

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Ensuring Customer Premises Equipment |) | PS Docket No. 14-174 |
| Backup Power for Continuity of |) | |
| Communications |) | |
| |) | |
| Technology Transitions |) | GN Docket No. 13-5 |
| |) | |
| Policies and Rules Governing Retirement Of |) | RM-11358 |
| Copper Loops by Incumbent Local Exchange |) | |
| Carriers |) | |
| |) | |
| Special Access for Price Cap Local Exchange |) | WC Docket No. 05-25 |
| Carriers |) | |
| |) | |
| AT&T Corporation Petition for Rulemaking |) | RM-10593 |
| to Reform Regulation of Incumbent Local |) | |
| Exchange Carrier Rates for Interstate Special |) | |
| Access Services |) | |
| |) | |
| Windstream Petition for Declaratory Ruling |) | WC Docket No. 15-1 |

REPLY COMMENTS OF COMPTTEL

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TABLE OF CONTENTS

Introduction and Summary.....1

I. The Technology Transitions Offer Potential for Significant Consumer Benefits in the Business and Wireless Markets If Accompanied by Strong Wholesale Access Policies5

II. ILEC Claims that Commission Action Would Hinder Their Transition are Spurious.....12

III. The Commission Needs to Address IP Interconnection18

IV. The Commission Should Make Clear That Incumbents May Not Charge for Special Construction In Lieu of Performing Sufficient Maintenance on Existing Facilities and/or When the Incumbent Plans to Use the New Network Infrastructure for Its Own Operations22

V. The Commission Should Confirm That ILECs’ Obligation to Provide DS1 and DS3 Capacity Loops on an Unbundled Basis is Not Altered by the Technology Transitions24

Conclusion27

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REPLY COMMENTS OF COMPTTEL

COMPTTEL respectfully submits these comments in reply to certain comments in response to the Commission’s Notice of Proposed Rulemaking (FCC 14-185) and Windstream’s petition for declaratory ruling, in the above-referenced dockets.

Introduction and Summary

The largest incumbent local exchange carriers (LECs), and their association, focus on the perceived burdens of the Commission oversight,¹ and the obstacles to their “ability to reap the

¹ See e.g., Comments of AT&T Services, Inc. (“AT&T”) at 1 (Executive summary of comments outlining “unworkable obligations on carriers, requiring voluminous new regulatory

benefits of their prudent investment *in a timely manner*,”² or as Sprint aptly portrays it, “parlaying their old TDM monopolies to current and future last-mile IP dominance.”³ In contrast, most other commenters focus on proposing actions, or supporting Commission proposals, that will preserve the principles embodied in the Communications Act “that have long defined the relationship between those who build and operate networks and those who use them.”⁴ Those principles include competition, consumer protection, universal service and public safety.⁵ The substantial and diverse set of comments – from state commissions, public interest groups, carriers, vendors, alarm monitoring service providers, public safety entities, etc. – demonstrate that the transition has wide-spread implications. As most commenters agree, while the technology transitions offer the potential for significant consumer benefits, Commission oversight is needed to ensure consumers are benefited, and not harmed, by the transitions.

As the Public Interest Commenters profess, the “best way to encourage people to embrace new technologies is to give them confidence that those technologies will be a true step forward for them.”⁶ At a minimum, this requires the replacement services and transmission

filings, increasing costs...”)

² United States Telecom Association Comments at 2.

³ Sprint Corporation (“Sprint”) Comments at 2.

⁴ *Technology Transitions et al*, Notice of Proposed Rulemaking and Declaratory Ruling, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, FCC 14-185 at ¶ 1 (2014) (“Technology Transitions NPRM”).

⁵ *Id.*

⁶ Public Knowledge, Appalshop, Benton Foundation, Center for Media Justice, Center for Rural Strategies, Common Cause, The Greenlining Institute, Media Action Center, Media Literacy Project, National Consumer Law Center, on behalf of its low-income clients, New America Foundation Open Technology Institute, Rural Broadband Policy Group, and TURN (the Utility Reform Network) (“Public Interest Commenters”) Comments at 7.

facilities, and the terms pursuant to which they are offered, to be equivalent to or better than the current ones. It should go without saying that the technology transitions should not just be about cost efficiencies for providers but, rather, should result in improved (or at least as good) quality of service to consumers – retail and wholesale, residential, businesses of all sizes, government entities and non-profits. It certainly should not result in consumers’ loss of important – sometimes life altering – functionalities of their service or services necessary for the operation and/or growth of a business. Such an outcome would be a step backward not progress.

