

**REDACTED — FOR PUBLIC INSPECTION**

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**VIA ECFS**

***EX PARTE***

August 22, 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; WC Docket No. 05-25, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; RM-10593, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*

Dear Ms. Dortch:

In accordance with the Second Protective Orders 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 21, 2014.

Windstream seeks highly confidential treatment of marked portions of the attached Notice pursuant to the Second Protective Orders in the above-referenced Technology Transitions and Special Access proceedings and subsequent clarification by Delegated Authority.<sup>1</sup> Highly

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<sup>1</sup> *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). *Special Access; In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, 25 FCC Rcd. 17725 (2010) (“Second Protective Order”). *See also Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, DA-12-199 (dated Feb. 13, 2012) (“Letter to Donna Epps”) (further supplementing the *Second Protective Order*).

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confidential treatment is required to protect information that details the terms and conditions of a Submitting Party's most sensitive contracts.<sup>2</sup>

Pursuant to the two Second Protective Orders, this redacted version is being filed in the above-referenced dockets via ECFS. Windstream is filing a copy of the highly confidential version with the Secretary, and sending two copies each to the Wireline Competition Bureau's Jonathan Reel (Competition Policy Division) and Marvin Sacks (Pricing Policy Division).

Please contact me if you have any questions.

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

Attachment

cc: Jonathan Reel  
Marvin Sacks

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<sup>2</sup> See IP Transition Second Protective Order at Appendix A.

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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; WC Docket No. 05-25, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; RM-10593, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*

Dear Ms. Dortch:

On August 21, 2014, Jennie Chandra and I, from Windstream Corporation, and Windstream's counsel, John Nakahata of Harris, Wiltshire & Grannis, LLP (hereinafter "Windstream") met with Madeleine Findley from the Office of the General Counsel, and the following staff from the Wireline Competition Bureau: Matthew DelNero, Pam Arluk, Kalpak Gude, Daniel Kahn, and Deena Shetler.

In the meeting, Windstream urged the Commission to act in the near term 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.<sup>1</sup>

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<sup>1</sup> See, e.g., Letter from Jennie B. Chandra, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 and 12-353 (August 7, 2014) (August 7 ex parte); 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).

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Windstream explained that the ability to plan for the longer term has an immediate and critical impact on providers of business services. Windstream today is making service commitments to retail customers that most often establish obligations for three to five years, through 2017 or beyond, because (1) customers want certainty and will seek out other providers (e.g., the regional Bell operating companies) if Windstream does not offer long-term arrangements; and (2) Windstream sometimes requires a longer commitment term to sufficiently recover service initiation expenses (e.g., special construction costs).

However, Windstream may lack commensurate commercial assurances from its wholesale providers that it will have access to TDM special access services at reasonable prices for the full extent of those multi-year terms. **\*\*BEGIN CONFIDENTIAL\*\*** [REDACTED]

**\*\*END CONFIDENTIAL\*\***<sup>2</sup>

Moreover, tariffs, which establish special access base prices and service duration, may be amended or discontinued. For example, it is Windstream's understanding that AT&T wishes to put wholesale purchasers on notice that future term plans may not be honored in full if they extend past 2018, and wishes to be able to discontinue TDM special access services soon thereafter. Discontinuation of special access services would be subject to approval by the Commission, but the current uncertainty surrounding that process leaves Windstream with little or no assurance regarding wholesale input availability and rates from AT&T and potentially other large ILECs after 2018 – even though Windstream already needs now to make long-term service commitments to retail business service customers that may extend through mid-year 2019.

Windstream also discussed the attached graphs, portraying data from International Data Corporation (IDC), that demonstrate that service reliability is a major factor influencing small

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**\*\*BEGIN CONFIDENTIAL\*\*** [REDACTED]

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and medium businesses' choice of broadband providers.<sup>3</sup> The attached also provides a breakdown of surveyed businesses' responses, by size segments, for why they choose to stay with a broadband provider. Further reinforcing the importance of reliability, the IDC data show network availability is the feature that small and medium businesses, in all size segments, value the most in existing or potential service level agreements.

Finally, Windstream asked 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 in 47 C.F.R. § 51.333.<sup>4</sup> 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. Indeed, UNEs allow Windstream better to control the quality of Ethernet services that it can provide to its customers, as compared to purchasing Ethernet special access services from the large ILECs.

As a threshold matter, a UNE 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.<sup>5</sup> 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.<sup>6</sup> 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:

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<sup>3</sup> See IDC, *Market Analysis Perspective: U.S. SMB Telecom and Broadband*, 2013, Doc # 244964, Dec. 2013 (reporting results to survey questions posed to 510 businesses with less than 1,000 employees at their work location).

<sup>4</sup> 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, GN Docket Nos. 13-5, 12-353, RM-11358, at 2-5 (filed June 27, 2014). These filings respond to AT&T and Verizon claims to the contrary. See "Short Term Public Notice Under Rule 51.333(A)" for Lynnfield, MA, Belle Harbor, NY, Hummelstown, PA, Farmingdale, NJ, and Ocean View, VA, available at <http://www.verizon.com/about/networkdisclosures/> (stating only that a 64 kbps voice-grade channel will be available to competitors as a UNE upon copper retirement); Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, et al., attachment at 11 (filed May 30, 2014); AT&T Reply Comments, GN Docket Nos. 13-5 and 12-353, at 40-41 (filed April 10, 2014).

<sup>5</sup> See *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, 2629-33 paras. 174-181 (2005) ("*TRRO*").

