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April 28, 2014

Mr. Jonathan Sallet
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ms. Julie Veach
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *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

Dear Mr. Sallet and Ms. Veach:

Windstream Communications, Inc., on behalf of its affiliates and subsidiaries, ("Windstream") is filing this ex parte submission to elaborate on its response to AT&T's proposed IP transition trial in Kings Point as well as to recommend necessary steps to be included in the Commission's managerial framework for "deciding the large-scale legal and policy issues arising from the IP transitions."[1]

In its *Technology Transitions Order*, the Commission identified four "enduring," "core statutory values" embodied in our communications laws— "public safety, universal service, competition and consumer protection."[2] The Commission made clear: "[T]here is no choice between embracing technological change and protecting values. Rather, preserving network values advances the technological progress."[3] To protect these values with respect to the experiments it solicited, the Commission established "a basic set of values-based conditions that

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[1] *Technology Transitions, et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, FCC 14-5, 29 FCC Rcd. 1433, Separate Statement of Chairman Thomas E. Wheeler (rel. Jan 31, 2014) ("*Technology Transitions Order*").

[2] *Id*. at 1441, 1444-45, 46 ¶¶ 23, 33, 37.

[3] *Id*. at 1441 ¶ 23.

any proposed experiment must satisfy."[4] Among these were specific conditions to preserve competition, including specifically the directive to "Maintain Wholesale Access."[5]

In the very first IP transition trial proposal presented to the Commission, AT&T thumbs its nose at the core value of competition and the conditions set by the Commission to protect and preserve it. Rather than breathing new life into the communications sector, AT&T's plans could choke off entire providers and the beneficial services they deliver to the millions of small businesses, non-profits, and government agencies that choose those providers because of superior innovation, service and value. If the Commission does not stick to the core values and conditions it has articulated—and lets AT&T dictate the terms of the transition—the IP transition could have the perverse effect of creating a different sort of transition altogether—a transition to fewer providers and reduced innovation and service options for consumers.

As a company with interests nearly evenly weighted between incumbent and competitive local exchange carrier operations, Windstream brings a unique and balanced perspective to competitive access debates. Windstream, the fifth largest ILEC in the nation, provides broadband, voice, and video services to mostly rural consumers across 18 states, as well as wholesale access to competing providers. At the same time, Windstream provides advanced communications and technology solutions, including managed services and cloud computing, to more than 600,000 businesses nationwide—a part of Windstream's business that is growing rapidly.[6] To enable its services, Windstream operates the nation's fifth largest fiber network (spanning approximately 118,000 miles). However, that still leaves a vastly larger area of the country where Windstream is not the ILEC, and where it is not economically feasible to build last-mile facilities alongside the incumbents' existing infrastructure, except to serve the very largest customers.[7] For its small and medium-sized business customers, Windstream typically must rely on the incumbent's existing infrastructure—a reality Congress anticipated and provided for when it enacted the Telecommunications Act of 1996.

Consistent with pro-competition conditions adopted in the *Technology Transitions Order*, as well as with COMPTEL's proposed managerial framework, the Commission's top priority with respect to competition should be ensuring access by competitors to last-mile facilities on reasonable rates, terms and conditions.[8] This does not mean preserving TDM technologies. Windstream and other competitors seek to speed the IP transition and look forward to the

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4 *Id*. at 1442-43 ¶ 26.

5 *Id.* at 1453 ¶ 59.

6 Approximately 60 percent of Windstream's total company revenues come from the provision of business services.

7 As discussed below, this is consistent with the Commission's conclusions. *See* nn.36-40, *infra*, and accompanying text.

8 *See* Letter from Angie Kronenberg, on behalf of Windstream, Bandwidth, HyperCube, Inteliquent, U.S. TelePacific, Level 3 Communications, Granite Telecommunications, tw telecom, EarthLink, Integra Telecom, Cbeyond, XO Communications, and COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353, WC Docket Nos. 10-90 and 05-25, RM-10593 and RM-11538 (dated Feb. 6, 2014) ("COMPTEL Managerial Framework Letter").

opportunities that it presents. But in the post-IP transition world, competitors still will need equivalent access to last-mile facilities and services to continue offering business services to millions of customers. Changing loop electronics from TDM to IP does not alter the fundamental economics of digging trenches and installing conduit and fiber. Unless CLECs can maintain wholesale access through and after the IP transition, many businesses and government entities that have chosen competitive providers because of their superior service and value will be forced to transition back to the incumbent, with no recourse when incumbent service or pricing is unsatisfactory.