Due to the wireline duopoly in the residential services market, the Commission must focus on *retail* products and services in the residential market to ensure that the critical concerns raised by the public interest groups and others are addressed.⁷ More robust retail competition currently exists in the business and wireless markets as a result of existing wholesale access policies. In order to maintain the more robust retail competition in these markets, which enable business and wireless consumers to get the services they need without as much Commission oversight of retail products, the Commission needs to take action to ensure the continued availability of viable wholesale input access services and facilities used to provision retail services as proposed by the Commission, COMPTTEL and other commenters. Comments in support of such action on wholesale input services and facilities are numerous and diverse, including state commissions, public interest groups, businesses user group and carriers. As COMPTTEL addressed in its initial comments, *at a minimum*, the Commission should 1) adopt its

⁷ See, e.g., Public Interest Commenters Comments at 7-10 and 13-15; ADT LLC d/b/a/ ADT Security Services (“ADT”) at 1-2.

proposed rebuttal presumption⁸ and tentative conclusion with regard to wholesale inputs;⁹ 2) ensure access to an alternative transmission medium once the copper loop is retired,¹⁰ in addition to necessary modifications to the process for copper retirement;¹¹ and 3) confirm ILEC obligations with regard to IP interconnection and unbundled DS1 and DS3 loops. This way, competitive carriers can continue to provide their innovative services and consumers can ensure for themselves that they maintain the retail services and functionality they need.

In the comments below, COMPTTEL: (1) addresses the potential benefits of the technology transitions *if* accompanied by strong wholesale access policies; (2) refutes incumbent LECs claims that such policies could derail the transition; (3) supports Competitive Carriers Association's ("CCA") call for the Commission to confirm IP interconnection rights under the Telecommunications Act of 1996 ("1996 Telecom Act") as well as address its impact on public safety; (4) calls on the Commission to affirm ILECs' obligations with respect to special construction charges; and, (5) asks the Commission to grant Windstream's Petition for Declaratory Ruling.

⁸ As discussed in COMPTTEL's initial comments, in certain circumstances it should be conclusive, not rebuttable. COMPTTEL Comments at 8-9

⁹ As discussed in COMPTTEL's initial comments, the Commission should adopt rules that established specific criteria for finding that the replacement services meets this standard. COMPTTEL Comments at 21-28.

¹⁰ COMPTTEL Comments at 28-35. COMPTTEL proposed access to dark fiber and wavelength transmission capacity. *Id.* It is important that, although discussed in the context of the business market in COMPTTEL's comments, as with the bare copper loop, such access to an alternative transmission medium should be made available to any location and should not be limited by the Fiber-to-Home/Fiber-to-the-Curb rules.

¹¹ Additionally, others proposed a moratorium on the retirement of copper loops until the Commission completes the special access proceeding or, alternatively, access to wholesale Ethernet transmission, that is equivalent to the transmission that could have been offered as Ethernet-over-Copper service over the retired loop, as an alternative to the copper loop. *See, e.g.,* Birch, Integra, and Level 3 ("Birch *et al*") Comments at 32-33.

I. The Technology Transitions Offer Potential for Significant Consumer Benefits, Particularly in the Business and Wireless Markets, If Accompanied by Strong Wholesale Access Policies

One area commenters generally agree is that the technology transition offers *the potential* for significant consumer benefits. The Commission, competitors and public interest groups have long recognized the advantages of the transition to more advanced technology. As addressed in the Joint Comments of Birch, Integra and Level 3, competitive carriers have been at the forefront of the IP transition, investing in IP networks and offering IP-based services to their customers for well over a decade.¹² XO states that the increasing adoption of IP innovations by competitors “fosters greater network efficiencies, enables the development of new and advanced services, and delivers great value to customers.”¹³ And Windstream confirms that “competitors seek to speed the IP transition and look forward to the opportunities it presents.”¹⁴ The Public Interest Commenters echo that there “has thus far been wide agreement on the ideas that the transition should be a step forward for everyone and that the public policy should encourage the tech transitions.”¹⁵ The Commission has recognized that these technology transitions are already generating innovative and improved communications services to the marketplace.¹⁶ New

¹² Birch *et al* Comments at 2 (“The Joint Commenters and other competitive carriers have been leading the transition to packet-based technologies – and bringing the benefits of those technologies to American businesses – for more than a decade.”). *See also* The Broadband Coalition, *Broadband Innovators: Driving the Network Forward*, at 5 (July 2013), available at <http://thebroadbandcoalition.com/storage/Driving%20The%20Network%20Forward%20-%20PRINT.pdf>; Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 *et al.*, Attachment, at 3 (filed Dec. 13, 2013) (“COMPTTEL Dec. 13, 2013 Letter”) (“As of December 2012, in the business market, competitors have *nearly ten times* the number of VoIP lines as ILECs.”) (emphasis in original).

