REDACTED — FOR PUBLIC INSPECTION

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EX PARTE

August 7, 2014

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

Re: *GN Docket No. 13-5, Technology Transitions; GN Docket No. 12-353, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*

Dear Ms. Dortch:

In accordance with the Second Protective Order for the above-referenced proceedings, Windstream Corporation ("Windstream") hereby submits a redacted version of the attached Notice of Ex Parte in connection with discussions held with FCC staff on August 5 and 6, 2014.

Windstream seeks highly confidential treatment of marked portions of the attached Notice pursuant to the Second Protective Order in the above-referenced proceedings.[1] Highly confidential treatment is required to protect information that details the terms and conditions of a Submitting Party's most sensitive contracts.[2]

Pursuant to the Second Protective Order, a redacted version of the document will be filed electronically via ECFS. Also pursuant to the Protective Order, Windstream is filing one copy of the highly confidential version with the Secretary, and sending two copies to Jonathan Reel, Competition Policy Division, Wireline Competition Bureau.

Please contact me if you have any questions.

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1 *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket Nos. 13-5 and 12-353, Second Protective Order, DA 14-273 (rel. Feb. 27, 2014) (IP Transition Second Protective Order).

2 *See* IP Transition Second Protective Order at Appendix A.

Sincerely yours,

/s/ Jennie B. Chandra

Jennie B. Chandra

Attachment

cc: Jonathan Reel

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Re: *GN Docket No. 13-5, Technology Transitions; GN Docket No. 12-353, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*

Dear Ms. Dortch:

On August 5, 2014, Malena Barzilai and I, from Windstream Corporation, and Windstream's counsel, John Nakahata and Randy Sifers of Harris, Wiltshire & Grannis, LLP (hereinafter "Windstream") met with Jonathan Sallet, General Counsel of the FCC, Madeleine Findley from the Office of the General Counsel, and the following staff from the Wireline Competition Bureau: Matthew DelNero, Deputy Bureau Chief; Eric Ralph (by telephone), Chief Economist; Randy Clarke (by telephone), Acting Division Chief, Competition Policy Division; and Patrick Halley, Associate Bureau Chief; and Linda Oliver, Deputy Division Chief of the Telecommunications Access Policy Division. Matthew DelNero and I engaged in a phone conversation on August 6, 2014 that further clarified items described below.

In the meeting, Windstream explained that CLECs play a crucial role in providing competitive alternatives and competitive discipline on ILEC special access providers. It shared the attached documents, which reference GeoResults data, to show CLECs are the primary source of competition for services purchased by non-residential customers, as well as specifically for key verticals (government, health care, schools and libraries) and organizations of all sizes. To provide competitive choice to so many customers, CLECs require access to ILEC UNEs and special access facilities, and increases in the prices charged to CLECs for these essential inputs would necessarily translate to higher prices for enterprise consumers, including governments, schools, hospitals, and small and medium sized businesses (a classic illustration of raising rivals' costs[1]). Accordingly, Windstream reiterated that it is critical for CLECs to maintain access to UNEs and special access on equivalent rates, terms and conditions through the IP transition.

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[1] 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 Qwest*

Windstream also discussed its priorities regarding the important legal and policy issues that the Commission must resolve to ensure that enterprise service customers of all sizes—businesses, governments, schools, healthcare providers, and nonprofits—continue to have competitive options during and after the technology transitions. In particular, to clear the TDM-to-IP migration path, Windstream urged the Commission to adopt competition policies, where needed, to ensure that enterprise customers have continued access to functionally equivalent last-mile facilities at equivalent rates, terms, and conditions. The discussion was consistent with Windstream's recent *ex parte* communications on the same topic.[2]

First, Windstream recommended that the Commission clarify the circumstances that would implicate the Section 214 discontinuance process, and those that would not. This should result in establishing important ground rules for the IP transition that would ensure consistent treatment of fundamental competition issues in the Section 214 discontinuance process and speed further consideration of discontinuance requests by narrowing the range of items subject to individual dispute and review. In particular, Windstream urged the Commission to clarify that Section 214 discontinuance does not relieve an ILEC of its obligation to provide DS1 or DS3 unbundled ("UNE") loops pursuant to 47 C.F.R. §§ 51.319(a)(4) and (5) when it transitions from TDM-based to IP-based technologies or avails itself of the copper retirement procedures set forth

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Phoenix Forbearance Order, ¶ 34 and n.102. *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, 12 FCC Rcd 15756, 15803 ¶ 83 ("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*, 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).