To uphold the statutory value of competition—and to protect small and medium-sized "main street" business consumers—the Commission should take two steps. First, with respect to AT&T's proposed trials, the Commission should require AT&T to abide by the wholesale access conditions already set—including providing IP equivalents to DS1 and DS3 special access services and UNEs at equivalent rates, terms and conditions, with no contractual penalties applying when customers migrate to IP alternatives. The Commission should not allow AT&T to drag its feet in meeting these conditions. As AT&T told the Commission, "If conducting these trials causes operational difficulties for existing ILEC-CLEC arrangements in the affected wire centers, that is a reason to hold the geographically limited trials as soon as possible, not a reason to delay them. The alternative is to remain blind to all these challenges until the final stages of the TDM-to-IP transition are underway nationwide."[9]

Second, the Commission should include in its managerial framework an immediate rulemaking to extend its core values and conditions for IP transition trials to policies that will govern the entire IP transition, and to provide further definition to those conditions and a reasonable process for evaluating whether they are met before any TDM discontinuances are authorized. In particular, through this rulemaking, Windstream recommends that the Commission act in the near term to:

- ensure that incumbents do not diminish or degrade wholesale access needed to make it economically feasible for competitors to establish last-mile connections;
- ban Minimum Revenue Commitments ("MRCs") and early termination fees that penalize wholesale purchasers seeking to replace TDM services with IP services; and
- clarify and limit acceptable special construction charges, which have become a key economic variable for last-mile access.

By taking these steps to set a clear baseline for the IP transition, the Commission can best ensure that competition—and its benefits of greater innovation, improved services, and better prices for consumers—will continue.

<u>AT&T's Proposed Trial in Kings Point</u>

Windstream requests that the Commission find that the wholesale and enterprise components of AT&T's proposed trial are fatally flawed, because AT&T has not established that its trial will meet all the Commission's clearly articulated competition-related conditions—

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9 Reply Comments of AT&T at 10, GN Docket No. 12-353 (filed Feb. 25, 2013), *quoted in Technology Transitions Order*, 29 FCC Rcd. at 1453 n.92.

including that comparable services for any DS1 and DS3 services and UNEs be made available at equivalent prices, terms and conditions. So far AT&T has failed to provide this important assurance.[10] If not corrected, competitors will be placed at a striking disadvantage: AT&T will be able to woo customers with new IP replacement products, while competitors will be left with extreme uncertainty regarding continued access to last-mile facilities. This troublesome scenario would be contrary to AT&T's own previous advice that wholesale trials must begin "as soon as possible."[11]

Preserving competition through the IP transition and beyond is *not* about favoring CLECs as competitors; it is about preserving choices and competitive pressures for improved services and prices for small and medium-sized businesses and comparably sized locations. As the Commission recognized in the *National Broadband Plan*,

> Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband provide critical inputs from one another. Because of the economies of scale, scope and density that characterize telecommunications networks, well functioning wholesale markets can help foster retail competition, as it is not economically or practically feasible for competitors to build facilities in all geographic areas.[12]

Our customers choose Windstream over AT&T because Windstream offers them superior value, with service tailored to their needs. As in Kings Point, these Windstream customers largely are "main street" businesses, such as medical practices, pharmacies, and insurance brokers, that are the backbone of their local economies. They generally require limited amounts of bandwidth, which can be delivered using DS0s, DS1s, or DS3s. If AT&T can increase the costs of last-mile access for Windstream and other CLECs—thus necessitating increased prices to these main street businesses—AT&T too will be able to raise its prices to them. Wholesale price hikes may even force CLECs to exit the market altogether, and customers therefore would lose the ability to purchase the competitors' innovative and tailored services.[13]

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[10] *See* Reply to Comments of AT&T Services, Inc. at 29, GN Docket Nos. 13-5 and 12-353 (stating that its retail IP replacement services will be available for resale "on commercial terms.") (filed April 10, 2014) ("AT&T Reply"). AT&T says it is prepared to move forward with the trials in the test wire centers subject to what it views as "the *key* competition-related condition established in the *Technology Transitions Order*—that is, limiting the involvement of wholesale customers at the initiation of the trial to those that participate ***voluntarily***." AT&T Reply at 26 (first emphasis added, second emphasis in original). But the Commission never said that AT&T could pick-and-choose from among its conditions, and AT&T never commits to be subject to *all* of them.

[11] *See* n.9, *supra.*

[12] Federal Communications Commission, *National Broadband Plan*, Report at 47 *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf ("*National Broadband Plan*").