¹³ XO Communications (“XO”) Comments at 4.

¹⁴ Windstream Corporation (“Windstream”) Comments at 4.

¹⁵ Public Interest Commenters at 7.

technologies and services have been introduced and widely adopted, many of which were in their infancy or not even in existence when the 1996 Telecom Act was passed.

As competitive carriers have explained, this technology has enabled them to provide packet-based services for businesses of all sizes and across all industries to, among other things, (1) simplify their networks and prioritize key traffic and applications; (2) transport critical business data securely and reliably among multiple office, branch, store, or campus locations; (3) support high-bandwidth applications at a lower cost; and (4) scale bandwidth as their businesses grow.¹⁷ Moreover, access to the transmission medium has enabled competitive carriers to offer more affordable Ethernet to small and medium-sized businesses (“SMBs”). In particular, competitors have been leaders in taking the unbundled copper loop and transforming it into Ethernet-over-Copper.¹⁸ EoC services allow SMBs to cost-effectively realize many of the same efficiencies of Ethernet technology that previously would have only been available to larger enterprise Ethernet customers.¹⁹ In addition, competitive carriers are delivering cloud services that allow these SMBs—the growth engines of our economy—to increase their productivity and

¹⁶ *NPRM* at ¶ 2.

¹⁷ *See, e.g.*, Comments of Cbeyond, Inc., Integra Telecom, Inc., MegaPath, Inc., Covad Communications Company and tw telecom inc., WC Dkt. No. 10-188, at 4-16 (filed Oct. 15, 2010).

¹⁸ *See* XO Comments at 4 (“Since its inception, XO has been an industry innovator and was one of the first carriers to exploit the opportunity to use copper loops to bring IP-based services to locations that did not have fiber – which are still a clear majority of building in the county.”) *See, also* Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5 *et al.*, Attachment, at 3 (filed Feb. 25, 2013) (stating that MegaPath has the largest CLEC Ethernet-over-Copper footprint in the U.S.); Comments of COMPTTEL, GN Dkt. No. 12-353, RM-11358, at 3-8 (filed Mar. 5, 2013) (“COMPTTEL Mar. 5, 2013 Comments”).

¹⁹ COMPTTEL Comments at 10-11 and 29-30; XO Comments at 5 and 8-9.

reduce IT costs.²⁰ Retail competition in the wireless market provides consumers various service plan options, enabling them to choose the one that best meets their individual (or family) needs.

There also appears to be no dispute that *retail* competition has spurred enormous innovation and has now prompted wide-scale transition by the telecom giants. Indeed, all three of the largest incumbent LECs acknowledge that they have been forced to innovate and make significant investment in order to keep up with the competition. As Verizon states: “In the face of [] competition, ILECs – like any company in a competitive market – have incentives to develop services that its customer want to buy.”²¹ CenturyLink notes, ILECs “must upgrade to far more efficient and robust fiber-optic facilities if they are to compete effectively in the converged, multi-provider marketplace....”²² AT&T has also conceded that competition from competitive carriers in the provision of packet-based services has spurred incumbent LECs to invest in their own packet-based networks and offerings.²³

These largest incumbents, however, refuse to expressly acknowledge – even though it is well established – that strong *wholesale access policies are necessary to maintain, and further generate, sufficient retail competition*, particularly in the business and wireless markets, to spur

²⁰ COMPTTEL Comments at 11. *See also* EarthLink Business, Whitepaper, *Small and Mid-market Business Achieve Tremendous Benefit From Cloud Services*, available at <http://www.earthlinkbusiness.com/about-us/whitepaper-cloud-services.xea> (last visited Mar. 10, 2014).

²¹ Verizon Comments at 28.

²² CenturyLink Comments at 1.

²³ *See* Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Jan. 14, 2013) (“CLECs are leading providers of Ethernet services, and ILECs have ‘*respond[ed] with further investments in their own Ethernet offerings.*’”) (emphasis added) (internal citation omitted).

such enormous innovation and investment. While the ILECs provide statistics on the competitive state of the retail market, they ignore the fact that retail competition in the business market, and competition from wireless providers in the residential market, exist because of wholesale access policies. Thus, the existence and benefits of this retail competition buttresses – not detracts from – the need for the Commission to adopt its tentative conclusion on wholesale input services, proposed rebuttable presumption, and the safeguards proposed by commenters on copper retirement, including alternative transmission options being made available upon retirement.