<sup>6</sup> 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).

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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.<sup>7</sup>

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 electronics to light the fiber at specific capacity levels, often “channelizing” these higher-capacity offerings into multiple lower-capacity streams.<sup>8</sup>

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<sup>7</sup> *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, 17,173 ¶ 325 n.956 (2003) (“TRO”)* (citations and cross-references omitted).

<sup>8</sup> *TRRO*, 20 FCC Rcd. at 2616 ¶ 150.

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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.<sup>9</sup> 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.<sup>10</sup> Elimination of UNEs in areas where competitors remain impaired could result in reduction of competitors' fiber investments.<sup>11</sup>

Please contact me if you have any questions.

Sincerely yours,

/s/ Malena F. Barzilai

Malena F. Barzilai

Attachment

cc (by email):  
Madeleine Findley  
Matthew DelNero  
Pam Arluk  
Kalpak Gude  
Daniel Kahn  
Deena Shetler

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<sup>9</sup> See *Technology Transitions, et al.*, Order, Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd. 1433, 1452, 1528, ¶ 58 and Appendix B ¶ 35.

<sup>10</sup> 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).

<sup>11</sup> *Id.*, 20 FCC Rcd. at 2629 ¶ 173 n.475.

Source: IDC, Market Analysis Perspective: U.S. SMB Telecom and Broadband, Dec. 2013.

Q: Of the following reasons for not switching broadband providers, please select the top 3:

Number of respondents: 431

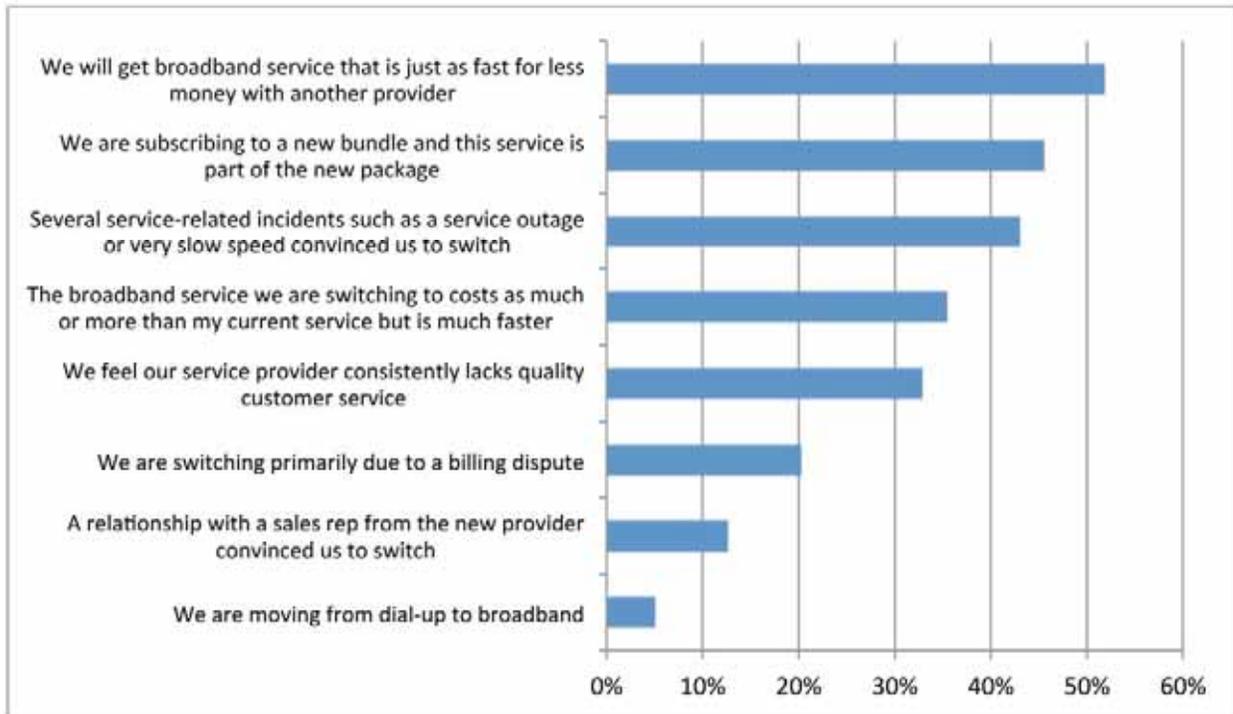


A further breakdown, by number of employees per SMB location:

|                         | Home Office | 1 to 19 | 20 to 49 | 50 to 99 | 100 to 999 |
|-------------------------|-------------|---------|----------|----------|------------|
| Best Service available  | 41.3        | 52.4    | 25.5     | 42.9     | 42.9       |
| Reliability             | 37.0        | 43.5    | 29.8     | 42.9     | 27.0       |
| Nothing comparable      | 45.7        | 40.3    | 29.8     | 14.3     | 21.4       |
| In a bundle             | 30.6        | 40.2    | 30.6     | 23.4     | 26.2       |
| Trusts current provider | 18.5        | 28.2    | 38.3     | 35.7     | 32.5       |
| N=                      | 92          | 124     | 47       | 42       | 126        |

*Q: Of the following reasons for switching broadband providers, please select the top 3:*

Number of respondents: 79



*Q: Either in your existing Service Level Agreement or if potentially receiving a Service Level Agreement in the future what is the feature your company values the most?*

Number of respondents: 510