[13] The Commission has long recognized that by raising rivals' costs, the seller of an input with market power can raise the market price for all consumers, to their detriment. *See Petition of*

The *Technology Transitions Order* correctly recognized that "[c]ompetitive LECs often serve customers by relying on incumbent LECs' last-mile networks, including by leasing a variety of copper-based UNEs and TDM-based DS1 and DS3 special access services."[14] As the Commission has repeatedly found, it is generally uneconomic for CLECs to build out to serve less than multiple DS3s of customer demand—which is consistent with Windstream's experience.[15] As such, the *Order* established certain baseline requirements—termed "conditions"—for any trial with respect to wholesale access.[16] Of particular concern to Windstream are four of these requirements:

- Comparable services must be available "at equivalent prices, terms, and conditions."[17]
- "[P]rices or costs of such access do not increase as a result of the experiment."[18]
- Replacement wholesale inputs must "offer substantially similar wholesale access to the applicant's network."[19]
- The applicant's plan must "ensure that neither wholesale nor retail customers are penalized as a result of the experiment (*e.g.*, purchases of alternative services count

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Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, Memorandum Opinion and Order, FCC 10-113, 25 FCC Rcd. 8622, 8639-41, ¶ 34 and n.102 (2010). ("*Qwest Phoenix Forbearance Order*"). *See also Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, 12 FCC Rcd 15,756, 15,803 ¶ 83 (1997) ("a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input."); *News Corp. and The DirecTV Grp., Inc., Transferors, & Liberty Media Corp., Transferee*, Memorandum Opinion and Order, FCC 08-66, 23 FCC Rcd. 3265, 3295 (2008) ("[W]here a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors. By doing so, the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete."), *citing* Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L. J. 513, 527-38 (1995) and Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L. J. 209, 234-38 (1986).

14 *Technology Transitions Order*, 29 FCC Rcd. at 1453 ¶ 59.

15 *See* discussion at n.50 *infra*.

16 *Technology Transitions Order*, 29 FCC Rcd. at 1453 and 1528, ¶ 59 and Appendix B ¶ 35.

17 *Id.* at 1453 ¶ 59.

18 *Id*. at 1528 Appendix B ¶ 35.

19 *Id.* at 1453 ¶ 59.

> towards discounts for purchases outside of the experiment areas, early termination fees are waived if early termination is caused by the experiment)."[20]

AT&T's trial proposal with respect to wholesale services—as embryonic as it is—flunks these conditions. To begin with, AT&T refuses to accommodate the provision of customer-requested bandwidth at equivalent pricing, terms and conditions. On reply, AT&T characterizes the condition that prices, term and conditions for comparable replacement services "be 'equivalent' to current offers" as merely an "expectation" by the Commission (not a requirement), and expressly rejects the notion there will be "some form of price ceiling on replacement services."[21] AT&T only commits to making alternative IP-based services available on "commercial terms"[22] —which, as indicated by AT&T's practices to date, could be very different from terms pertaining to regulated TDM offerings if these alternative products are not subject to a price ceiling.[23]

With respect to UNE DS1s and DS3s, AT&T expressly disavows any plans to ensure that the access provided through unbundling "is functionally equivalent to that provided immediately before the experiment," notwithstanding the Commission's direction.[24] In its reply comments, AT&T disclaims any obligation to continue to provide UNE DS1s and DS3s after the IP transition, stating, "any obligation (with which AT&T will comply) to provide unbundled access to DS1s and DS3s is limited to those situations where TDM remains in place."[25] As discussed further below with respect to the managerial framework, AT&T is simply wrong, selectively quoting from the *Triennial Review Order*[26] and ignoring entirely the *Triennial Review Remand*

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20 *Id.* at 1528, Appendix B ¶ 35.

21 AT&T Reply at 32, n.79. AT&T also complains that this so-called "expectation" was "without the benefit of comment by the incumbent LECs." *Id.*

22 AT&T Reply at 29.

23 A comparison of the AT&T tariffed rack rates for its TDM products to the rack rates for the proposed IP alternatives shows a significant price increase for wholesale customers, and installation intervals for the IP products may be significantly longer than the corresponding intervals for TDM products. *Compare* AT&T Interstate ILEC Guidebook, Switched Ethernet (ASE), Part 5, Section 4, *available at:* http://cpr.att.com/pdf/is/0005-0004.pdf and http://cpr.att.com/pdf/is/filings/appr/GBIS-13-0021.pdf, with *e.g.*, BellSouth Telecommunications, Tariff FCC No. 1 § 7.5.9, *available at* http://cpr.att.com/pdf/fcc/1007b.pdf. Windstream will separately provide specific data with respect to average UNE and TDM special access costs with AT&T, as they compare with the costs for AT&T's Ethernet services.

24 *Technology Transitions Order*, 29 FCC Rcd. at 1528, Appendix B ¶ 35.

25 AT&T Reply at 40.

26 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand And Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16,978 (2003) ("*Triennial Review Order*" or "*TRO*").