The Commission has long recognized that the “nation’s *regulatory policies* for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.”²⁴ While the ILECs constantly attempt to rely on the intermodal competition they face from wireless providers to argue for no wholesale safeguards, the largest wireless providers are these ILECs’ affiliates. And, with regard to unaffiliated providers, as the CCA confirms, the “ability of competitive LECs to access wholesale inputs from ILECs not only fosters competition between wireline competitive carriers and ILECs, but also enables wireless service providers such as CCA’s member to compete with the wireless offerings of the ILECs’ affiliates.”²⁵ Sprint echoes this reliance on special access services, not only for a competitive wireless market, but also for competitors to provide wireline voice and data services.²⁶ Moreover, Windstream – which is both a competitive carrier and the

²⁴ See, e.g., Federal Communications Commission, Connection America: The National Broadband Plan at 47 (“National Broadband Plan”), *available at*: <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> (emphasis added).

²⁵ Competitive Carriers Association (“CCA”) Comments at 9.

²⁶ Sprint Comments at 2.

fifth largest ILEC in the nation – demonstrates that the vast majority of competition in the business market results from competitors that are dependent on last mile access from the ILEC.²⁷ This fact is confirmed by Birch *et al*,²⁸ XO Communications,²⁹ Granite Telecommunications, LLC,³⁰ the Wholesale DS-0 Coalition,³¹ Grande Communications Networks LLC, U.S. TelePacific Corp.,³² and others.³³

While the incumbents allege that the Commission’s proposed rebuttable presumption is unsupported – claiming a competitive carrier can purchase or provide for itself a substitute for discontinued wholesale services – the Commission has already recognized, repeatedly, that it is pure fantasy to suggest that competitive carriers could somehow replace these last-mile inputs by

²⁷ Windstream Comments at 6-7 (Figure 1 and Figure 2).

²⁸ See Birch *et al* Comments at 2 (“[A]t many business customer locations, competitive carriers must purchase last-mile access...from the incumbent ILEC.”)

²⁹ XO Comments at 5 and 9 (“The scope of XO’s deployment of EoC to business customers has grown tremendously, underscoring the role competitive access to copper loop facilities continues to play.... XO also is a major customer the ILECs for DS1 and DS3 special access services and unbundled network elements.”)

³⁰ Granite Comments Supporting Windstream’s Petition for Declaratory Ruling at 5-7.

³¹ Wholesale DS-O Coalition Comments at 2 (“In many cases, the locations served by the Wholesale DS-O Coalition members are in areas where the only facilities-based provider is the ILEC, and it is not economical for a facilities-based [competitor] to extent facilities to the location for such a small volume of business.”)

³² Joint Comments of Grande Communications Networks, LLC and U.S. TelePacific Corp. Supporting Windstream’s Petition for Declaratory Ruling at 4 (Continued availability of DS1 and DS3 capacity loops promotes innovation and competition in business broadband to the benefit of many small and medium-sized businesses, nonprofits and government entities...[and] are *vital* to Joint Commenters’ continued provision of competitive communications services.”) (emphasis added).

³³ See *e.g.*, Full Service Network LP *et al* Comments.

constructing fiber networks that duplicate the entirety incumbents' ubiquitous networks.³⁴ As a practical matter, *only* incumbent local exchange carriers enjoy the benefit of a ubiquitous network that represents the cumulative investment of decades, supported by a geographically dispersed customer base that is still significant, even after years of competition.³⁵ Certainly parts of this network must be replenished, but much of the core investment – in poles, conduits, rights-of-way, building entries, fiber and even copper – is easily reusable in a broadband infrastructure.

Competitive carriers, on the other hand, would have to duplicate the entire ILEC network. While many competitors have been building their own network since the 1996 Telecom Act, the economics of replicating *all* portions of the incumbent network infrastructure have not changed,³⁶ as the most significant costs of providing service lie with the physical infrastructure, not with higher layers that electronically define and control traffic flow. In particular, as Sprint states, “last-mile (and often time middle mile) facilities remain a bottleneck...”³⁷ Indeed, oddly,

³⁴ See, e.g., *National Broadband Plan* at 47 (“Because of the economics of scale, scope and density that characterize telecommunications networks, . . . it is not economically or practically feasible for competitors to build facilities in all geographic areas.”); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶¶ 84, 90 (2010) (finding that competitive carriers continue to face extensive economic and operational barriers to the construction of last-mile facilities).

