 2020, AT&T is proposing to eliminate the most competitively significant service offerings from its special access tariffs – five- and seven-year term commitment pricing.

As discussed by a variety of other purchasers of AT&T's special access service, AT&T's elimination of its five-year and longer term discount plans is effectively a rate increase for AT&T's DS1 and DS3 services.[5] With the elimination of longer-term plans, purchasers of DS1 and DS3 special access service, such as Windstream, would be forced either to pay the higher three-year-term rates or purchase the closest bandwidth Ethernet equivalents, which, as discussed below, are frequently not substitutable. Despite claiming that its elimination of five-year and

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No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (rel. Feb. 4, 2005)("*Triennial Review Remand Order*").

[3] *See, e.g.*, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 37, 7th Revised Page 37-1, 15th Revised Page 37-2; Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13, 10th Revised Page 309.5, 11th Revised Page 309.6, 7th Revised Page 309.6.1, 12th Revised Page 309.7, 9th Revised Page 309.7.1; Pages 309.5-309.7.1. Level 3 has previously explained its own experience with such lock-up provisions. *See* Letter from Erin Boone, Senior Corporate Counsel-Federal Regulatory Affairs, Level 3 to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and 10-90, RM-10593, filed Mar. 1, 2012.

[4] *See* Petition to Launch a Proceeding Concerning the TDM-To-IP Transition, *AT&T Petition to Launch a Proceeding Concerning the TDM-To-IP Transition,* GN Docket No. 12-353 (filed Nov. 7, 2012).

[5] *See, e.g.*, Cbeyond Oct. 18, 2013 Ex Parte, CALTEL Nov. 7, 2013 Ex Parte.

longer term discounts is not driven by economics, AT&T has yet to explain why it cannot offer the level of discount applicable to five-year and longer term discounts to three-year term commitments.

Circuits provided through AT&T's special access tariff remain critical to CLECs' ability to provide competitively-relevant alternatives to AT&T because Ethernet is not fully substitutable.[6] As an initial matter, Ethernet is not ubiquitous – in particular, many single-tenant buildings are not served by fiber. While AT&T "offers" to construct fiber to such locations, its special construction charges are exorbitant, and are sometimes further inflated by unexplained charges that can increase such already high quotes by more than 50%.[7] In addition, the length of time for AT&T to complete such special construction can result in substantial delays in the process of Windstream initiating service to new customers. These special construction charges and extended construction provisioning intervals raise serious questions about the reasonableness of AT&T's 2020 target date and its ability to achieve that goal, including what part AT&T is assuming special construction charges billed to its wholesale customers will play in funding it.

Second, Ethernet service is not substitutable for DS1 special access service, at least at present, due to the pricing structure of AT&T's lower-capacity Ethernet service. Ethernet is built to be a particularly high-capacity service. Ethernet, as a result, is rarely purchased today at speeds lower than 10 Mbps.[8] Low-bandwidth customers in single-tenant buildings – which often are small businesses – instead typically purchase service in the capacity range of 2 to 5 Mbps, because DS1 pricing at five-year and longer terms is far more favorable than Ethernet pricing. AT&T's recent action suggests that the company effectively is seeking to increase the prices charged to these customers in single-tenant buildings, by raising prices for their special access services and ultimately driving them to a more expensive Ethernet offering. This shift is contrary to the FCC's efforts to ensure that customers only pay for the communications services they need, and no more.[9]

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[6] Windstream's discussion of AT&T's Ethernet services refers to Ethernet over fiber. To the extent that Windstream seeks to deploy Ethernet over copper, it must purchase the very copper-based special access services that would be affected by AT&T's plans.

[7] For example, Windstream received a 10 Mbps Ethernet special construction quote last month from AT&T for $99,685 (material, labor, and taxes) to which "revenue recovery charges in the amount of $53,125" also applied.

[8] And even if there were demand for it, as indicated above, this product today likely would have limited availability given the lack of ubiquitous fiber coverage.