Order.[27] And for the purposes of the trial, AT&T's position is flatly contrary to the Commission's direction that comparable services to traditional wholesale access inputs be available at "equivalent prices, terms, and conditions."[28]

Furthermore, AT&T is utterly silent as to how a wholesale customer's purchase of a replacement IP product will be treated with respect to Minimum Revenue Commitments or early termination fees for legacy TDM services. AT&T is not allowed to hide this ball. As the Commission stated, an applicant's plan must "ensure that neither wholesale nor retail customers are penalized as a result of the experiment (*e.g.*, purchases of alternative services count towards discounts for purchases outside of the experiment areas, early termination fees are waived if early termination is caused by the experiment)."[29] To avoid penalizing customers, purchases of the catch products must reduce the MRCs for the TDM services they would replace, and early termination fees should be not applied when a customer migrates to an IP offering.

AT&T's statement that CLECs are somehow advantaged during the trial because they will be offering traditional TDM service while AT&T will be attempting to convert customers to IP offerings is nothing short of fanciful.[30] In the first instance, it is very difficult to square this assessment of competitive advantage with AT&T's repeated remarks that IP services are superior to TDM offerings.[31] But even more significantly, CLECs will be marketing their services in an environment in which the future availability and pricing of critical last-mile facilities and services are uncertain. These competitors face the prospect of entering into long-term contracts on the assumption that they will continue to be able to purchase equivalent services at equivalent rates, terms and conditions after the transition, or attempting to price those future unknown input services, rates, terms and conditions into their contracts. This is not an advantage; it is significant uncertainty, and a significant disadvantage. Thus, it is important that the Commission continue to require that AT&T provide equivalent services at equivalent prices, terms and conditions, and not delay in finding that the wholesale component of AT&T's trial is fatally flawed.

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27 *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, FCC 04-290, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

28 *Technology Transitions Order*, 29 FCC Rcd. 1453 and 1528, ¶ 59 and Appendix B ¶ 35.

29 *Id*. at 1528, Appendix B ¶ 35.

30 *See* AT&T Reply at 33 ("[W]holesale customers will have their own marketing advantages during the initial phase of the trials, as they will be offering familiar services to customers while AT&T is seeking to induce customers to switch to new IP retail offerings that may be unfamiliar to them.").

31 *See* AT&T Proposal for Wire Center Trials at 3-4, GN Docket Nos. 13-5 and 12-353 (filed February 27, 2014) ("IP-based services offer greater functionality than circuit-switched telephony ever could offer, and the 'value gap' will only widen with the continuing integration of IP networks with cloud computing and the Internet of things.").

<u>Managerial Framework Recommendations</u>

The shortcomings of AT&T's trial plans highlight the need for the Commission to establish core ground rules to govern the IP transition. Setting these ground rules and joining them to a viable enforcement process are key initial tasks for the managerial framework. With respect to wholesale competition, these ground rules should build on the values and conditions that the Commission established for the trials and should, at a minimum, ensure competition is not further impaired—even as the Commission continues to reexamine its existing special access rules in light of the lack of special access alternatives and the updated analytical framework adopted in the *Qwest Phoenix Forbearance Order*.[32] Of course, preserving the status quo is not a stopping point, but only a starting point for a pro-consumer, pro-innovation rationalization of the "hodgepodge" of existing wholesale regulations.[33] Such an overhaul was recommended in the *National Broadband Plan* and, more recently, in COMPTEL's proposed managerial framework, which Windstream supports.[34]

In particular, the Commission should take several, near-term steps, including a combination of rules and declaratory rulings, to preserve the status quo with respect to the availability of last-mile access at equivalent rates, terms and conditions while the Commission completes its long-overdue review of the state of competition in the special access market:

1. The Commission should immediately develop rules that create stable conditions for competition, thus ensuring that existing competitive options are not undermined by incumbents seeking to invoke the IP transition as a pretext to shed pro-competition requirements. This advance guidance will ensure consistent treatment of fundamental competition issues and speed future consideration of proposed IP experiments and Section 214 discontinuance requests by narrowing the range of items subject to individual dispute and review.

2. The Commission should reaffirm that Section 251(c)(3)'s requirement for unbundled high-capacity loops, *i.e.*, DS1 and DS3-capacity UNE loops, survives the IP transition, and make clear that these rules will be enforced.

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32 *See, e.g.*, Petition of Ad Hoc Telecommunications Users Committee, *et al.* to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Docket No. 05-25 (filed Nov. 2, 2012) (seeking reversal of the Commission's packet-services forbearance orders based on a market-power analysis using the framework adopted in the *Qwest Phoenix Forbearance Order*); *see also Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, 27 FCC Rcd. 16,318 (2012). Windstream does not disagree with those who advocate that the Commission must do more than preserve the competitive status quo; Windstream states here what it believes to be the absolute minimum that would not exacerbate the harm that existing rules already pose to competition.

33 *National Broadband Plan* at 47.