³⁵ See COMPTTEL Comments at 32, n. 69.

³⁶ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 822, ¶ 84 (2010) (“[T]he Commission in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile facilities.... We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.”)

³⁷ Sprint Comments at 2.

the only example AT&T provides in its comments on how competitors can compete without the wholesale services that are being discontinued, is the use of the bare copper loop that competitors can add their own electronics in order to provide high-capacity services to their end-user customers³⁸ – one of the very mechanisms that will likely be eliminated by the retirement of the copper loop.³⁹ CenturyLink likewise has recognized competitors’ dependence on ILEC TDM-based DS1 and DS3 services or the unbundled copper loops for providing competing enterprise broadband services.⁴⁰ Moreover, the Commission has already determined that competitors are highly reliant on price regulated special access services in the provisioning of their services.⁴¹ As Ad Hoc states, “continued access to [equivalent] inputs is critical to the ability of competitive carriers to provide a check on the ILECs’ market dominance.”⁴²

As discussed in COMPTTEL’s and other parties’ initial comments, in order to preserve the necessary wholesale access that supports existing retail competition, the Commission needs, at a minimum, to 1) adopt its proposed rebuttal presumption⁴³ and tentative conclusion with regard to

³⁸ AT&T Comments at 52.

³⁹ While AT&T has proposed the idea of having incumbents sell copper facilities, even Verizon acknowledge that “[s]elling these facilities would be easier said than done, due to the intertwined way that copper and fiber facilities often are deployed and the required ongoing engagement from ILECs that might be necessary to make such a sale work.” Verizon Comments at 17.

⁴⁰ CenturyLink Petition for Forbearance, *CenturyLink’s Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, at 15, filed Dec. 13, 2013.

⁴¹ See Report and Order, *Special Access for Price Cap Local Exchange Carriers et al*, FCC 12-92, WC Docket No. 05-25, ¶ 2 (2012) (“Competitive carriers rely heavily on special access to reach customers.”)

⁴² Ad Hoc Telecommunications Users Committee (“Ad Hoc”) Comments at 17.

⁴³ As discussed in COMPTTEL’s initial comments, in certain circumstances it should be

wholesale inputs;⁴⁴ 2) ensure access to an alternative transmission medium once the copper loop is retired,⁴⁵ in addition to necessary modifications to the process for copper retirement;⁴⁶ and 3) confirm ILEC obligations with regard to IP interconnection and unbundled DS1 and DS3 loops.

II. ILEC Claims that Commission Action Would Hinder Their Transition are Spurious.

First, ILEC allegations that the proposed Commission action would require them to maintain two networks⁴⁷ or “continue to provide outdated technologies (like the manual switchboard) after better alternatives become available”⁴⁸ is pure nonsense. The actions proposed by the Commission in the *NPRM*, and by the majority of commenters, are for processes and standards for the transition to new technologies and facilities, not requirements to maintain legacy services or facilities. Indeed, the Commission makes clear that the retirement of copper will not require approval. While ILECs blame their statutory obligations for the continued

conclusive, not rebuttable. COMPTTEL Comments at 8-9

⁴⁴ As discussed in COMPTTEL’s initial comments, the Commission should adopt rules that established specific criteria from finding that the replacement services meets this standard. COMPTTEL Comments at 21-28.

⁴⁵ COMPTTEL Comments at 28-35. COMPTTEL proposed access to dark fiber and wavelength transmission capacity. *Id.* It is important that, although discussed in the context of the business market in COMPTTEL’s comments, as with the bare copper loop, such access to an alternative transmission medium should be made available to any location and should not be limited by the Fiber-to-Home/Fiber-to-the-Curb rules.

⁴⁶ Additionally, others proposed a moratorium on the retirement of copper loops until the Commission completes the special access proceeding or, alternatively, access to wholesale Ethernet transmission, that is equivalent to the transmission that could have been offered as Ethernet-over-Copper service over the retired loop, as an alternative to the copper loop. *See, e.g., Birch et al* Comments at 32-33.

⁴⁷ *See, e.g., CenturyLink* Comments at 4.

⁴⁸ *Verizon* Comments at 3-4.

demand for TDM services, the cause for this demand is actually their refusal to offer comparable packet-based services at equal or lower rates. If the market for packet-based wholesale input services (*e.g.*, Ethernet) were competitive, as the ILECs claim, their request for discontinuance approval would be far less contentious, because the customers themselves would *choose* to purchase these alternative services (which are generally viewed as more innovative and efficient). The fact that ILEC plans for the transition are a subject of so much concern across the industry says everything about the state of the market for the underlying last mile transmission component; the market is not working.

