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August 13, 2014

VIA ECFS ***EX PARTE NOTICE***

Ms. Marlene H. Dortch
Secretary
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; *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25**

Dear Ms. Dortch,

On August 11, 2014, Chip Pickering (by phone), Angie Kronenberg and the undersigned from COMPTEL, Eric Einhorn from Windstream Communications, Lisa Youngers from XO Communications, Tom Cohen from Kelley Drye and Warren LLP, and Thomas Jones from Willkie Farr and Gallagher LLP (by phone) met with Jonathan Sallet, the Commission's General Counsel, Linda Oliver and Jennifer Tatel, of the Office of General Counsel, and Matt DelNero, of the Wireline Competition Bureau. In the meeting, we discussed the importance of timely action by the Commission in addressing critical competitive access issues. These issues must be resolved swiftly for non-residential consumers to continue benefitting from competition – which enables cost-effective choices and drives innovation – as carriers transition from TDM to IP technologies and consumers adapt to these changing technologies. The key providers of competition in the business service marketplace today are competitive local exchange carriers.[1] COMPTEL members currently are at the forefront of innovation in the marketplace, and federal policies should ensure that competition is preserved and promoted for all consumers in the transition to the IP era.

In particular, we emphasized that the most important issue the Commission must address is continued availability to wholesale last mile access. We explained that although CLECs have

[1] *See* Letter of Jennie B. Chandra, Windstream, to Marlene H. Dortch, FCC, GN Docket Nos. 13-5 and 12-353, at p. 1 and Attachment (filed Aug. 7, 2014) ("Windstream August 7 Ex Parte").

invested many billions of dollars in network over the past several years, it is impossible for competitors to make an economic case to replicate most last mile infrastructure for multilocation and smaller enterprises, which include governmental entities, schools, libraries, and other non-profits as well as businesses. Incumbents have experienced and continue to maintain significant last-mile investment advantages due to their historical status as monopolies.

As such, it is vital for the Commission to ensure incumbents do not exploit their transition to IP technologies as a means of diminishing or degrading wholesale access needed to make it economically feasible for competitors to establish last-mile connections. To that end, we recommended that the Commission open a proceeding to establish fundamental criteria that a dominant provider of legacy services will need to meet in a Section 214 discontinuance request stemming from the TDM-to-IP transition. Specifically we called upon the Commission to adopt a standard to ensure, at minimum, adequate and comparable wholesale alternatives will be provided at equivalent rates, terms and conditions to those applicable to the legacy inputs for which discontinuance is sought. We urged the Commission to apply this standard to all applications by dominant carriers for the discontinuance of legacy services (such as TDM-based services), not just those filed pursuant to an experimental trial. We also urged the Commission to clarify that Section 214 discontinuance does not relieve an ILEC of its obligation to provide unbundled DS1 and DS3 loops pursuant to 47 C.F.R. §§ 51.319(a)(4) and (5) when it transitions from TDM-based to IP-based technologies.[2] It is important that the Commission not wait for discontinuance applications to be filed to address these fundamental competition issues. Competitors must plan now for offerings through the technology transitions, as meeting the needs of non-residential customers who typically seek multi-year contracts, is our first and foremost priority.[3] We accordingly request that the Commission act expeditiously in initiating a proceeding on these issues.

We also discussed the importance of the Commission promptly adopting an Order addressing unjust and unreasonable terms and conditions in incumbent LEC special access volume and term plans. These lock up plans undermine competition and investments in network infrastructure, contrary to the Chairman's objectives. We explained that these "discount plans" include terms that are effectively exclusionary because they require purchasers to commit to maintaining unreasonably high percentage (*e.g.*, 90%) of historic purchase volume, often across a region encompassing several states, in order to receive significant discounts and circuit portability. A competitor has no real alternative to these agreements since ubiquitous competitive alternatives do not exist and the ILEC's rack rate prices are very high. The ILEC thus can extract these terms, effectively locking up a competitor's business and preventing them from seeking services from alternative providers, to the extent any overbuilding is economically feasible, and deterring carriers from building alternative facilities – conditions that impede the IP-to-TDM and copper-to-fiber transitions for competitive carriers.[4] We explained that the

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[2] *See* 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).

[3] *See Windstream August 7 Ex Parte* at 3.

[4] In elaborating upon these concerns, we referred to a document by Timothy Brennan "Bundled Rebates as Exclusionary Rather than Predation," Journal of Competition Law & Economics

Commission may adopt such rules to address these unreasonable terms and conditions now without conducting an information collection and associated market power analysis. Specifically, on an interim basis and pending the completion of the special access proceeding, the Commission could – and should -- limit the volume commitment required for loyalty arrangements involving large circuit volumes in the ILEC discount plans to no more than 50 percent of a customer's historic purchase levels, unless the incumbent proves conclusively that a higher percentage is in the public interest.

Finally, we emphasized the importance of the Commission's confirming IP interconnection rights for the exchange of managed voice traffic pursuant to Sections 251(c)(2) and 252 of the Act.[5]

Please do not hesitate to contact us if you have any questions about this submission.

Respectfully submitted,

/s/ Karen Reidy

(2008), available at: http://jcle.oxfordjournals.org/content/4/2/335.full. *See also* Comments of XO Communications, WC Docket No. 05-25; RM-11358, Exhibit 2, ¶¶ 8-12 (filed Feb. 11, 2013) (describing provisions in AT&T and Verizon's special access commitment plans that "constrain XO's ability, for the most part, to obtain special access from competitors even when such alternative sources are available"); Comment of tw telecom et al. WC Docket No. 05-25; RM-11358, Appendix A, ¶¶ 23-32 (filed Feb. 11, 2013) (discussing loyalty provisions in various incumbent LEC special access lock-up plans that have prevented tw telecom from shifting more than a modest portion of its special access demand to alternative suppliers); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 8-16 (filed Feb. 22, 2012) ("Level 3 Feb. 22, 2012 Letter") (describing various forms of lock-up provisions in incumbent LEC special access plans that prevent Level 3 and other purchasers from switching more than a fraction of their purchases to competitive suppliers); Comments of Sprint Nextel Corporation, WC Docket No. 05-25; RM-10593, pp. 28-29 (filed Aug. 8, 2007) ("Exclusionary contract terms also have the effect of deterring service providers from building out their own facilities. Verizon, for example, has initiated a new pricing plan that offers discounts to carriers only if they agree to commit to purchase, for example, both 90% of their channel termination volumes as well as 90% of their transport volume. It is unlikely that a carrier would find it economical to construct its own low volume channel termination circuits. By tying the discount for channel terminations to a carrier's purchase of channel mileage, Verizon's plan provides an additional deterrent to the carrier's construction of its own interoffice transport facilities. Such practices plainly undermine the FCC's goal of encouraging facilities-based competition.")

[5] *See* Letter of Angie Kronenberg, COMPTEL, to Marlene H. Dortch, GN Docket No. 13-5 *et al*, pp. 11-14 (filed Apr. 2, 2014); *See also*, COMPTEL's Response to Questions in House Energy and Commerce White Paper Network Interconnection, *available at*: http://www.comptel.org/Files/filings/2014/08_08_14_COMPTEL_Response_to_Energy_and_Commerce_CommActUpdate_Interconnection_White%20Paper.pdf

cc: Jonathan Sallet
Linda Oliver
Jennifer Tatel
Matt DelNero