34 COMPTEL Managerial Framework Letter at 6-14.

3. The Commission should adopt rules to make clear that an ILEC must provide a migration path for customers subject to Minimum Revenue Commitments or early termination fees, so that purchases of replacement services reduce the MRCs for the services being replaced and do not trigger the imposition of early termination fees.
4. The Commission should take steps to clarify further the limits on special construction charges—especially that they cannot be assessed when a CLEC is replacing the ILEC as a vendor, that they must be itemized, and that a CLEC cannot be required to bear the costs for capacity to benefit the ILEC or other, future users.

First and foremost, the Commission must require that wholesale customers continue to have access to bottleneck facilities and services at equivalent prices, terms and conditions. As noted above, AT&T's reply comments characterized the Commission condition that prices, terms and conditions for comparable replacement services "be 'equivalent' to current offers" as merely an "expectation" by the FCC, and rejected the notion that there will be "some form of price ceiling on replacement services."[35] Given the extent to which CLECs must rely on AT&T and other ILECs for last-mile connections—particularly at DS0, DS1, and DS3 levels—there can be no ambiguity about whether AT&T or other ILECs (including Windstream) are required to provide comparable replacement services at equivalent prices, terms and conditions.

The IP transition does not alter the fundamental economics of last-mile deployment that the Commission identified in a series of decisions, including the *TRO*, the *TRRO*, and the *Qwest Phoenix Forbearance Order*.[36] As the Commission noted in the *TRO*, deployment of last-mile facilities to customers that do not require high bandwidth presents "extremely high economic and operational barriers," and "overbuilding to enterprise customers that require services over [DS1 and DS3] facilities generally does not present sufficient opportunity for competitors to recover their costs . . . "[37] The Commission echoed this sentiment in the *TRRO*, noting that "competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial

[35] AT&T Reply at 32 n.79.

[36] *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8623, 8661, ¶¶ 2, 73 ("[C]ompetitors offering business services largely must rely on inputs purchased from Qwest itself to provide service," and thus "We find potential competition from either supply-side substitution or from de novo entry to be unlikely in the Phoenix MSA.").

[37] *TRO*, 18 FCC Rcd. at 17,173-74, 17,156, ¶ 325 and n.859. *See also* Letter from Joan Marsh, Director, Federal Government Affairs, AT&T Corp., to Marlene Dortch, Secretary, FCC, CC Dockets No. 01-338, 96-98, 98-147, at 3 (filed January 14, 2003) (stating that a "competitor's opportunity to address buildings with non-ILEC high capacity facilities is also limited, because the market for deploying such facilities is mature. Much of the competitive build-out of alternatives to the ILECs' high capacity facilities occurred even before passage of the 1996 Act. Furthermore, as acknowledged by the Commission, the ILECs have extensive local fiber deployment and, when the fiber was deployed, substantial unused capacity was also installed. Thus, the number of instances in which there is an overlap between previously unaddressed high demand locations and positive conditions for building (building access, proximate transport ring capacity, practical rights of way access, etc.) is now relatively small.").

operational barriers."[38] The "passage of time has [not] lowered these barriers," as noted in the more recent *Qwest Phoenix Forbearance Order,*[39] nor lessened the danger of "downstream" customer impacts that can arise where a single party holds substantial market power in the upstream wholesale market.[40] There are no grounds to deviate suddenly from this line of decisions and findings; it is incumbent on the Commission to ensure that essential protections of last-mile access endure with the transition from TDM to IP.

Moreover, the existence of DS1 and DS3 TDM special access and UNE alternatives was a critical pre-condition for Ethernet forbearance. AT&T may attempt to argue that a requirement to offer comparable IP-based services or facilities at equivalent prices, terms and conditions is inconsistent with the Commission's Ethernet forbearance orders. However, the *AT&T Forbearance Order* and its brethren do not preclude the Commission from taking the limited step of mandating that IP-based equivalent services be made available at equivalent prices, terms and conditions when TDM-based services are voluntarily eliminated. As the Commission made clear in those orders, forbearance from dominant carrier regulation of packet-based special access services was predicated on the existence of DS1 and DS3 TDM special access and UNE alternatives.[41] AT&T itself relied on the continued availability of "these still-highly-regulated ILEC TDM inputs" to justify forbearance with respect to Ethernet services in its brief before the D.C. Circuit when defending the Commission's packet-based forbearance orders.[42] Even without reaching the critical, larger question of whether the *AT&T Forbearance Order* must be reversed in light of the *Qwest Phoenix Forbearance Order*, the Commission would have a rational basis and good cause for conditioning any discontinuance of TDM offerings in favor of

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38 *TRRO*, 20 FCC Rcd. at 2616 ¶ 150.

39 *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8670 ¶ 90.

40 *See id*., 25 FCC Rcd. at 8639-41 ¶ 34. *See also id.*, 25 FCC Rcd. at 8645 ¶ 40 (noting that the Commission is focused on "ensur[ing] that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets.").