Moreover, the notion that networks using IP and TDM technology are completely separate and distinct is false. The same physical infrastructure that has supported TDM-based services over the decades supports IP-based services. This network consists of trenches, poles, rights-of-way, conduits, fiber, copper loops, spectrum licenses, municipal permitting for disruptions of streets and pavements, easements, right of access to buildings, and all the other necessary inputs for any network. A recent *NASUCA Report* found “there is no question that ILECs are currently utilizing substantial proportions of their legacy infrastructure to deliver broadband services.”⁴⁹

Second, ILEC claims that the proposed Commission action would deter fiber deployment or investment in advanced technology is likewise absurd. Indeed, in a conference call recently with investors, Verizon’s chief financial officer, Francis Shammo, made it clear that this is not the case:

“I mean to be real clear, I mean [regulation] does not influence the way we invest.

⁴⁹ Trevor R. Roycroft, Ph.D., “The IP/Broadband Transition – Public Policy Still Matters” Prepared for NASUCA, Nov. 15, 2013, at 3 (“NASUCA Report”); available at: http://nasuca.org.s80874.gridserver.com/nwp/wp-content/uploads/2014/01/11-15-13_NASUCA_Response_to_Kovacs_Final.pdf

I mean we're going to continue to invest in our networks and our platforms, both in Wireless and Wireline FiOS and where we need to. *So nothing will influence that.* I mean if you think about it, look, I mean we were born out of a highly regulated company, so we know how this operates.”⁵⁰

Verizon further confirms that other factors – one in particular being cost efficiencies – exist to incentivize the transition to fiber or upgrades to more innovative technology. As Verizon discusses in its comment, fiber deployment offers significant benefits *to the carrier* in the provisioning of service, e.g., less outages, more durability, longer life span, fewer repairs, lower maintenance, and reduced energy consumption/costs.⁵¹ While Verizon portrays these factors as benefits to consumers – and no doubt they should be – they are huge cost savings to Verizon as well. As Verizon states, the “costs of installation and maintenance [of copper facilities] can become greater than the cost of deploying the superior fiber facilities.”⁵² In its comments, AT&T indicates its agreement with the Commission’s remark that the transformation of networks and services will “dramatically reduce network costs, allowing providers to service customers with increased efficiencies.”⁵³ As discussed above, ILECs upgrade to more efficient and robust fiber-optic facilities in order to compete effectively. Retail competition spurs investment and upgrades in technology and, as also addressed above, wholesale access policies create the necessary retail competition.

⁵⁰ Brian Fung, Washington Post, “Verizon: Actually, strong net neutrality rules won’t affect our network investment,” available at <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/?wpisrc=nl-swbd&wpmm=1>. A transcript of the investor conference is available at <http://www.verizon.com/about/investors/ubs-42nd-annual-global-media-and-communications-conference/>

⁵¹ Verizon Comments at 5-7.

⁵² *Id* at 7.

⁵³ AT&T Comments at 3-4.

Moreover, in its *Technology Transitions Order and Further NPRM*, the Commission recognized evidence that wholesale access policies promote investment. Specifically, it found that between 1996 and 2001 – the time period *after* the telephone network was open to competition and *before* the Commission started granting ILECs watershed relief from their wholesale obligations – the industry experienced “a torrent of new investment deployed over 200,000 miles of trenches and approximately 18 million miles of fiber – enough fiber to circle the equator 750 times.”⁵⁴ This demonstrates that the Commission’s wholesale policies did not deter investment. Moreover, the Commission should be concerned with promoting deployment and investment by the entire industry, not just the incumbent. If the competitors are cut off from last-mile access to their customers, they lose the incentive to continue to invest in middle-mile and last-mile access where economical to build. Since 1996, an estimated \$1.3 trillion in investment has been made in the communications industry,⁵⁵ and new technologies and services, many of which were in their infancy or not even in existence when the 1996 Act was passed, have been introduced and widely adopted. These developments demonstrate that wholesale access policies are successful in promoting significant investment and advancing the deployment of the innovative networks and services.

Moreover, the proposed tentative conclusion is not tantamount to broad regulation of the provision of wholesale services, as AT&T alleges.⁵⁶ The proposed standard is only triggered by

⁵⁴ *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, GN Docket No. 13-5, *et al*, FCC 14-5, at ¶ 12 (2014).