[2] *See, e.g.*, Letter from Malena F. Barzilai, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, GN Docket Nos. 13-5, 12-353 (June 9, 2014) (June 9 Ex Parte); Letter from Malena F. Barzilai, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353 (May 20, 2014) (May 20 Ex Parte); Letter from Eric Einhorn et al., representing Windstream Corporation, to Julie Veach, Chief, Wireline Competition Bureau, FCC, and Jonathan Sallet, General Counsel, FCC, GN Docket Nos. 13-5 and 12-353 (April 28, 2014) (April 28 Ex Parte).

in 47 C.F.R. § 51.333.[3] Because UNEs are facilities that exist regardless of the technology used—either TDM or IP—any effort to discontinue UNEs should be handled under forbearance procedures, not Section 214 discontinuance. UNEs still are in high demand and often are necessary for the provision of competitive offerings, in IP as well as TDM formats.

Windstream explained that access to UNEs is important both for last-mile access and as an anchor for commercial negotiations addressing special access services. Despite their own substantial network build-outs, competitors often must employ incumbent carriers' last-mile infrastructure to reach an enterprise service customer. This is because overbuilding this infrastructure, which was constructed and financed when the government maintained a protective monopoly, is uneconomic. UNEs often provide the most effective means for last-mile access when it is not economically feasible to build duplicate facilities. UNEs also constrain an incumbent's market power over last-mile facilities and affect rates paid and service quality assured for special access. If UNEs were not available, competitors would have far less leverage in commercial negotiations, because there often would be no economically viable alternative to special access services. Ultimately, the existence of UNEs means that all customers benefit—both competitors' and incumbents'—because access to UNEs makes it possible for competitors to charge lower retail prices and thereby place pressure on incumbent carriers to do the same.

Second, Windstream recommended that the Commission act now to designate the fundamental criteria that will need to be shown in a Section 214 discontinuance request. 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. This determination of key criteria must be made in the near term to prevent competitors from being placed at a disadvantage when attempting to make plans for the IP transition and ensure consistent, evenhanded review of discontinuance applications. Waiting to address these issues in 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, would not sufficiently address competitive concerns. Given the importance of the competitive issues raised, wholesale customers require far more 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 on ILEC last-mile facilities. Sufficient notice is necessary to accommodate competitors' strategic planning and investment initiatives. Currently competitors face severe uncertainty about their ability over the next 12-60 months to secure last-mile inputs at reasonable rates, terms and conditions; meanwhile enterprise customers want certainty and, to that end, often demand contracts that typically cover a multi-year period, which competitors are bound to honor.

Third, Windstream raised its general concerns that under tariff-based volume commitments (including minimum revenue commitments) carriers can be penalized for

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[3] *See* June 9 Ex Parte at 2; April 28 Ex Parte at 11-13. *See also* Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, at 2, GN Docket Nos. 13-5 and 12-353; RM-11358 (dated Jun. 27, 2014).

transitioning their purchases from DS1 and DS3 special access to IP-based Ethernet services.[4] For example, in Windstream's commercial agreement with ****BEGIN HIGHLY CONFIDENTIAL**** [redacted] ****END HIGHLY CONFIDENTIAL**** Such provisions effectively could significantly increase competitors' costs to attain last-mile access in the IP era.

Finally, Windstream discussed several issues with special construction that should be addressed as part of guidelines adopted for the IP transition. In particular, the imposition of unwarranted and/or excessive special construction charges is being used as an opportunity to impose last-mile price increases. This can arise where the retail customer requesting Windstream service is currently using the facilities for retail service from the ILEC to which Windstream seeks wholesale access to replace the ILEC as the retail provider. Although the same facilities will be used, the ILEC suddenly determines that the facilities are not suitable and requires the 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 customer. The imposition of excessive special construction charges impedes competition by providing the incumbent carrier with an artificial cost advantage that can make a competitor's service to a particular customer uneconomic. Moreover, requiring a competitor to pay the ILEC to construct duplicative last-mile facilities is inconsistent with the Commission's rules and precedents,[5] erects a barrier to competition, and unnecessarily diverts resources from both parties' ability to invest in IP upgrades. Windstream explained that if the Commission does not clarify ILEC obligations with respect to special construction charges, such charges could become a significant means for ILECs to effect de facto price increases for last-mile inputs. Permitting unconstrained increases in these charges – which disproportionately burden competitors encouraging customers to switch providers – would undermine any limits placed on rates for IP equivalent products.[6]

Please contact me if you have any questions.

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4 *See also* April 28 Ex Parte at 13-14.

5 *See, e.g., 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).