41 *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of Bellsouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18705, 18717 ¶ 20 n.86 (2007) "[W]e observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.").

42 Brief for Intervenors AT&T Inc., et al. in Support of Respondents at 11 (filed Dec 3, 2008), *Ad Hoc Telecommunications Users Committee, et al., v. FCC*, No. 07.1426 (D.C. Cir. 2008) ("Because these [ATM and frame relay over TDM circuits] are alternative technologies [to Ethernet] within the same market for enterprise services, competing providers could purchase these still-highly-regulated ILEC TDM inputs to compete effectively in that market, even in circumstances where the provider could not deploy its own facilities-based alternative or purchase capacity from a third-party provider, and even if petitions had any basis for challenging the Commission's conclusions about Ethernet-over-TDM.") (citations omitted).

IP offerings on providing a tariffed, IP alternative to TDM DS1 and DS3 services at equivalent rates, terms and conditions.

A rulemaking would provide the optimal vehicle for the Commission to provide this clarity, benefitting from comments of all interested parties.[43] While it is not necessary to attempt to resolve all issues that may arise in a Section 214 application, a rulemaking proceeding is needed to establish important ground rules for the IP transition that would ensure consistent treatment of core competition issues and speed future consideration of proposed IP experiments and Section 214 discontinuance requests by narrowing the range of items subject to individual dispute and review. The Section 214 process should be a review of an ILEC's implementation of the Commission's fundamental values and conditions against objective standards—not the time at which those fundamental values and conditions, or those objective standards, are established. To do this, the Commission will need to establish clear parameters for determining whether adequate and comparable wholesale alternatives proposed by an incumbent will, in fact, be provided at equivalent rates, terms and conditions, including safe harbors.[44] This critical determination does not lend itself to a process in which discontinuance is deemed granted 30 or 60 days following release of a public notice seeking comment, as would occur under the current Section 214 rules, or a process where the Commission, in the context of an IP experiment, would consider requests to withdraw legacy services from all customers within a specific geography within three months of that request.[45] Given the importance of the competitive issues raised, wholesale customers need significant lead time so that they can both plan for the necessary changes to their products as well as prepare their customers for changes to offerings dependent upon ILEC last-mile facilities. The rulemaking proposed by Windstream would address this need by clarifying and ensuring consistent Commission enforcement of policies to protect and preserve the Communication's Act's statutory core competition value.

It is important to recognize that the Commission can adopt these rules to preserve the competitive status quo during the IP transition even before it has received and analyzed the special access data request or completed its special access rulemaking. While an ultimate determination of how best to revise its competitive triggers for special access deregulation requires an assessment of competitive market conditions, preserving the status quo does not. In preserving the status quo, the Commission is simply preserving the impairment decisions that it made in the *TRRO* and the state of regulation under *existing* special access rules, and other applicable rules, notwithstanding a shift from TDM- to IP-based network electronics.

Second, AT&T's repudiation of its post-transition UNE obligations in its reply comments highlights that the Commission should reaffirm that Section 251(c)(3)'s requirement for unbundled high-capacity loops, *i.e.*, DS1 and DS3-capacity UNE loops, survives the IP

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[43] A rulemaking also would address AT&T's complaint that the Commission's values and conditions were adopted "without the benefit of comment by incumbent LECs." *See* n.21, *supra*.

[44] *See* Comments of Cbeyond, Integra, Level 3 and tw telecom, GN Docket Nos. 13-5, 12-353, at 23 (filed March 31, 2014) (stating that it is not "appropriate to delay consideration of this issue until AT&T seeks authority under Section 214 of the Act to grandfather TDM-based local transmission services").

[45] *Technology Transitions Order*, 29 FCC Rcd. at 1444-45 ¶ 33.

transition. As noted above, AT&T asserts that its obligations to unbundle UNE DS1s and DS3s sunset with the discontinuance of a TDM network.[46] But, as a threshold matter, an unbundled network element is a facility that supports either TDM or IP technology. A high-capacity loop, by definition, is not limited only to TDM. Nothing in the *Triennial Review Remand Order* limits a DS1 or DS3 UNE to TDM, or limits it to copper facilities.[47] 47 C.F.R. § 51.319(a) treats DS1 and DS3 loops separately from copper, hybrid and fiber loops used primarily for mass-market services.[48] Moreover, in the *Triennial Review Order*, the Commission could not have been clearer that it was not limiting DS1 unbundling to copper or to TDM when it stated:

> DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, *e.g*., two-wire and four-wire HDSL or SHDSL, fiber optics, or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated. The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers.[49]

Indeed, the *TRO*, the source of Commission limitations on mass-market fiber unbundling and mass-market unbundling of packetized services, specifically addressed these restrictions in its section entitled, "Mass Market Loops," separate from its section on "Enterprise Market Loops."