⁵⁵ USTelecom, Research Brief September 8, 2014, *available at*: <http://www.ustelecom.org/sites/default/files/documents/090814%20Latest%20Data%20Show%20Broadband%20Investment%20Surged%20in%202013.pdf>

⁵⁶ AT&T Comments at 49.

a discontinuance of an existing wholesale input. It is not a comprehensive update of its wholesale access policies for a packet-based environment – such comprehensive reform is needed and supported by COMPTTEL as well. Nevertheless, until it reevaluates the wholesale market comprehensively, the Commission must ensure equivalent replacement services to wholesale input services that have provided a competitive market to business and wireless consumers. Without such action, the Commission is not fulfilling its obligation under Section 214 of ensuring “the present and future public interest and necessity,” given that the Commission has found, and the record demonstrates, competition is a critical public interest principle.

AT&T argues that the Commission cannot impose carrier-to-carrier obligations under Section 214 since Sections 201-205 and 251 expressly address carrier-to-carrier obligations. It attempts to analogize the statutory framework here with that at issue in *FDA v. Brown & Williamson Tobacco Corp.* In that case, however, the court concluded that the FDA lacked authority to regulate tobacco under the Food, Drug, and Cosmetic Act (FDCA) because Congress acted to create a “distinct scheme to regulate” the marketing of tobacco based on the representations of the FDA that it didn't have authority to do so under the FDCA.⁵⁷ This situation is distinguishable in a number of respects. As an initial matter, the Commission indisputably has jurisdiction over carriers and their telecommunications services and facilities. The TDM-based services being discontinued and the IP-based replacement products (e.g., Ethernet services) are both telecommunications services. The adoption of carrier-to-carrier

⁵⁷ *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 156 (2000) (“Congress has affirmatively acted to address the issue of tobacco and health, relying on the representations of the FDA that it had no authority to regulate tobacco. It has created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA. As a result, Congress’ tobacco-specific statutes preclude the FDA from regulating tobacco products as customarily marketed.”)

provisions of the Act – some of which were adopted prior to Section 214 – were not adopted based on any finding or claimed lack of jurisdiction under Section 214. Section 214 serves a distinct purpose not at issue in the other provisions – addressing the public interest when a critical service is being discontinued. Finally, the Commission expressly has the authority to attach terms and conditions to the grants of discontinuance approvals.⁵⁸

Moreover, neither *National Fuel Gas Supply Corp. v. FERC* nor *Time Warner Entm't Co. v. FCC* support AT&T's proposition that if an ILEC currently lacks an obligation to provide wholesales services under one set of statutory provisions, such an obligation cannot be imposed under Section 214.⁵⁹ In *Time Warner Entm't Co. v. FCC*, the Court found that because the Commission was expressly prohibited from regulating the use of funds derived from franchising fees it, therefore, could not dictate the use of such fees as a criterion for receiving a Commission benefit.⁶⁰ There is no express (or otherwise) statutory prohibition on the Commission developing a standard for replacement products. As AT&T acknowledges, the Commission has authority to impose regulation on wholesale services.⁶¹ The mere fact that the Commission has the jurisdiction over services under an alternative set of provisions does not in itself preclude the Commission from imposing an obligation under a separate provision that serves a different purpose.

AT&T's reliance on *National Fuel Gas Supply* is also misguided. In that case, the agency specifically found the public interest was met without conditions, but nevertheless

⁵⁸ 47 U.S.C. 214(c).

⁵⁹ AT&T Comments at 58, n. 157.

⁶⁰ *Time Warner Entm't Co. v. FCC*, 56 F.3d 151 (1995).

⁶¹ AT&T Comments at 59.

attached conditions.⁶² As discussed above, the record in this proceeding supports a finding that the public interest is *not* met without conditions being attached to the grant of discontinuances. Importantly, the record not only supports that the proposed conditions (such as the tentative conclusion on discontinuance of wholesale input services) are necessary for a competitive environment, but that such competition will bring substantial consumer benefits in the form of innovative, individually tailored services.

This finding that substantial consumer benefits flow from competition, which is enabled by the wholesale access the Commission's proposal will provide, addresses the concerns raised in *Hawaiian Telephone Company v. FCC*.⁶³ Furthermore, that case does not support AT&T's notion that a Section 214 analysis must be done on a case-by-case analysis. It stands for the concept that the Commission must look at the situation at hand and not be limited by past determinations.⁶⁴ In other words, it supports the Commission's current action of addressing the impact to the community of a pending wide-scale transition, rather than limit itself to its previous Section 214 actions when these type of discontinuances were occurring in a more nascent manner.