[9] *See, e.g.,* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298524A1.pdf (advising customers to "choose a service tier that offers the best value"). To help customers determine which service offers them the best value, the FCC released a "Broadband Speeds Guide," available at http://www.fcc.gov/guides/broadband-speed-guide.

The effective price increase resulting from discontinuance of five-year and longer term commitment discounts would logically mean business end users, by extension, will see the prices for competitive options go up, and a resulting decrease in demand for CLEC services would put significant pressure on the ability of CLECs to otherwise maintain the circuit volumes discussed above that are necessary to qualify for any tariff discounts for DS1 and DS3 circuits. Thus, Windstream and similarly-situated CLECs could not only lose this additional discount on DS1 and DS3 circuits that they would have ordered (either as initial orders or "re-termed" circuits in service) on five-year terms, but also would lose this additional discount on its continuing base of in-service five-year-term circuits. AT&T has not yet addressed how these lock-up provisions would be handled either during the interim transition period leading up to its self-imposed 2020 IP Transition deadline, or how they would be addressed if these DS1 services are no longer available after 2020.

Looking further ahead, AT&T's unilateral plan for transitioning the PSTN in its ILEC footprint does not bode well for future competition in the business services marketplace. AT&T's justification for its effective price increase has been reported as the supposed need to "wean" CLECs (and others) off of AT&T's TDM network,[10] yet, at the same time, as discussed above, Windstream is unaware of any concrete plans for full deployment of a replacement fiber-based network.[11] And, assuming that AT&T's special construction charges are indicative of the cost that it will incur to construct such a network, it is not apparent how AT&T will fund this deployment. It is also difficult to determine what the future would hold specifically with respect to potential elimination of other term discount (or perhaps volume) pricing. Will AT&T be announcing plans to eliminate three-year term discounts two years from now? Will AT&T soon be eliminating <u>all</u> discounts? The implications for business market consumers are too great for the Commission to leave such questions unanswered.

In light of these considerations, Windstream respectfully requests that the Commission suspend and investigate any tariff revision filed by AT&T to effectuate AT&T's plans to discontinue its five-year and longer term discounts, and then take any actions necessary to avoid

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10 Ryan Knutson, *Rivals Protest AT&T Rate Shift*, WALL STREET JOURNAL, October 23, 2013.

11 AT&T's November 7, 2012, press release touting its investment plans, for example, only promised to bring its fiber reach 50 percent of multi-tenant office buildings by the end of 2015 – three years later. *See* AT&T to Invest $14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services, http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661 (last visited Nov. 19, 2013). Considering that AT&T presumably already had a head start on such deployment and that it would likely tackle the easier and more economically-attractive projects first, it seems hard to imagine how AT&T could reach the remaining 50 percent in the four years before January 1, 2020. Further, AT&T's silence about its plans for single-tenant locations leaves us to guess about its plans, if any, for those locations. AT&T's plans give the impression that businesses at single-tenant locations are, at best, an afterthought.

anticompetitive effects. The Commission should not approve AT&T's tariff changes without first ensuring full mitigation of the anticompetitive effects of the resulting rate increases. Consumers and providers need substantially more detail regarding AT&T's Ethernet deployment plans, as it is critical that business and government end users continue to have access to multiple, competitively priced choices for their high-speed broadband needs. *Particularly given that AT&T's stated primary concern is only to ensure that service terms do not chronologically extend beyond their internal goal of completing the IP Transition by 2020, the pricing of special access services between now and 2020 should not need to increase.* If the Commission does permit AT&T to make the requested changes to its tariff discount plan offerings, conditions should be added to mitigate the effect of any such termination of five- and seven-year term discount pricing. At a minimum, AT&T should be required to recompute its three-year term discount rates using AT&T's current five-year and longer term discount percentages.

Access to DS1 and DS3 TDM circuits remains critical to ensuring that business and government entities continue to have meaningful competitive choices available to them. AT&T should not be permitted to revise its tariffs in a manner that dramatically increases the rates on circuits critical to enabling competition in the business services marketplace.

Please feel free to contact me if you have any questions or need any more information.

Respectfully submitted,

/s/ Eric N. Einhorn

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