The only result that is consistent with the Commission's cost findings underlying its determination of impairment in the *TRRO* is that a shift from TDM to IP electronics *does not* alter the requirement to unbundle high-capacity loops. In the *TRRO*, the Commission examined when it would be feasible for a CLEC to self-deploy its own fiber facilities. As a key, but not the only factor, the Commission found:

> Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities. The costs of loop construction are fixed, meaning that they are largely independent of the particular capacity of service that a customer obtains at a particular location. For fiber-based loops, the cost of construction does not vary significantly by loop capacity (*i.e.*, the per-mile cost of building a DS1 fiber loop does not differ significantly from the cost to construct a DS3 or higher-capacity fiber loop), but such costs do vary based on the length of the loop. The most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location, rather than from lighting the fiber-optic cable. The record reflects that for these reasons, LECs do not typically construct fiber loop facilities at lower capacity levels, such as DS1 or DS3, but rather install high-capacity fiber-optic cables and then use

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[46] AT&T Reply at 40-42.

[47] *See TRRO*, 20 FCC Rcd. at 2629-33 ¶¶ 174-181.

[48] *Compare* 47 C.F.R. § 51.319(a)(1)-(3) (addressing copper, hybrid and fiber loops) *with* 47 C.F.R. § 51.319(a)(4) and (5)(addressing DS1 and DS3 loops).

[49] *TRO*, 18 FCC Rcd. at 17,173 ¶ 325 n.956 (citations and cross-references omitted).

> electronics to light the fiber at specific capacity levels, often "channelizing" these higher-capacity offerings into multiple lower-capacity streams.[50]

These large fixed and sunk costs do not stem from the difference between TDM and IP electronics, but from construction and rights-of-way costs that are the same irrespective of the nature of the electronics. Shifting a copper loop from TDM electronics to IP electronics does not change the lack of competitive alternatives or the economics of self-deployment of the loop; those economics are driven by the costs of digging up streets, digging trenches, and obtaining fiber, conduit, and rights-of-way.

A departure from Commission precedent would undermine the Commission's core value of competition, resulting in higher prices for business consumers and reduced innovation and investment.[51] As recognized in the *TRRO*, the existence of UNEs places an important check on pricing of high-capacity services, and the Commission's prior decision to adopt pricing flexibility for TDM special access services was conditioned in part on competitors' ability to purchase UNEs.[52] Moreover, elimination of UNEs in areas where competitors remain impaired could result in reduction of competitors' fiber investments.[53]

The Commission accordingly should make clear that, in the absence of further forbearance or a future finding that CLECs are not impaired without access to high-capacity loops, AT&T and other ILECs remain required to provide high-capacity loops pursuant to Section 251(c)(3), regardless of whether traffic is transmitted over them in an IP or TDM format. For unbundled high-capacity loops, no new regulations are required. The Commission only needs make sure that its existing regulations are followed; however, to forestall future litigation, the Commission could issue a public notice reminding ILECs of their post-transition UNE obligations.

Third, as the Commission has done in the context of the trials, it should promulgate a "no penalties" rule with respect to the IP transition beyond the trials.[54] Specifically, the Commission should require that any purchases of successor IP products reduce the MRCs for the predecessor TDM services,[55] and it should ban application of early termination fees when a customer replaces TDM services with Ethernet offerings. Establishing this reasonable migration path for wholesale purchasers will ensure that they will not be penalized for migrating to IP-based services—particularly when they will have no choice but to do so in the face of discontinuance of traditional TDM inputs. AT&T's statements that it will work aggressively to retain CLECs' business are of little value when CLECs lack alternatives to AT&T for the DS1 and DS3 services

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[50] *TRRO*, 20 FCC Rcd. at 2616 ¶ 150.

[51] *See Technology Transitions Order*, 29 FCC Rcd. at 1452, 1528, ¶ 58 and Appendix B ¶ 35.

[52] *See TRRO*, 20 FCC Rcd. at 2569-70, 2574-75 ¶¶ 62, 65 (noting check on special access pricing), n. 167 (noting reliance on UNEs in granting pricing flexibility).

[53] *Id.*, 20 FCC Rcd. at 2629 ¶ 173 n.475.

[54] *Id.*, 29 FCC Rcd. at 1528, Appendix B ¶ 35.

[55] This would mean the incumbent should subtract the value (however measured under the MRCs—by circuits, dollars, etc.) of the newly purchased IP offering from the required TDM MRC.

they need to serve their small and medium sized business customers.[56] Without Commission action, competitors effectively will be required to maintain TDM spending levels established in current contracts even though AT&T is withdrawing TDM services and thus compelling competitors to transition their business customers to IP services.