6 *See also* April 28 Ex Parte at 14-15.

Sincerely yours,

/s/ Jennie B. Chandra

Jennie B. Chandra

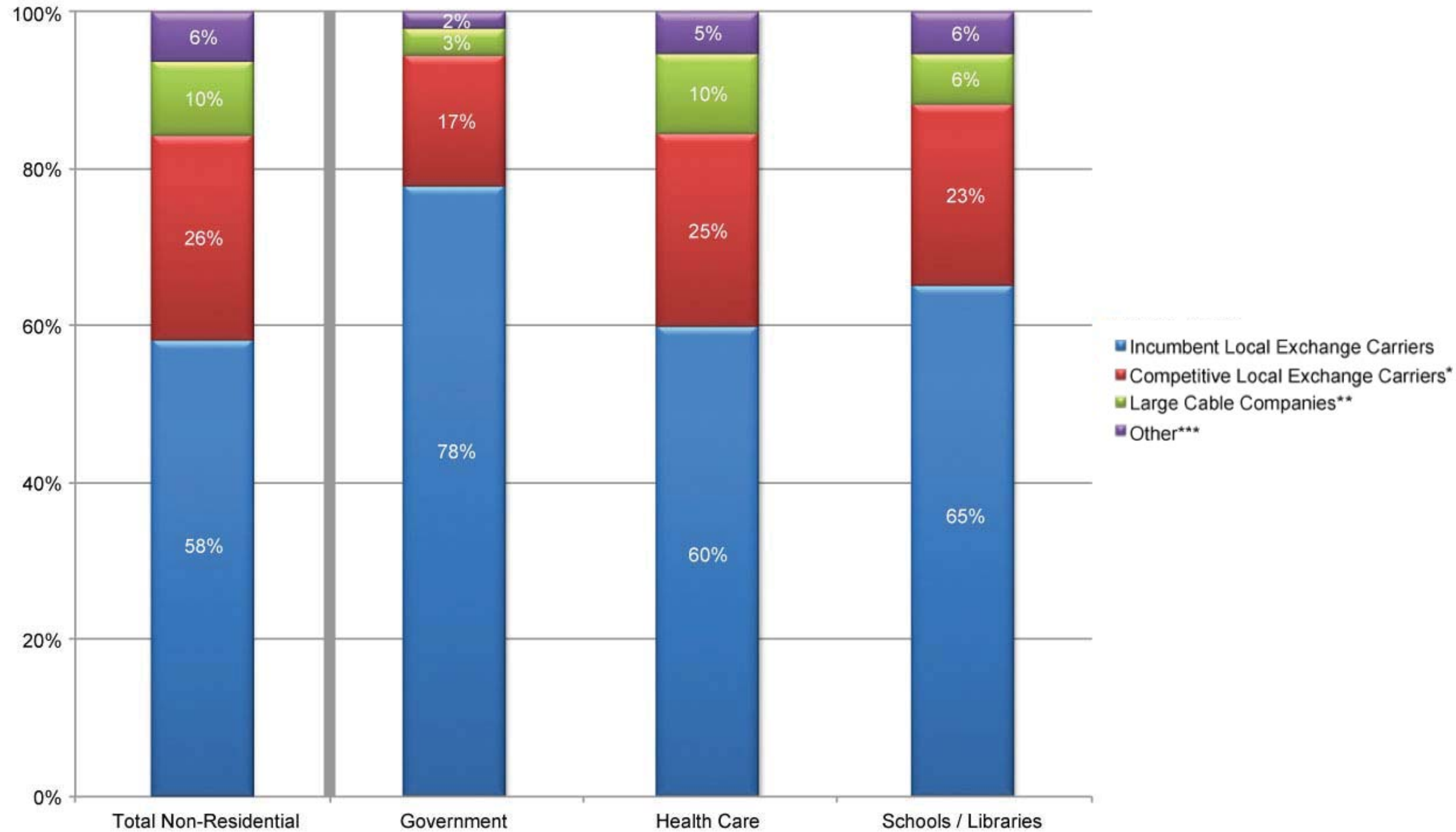
Attachments

cc: Randy Clarke
Matthew DelNero
Madeleine Findley
Patrick Halley
Linda Oliver
Eric Ralph
Jonathan Sallet

Competitive Carriers Are Ensuring Businesses, Government, and Nonprofits Have Cost-Effective Choices

windstream

Estimated Shares of Non-Residential Customer Expenditures on Wireline Communications



Source: Estimated monthly spending for wireline communications during 2nd Quarter of 2014, as compiled by the independent market research firm GeoResults.