Finally, Windstream has encountered several general issues with special construction that it urges the Commission to address as part of the managerial framework review, irrespective of whether these are or can also be addressed through individual carrier complaints. The imposition of excessive special construction costs impedes competition by providing the incumbent carrier with an artificial cost advantage, in some cases making competitors' service to particular customers uneconomic. Improperly applied, special construction charges enable the ILEC to be paid for costs that are unnecessary or are already covered through recurring charges, to have a CLEC fund network construction that benefits the ILEC or other providers, or simply inflate these charges. Addressing this unwarranted off-loading of costs will promote competition and thereby encourage diversity of the supply and reasonable pricing of IP services offered to customers. Specifically, Windstream requests Commission action to address the following anticompetitive problems with respect to special construction:

- Windstream has been required to enter into special construction arrangements on the basis that facilities are not available, even though it appears that the customer requesting service is currently using the facilities (for service from the ILEC) to which Windstream seeks wholesale access to replace the ILEC. The Commission should make clear that special construction charges are inappropriate under these circumstances. Requiring a competitor to pay the ILEC to construct duplicative last-mile facilities in lieu of using the facilities that the ILEC has been using to serve the end user is inconsistent with the Commission's rules and precedents,[57] erects a barrier to competition, and unnecessarily diverts resources from both parties' ability to invest in IP upgrades.
- Windstream has been denied service using existing facilities because they were not designed to permit wholesale access. Addressing these circumstances directly, the Commission should define a "reasonable modification" standard governing when ILECs must modify existing facilities to provision special access service. Such a standard could be modeled on the routine network modification standard for UNEs.[58]

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[56] *See* AT&T Reply Comments at 29.

[57] As common carriers, ILECs "must provide service upon a reasonable request, under terms and conditions that are just and reasonable," including to competitors. *Technology Transitions Order*, 29 FCC Rcd. at 1452 ¶ 58. In particular, ILECs, including Windstream, must provide service to CLECs "[i]n a manner that is at least as timely and efficient as the service the LECs provide themselves for services that compete with interconnectors' offerings," because failure to do so would constitute an unreasonable practice under Section 201(b) of the Communications Act of 1934, as amended. *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, FCC 94-190, 9 FCC Rcd 5154, 5172 ¶ 57 (1994) ("*Special Access Remand Order*"); *see also* 47 U.S.C. § 201(b).

[58] *See TRO*, 18 FCC Rcd. at 17378-80, 17,381 ¶¶ 642-44, 647 (2003).

- In certain cases, Windstream, as the CLEC whose order allegedly triggers a build out, is being charged costs for special construction of facilities and equipment that are engineered to support capacity for multiple carriers. The Commission has stressed that ILECs cannot force interconnectors to pay for services and equipment that they do not actually need, because this would impede efficient competitive entry.[59] Consistent with this principle, the Commission should clarify that special construction charges should be prorated or refunded to ensure that costs are equitably shared by all benefiting from shared facilities.
- Windstream in some instances receives a single quotation for special construction that contains little or no detail, so it cannot sufficiently evaluate the reasonableness of the charges proposed. The Commission should make clear that incumbents are required to identify specific special construction costs disaggregated by each cost component.[60]

Although the Act and Commission precedent already restrict ILECs' ability to impose unreasonable special construction rates, terms and conditions, Windstream urges the Commission to provide this further clear guidance on when an ILEC can assess special construction, the extent and conditions for upfront charges, and the levels of detail that must be provided. While these violations could be established through formal complaints, this clarity will forestall a multiplicity of individual complaints going forward.

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In conclusion, the Commission's highest priority with respect to the issues to be considered in the managerial framework should be ensuring that competitors maintain access to ILEC bottleneck facilities and services on no worse than the current rates, terms and conditions, whether the ILEC network is TDM or IP. The Commission should establish this measure as a firm ground rule now, so that all stakeholders—ILEC, CLECs, end users, and investors—can be assured that the IP transition itself will not result in further restrictions on CLEC access to ILEC facilities that enable small and medium sized businesses to benefit from competitors' innovative services and superior value.

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[59] *See, e.g., Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, FCC 97-208, 12 FCC Rcd. 18,730, 18,745-46, 18,751 ¶¶ 23-24, 37 (1997).

[60] *Cf. Knology, Inc. v. Georgia Power Company*, Memorandum Opinion and Order, FCC 03-292, 18 FCC Rcd. 24,615, 24,641-42 ¶¶ 59-62 (2003) (stating that refusal to provide detailed billing information for make-ready work is an unreasonable practice under Section 224). *See also Special Access Remand Order*, 9 FCC Rcd. at 5186, ¶ 116 ("[T]he facilities and services provided under each rate element should be clear on the face of the tariff, and the tariff support information should identify the specific costs that are recovered by each rate element. In addition, each rate element should logically relate to the service function provided under that rate element.").

If you have questions or require any additional information, please do not hesitate to contact any of the undersigned.

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