* “Competitive Local Exchange Carriers” includes revenues from services both over CLECs’ network facilities as well as last-mile facilities leased from incumbent LECs.

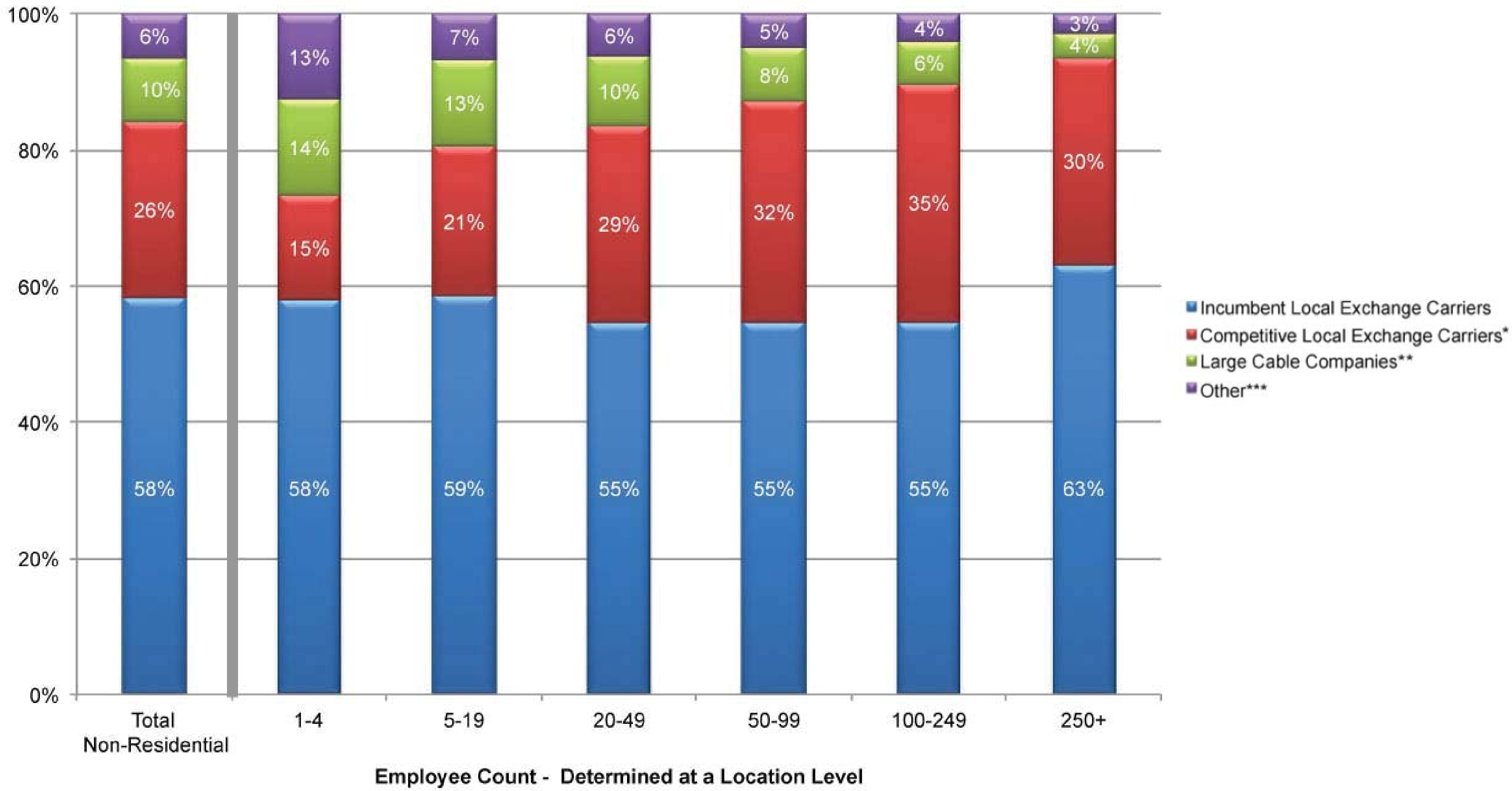
** “Large Cable Companies” are the top 15 cable providers, which together address more than 90% of non-residential locations in cable service areas. A de minimis market share is held by smaller cable companies, and the data source groups these into the “Competitive Local Exchange Carriers” category.

*** This category primarily includes wireless providers offering business phone line service.

Organizations of All Sizes Are Selecting Competitive Carriers to Meet Their Communications Needs

windstream

Estimated Shares of Non-Residential Customer Expenditures on Wireline Communications



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