III. The Commission Needs to Address IP Interconnection

As COMPTTEL and others have repeatedly called for as part of the technology transitions proceeding, and CCA aptly reiterates in its comments in response to the *NPRM*,⁶⁵ the Commission should clarify that incumbent LECs have a duty to provide IP interconnection for

⁶² *National Fuel Gas Supply v. FERC*, 909 F.2d 1519.

⁶³ *Hawaiian Telephone Company v. FCC*, 498 F.2d 771 (1974).

⁶⁴ *Id.* at 776.

⁶⁵ CCA Comments at 3-6.

the exchange of facilities-based (or “managed”) voice traffic (hereinafter “IP interconnection”) under Section 251(c)(2) of the Act.⁶⁶ The significance of this issue is demonstrated by the fact that there has seldom been such broad support in the industry across the various types of service

⁶⁶ See 47 U.S.C. § 251(c)(2) (requiring incumbent LECs, other than those subject to certain exemptions or suspensions pursuant to 47 U.S.C. § 251(f), to provide requesting telecommunications carriers with interconnection “at any technically feasible point” “for the transmission and routing of telephone exchange service and exchange access”). There is no question that VoIP interconnection is technically feasible, and the industry is continuing to develop technical standards for VoIP interconnection. See, e.g., Press Release, ATIS and SIP Forum, *ATIS and SIP Forum Launch Joint Task Force on IP-NNI*, Jan. 8, 2014, available at <http://www.atis.org/PRESS/pressreleases2014/010814.asp>.

providers as there has been – such as by cable providers,⁶⁷ rural carriers,⁶⁸ wireless providers,⁶⁹

⁶⁷ See e.g., Comments filed *In the Matter of Connect America Fund, et al*, Before the Federal Communications Commission, WC Docket No. 10-90 *et al*, filed on Feb. 24, 2012 by the following representative in the cable industry: National Cable and Telecommunications Association (“NCTA”) at 5 (“The interconnection provisions of section 251 of the Act afford telecommunications carriers the right to establish IP-to-IP voice interconnection with an incumbent LEC network for the provision of telephone exchange service and exchange access.”); Time Warner Cable at 5 (“Negotiating IP-to-IP interconnection agreements under Section 251 of the Act is not merely an aspiration, but rather is a fundamental statutory obligation of ILECs.”); Charter Communications at 4 (“An ILEC’s duty under Section 251(c)(2) to provide interconnection for “any requesting telecommunications carrier . . . at any technically feasible point within the [ILEC’s] network” clearly encompasses IP-to-IP interconnection arrangements.”) ; Comments of Cablevision Systems Corporation, GN Docket No. 12-353, at 6-7 (filed Jan. 28, 2013). See also Letter of Howard J. Symons, Mintz Levin, on behalf of Cablevision and Charter Communications, to Marlene Dortch, WC Docket No. 10-90 *et al*, p. 1 (filed Oct. 12, 2011) (“[S]ection 251(c)(2) requires ILEC to provide IP-to-IP Interconnection. . . IP-to-IP interconnection will ensure that consumers enjoy the full benefits of IP services and networks, and encourage all carriers to migrate to IP-based networks.”).

⁶⁸ See e.g., Comments filed *In the Matter of Connect America Fund, et al*, Before the Federal Communications Commission, WC Docket No. 10-90 *et al*, filed on Feb. 24, 2012 by the following rural carrier associations: National Exchange Carrier Association (NECA), National Telecommunications Cooperative Association (NTCA), The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Western Telecommunications Alliance (WTA) at 38 (“Sections 251 and 252 of the Act govern all interconnection arrangements, including IP-to-IP Interconnection for the purposes of exchanging traffic between carriers.”); Alaska Rural Coalition (“ARC”) at 17 (“[R]egulation of IP-to-IP networks should remain consistent with [] regulation of traditional interconnection. All carriers should remain obligated to interconnect their networks in the most efficient configuration possible and negotiate those contractual relationships in good faith, consistent with the Telecommunication Act obligations outlined in section 251.”); Nebraska Rural Independent Companies (“NRIC”) at 27 (“Sections 251/252 interconnection framework. . . will ensure that any migration from TDM to IP-based transmission technologies and then to IP-to-IP technologies is not hampered by those entities with the ability to exercise market power. . .”).

⁶⁹ See, e.g., *Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, GN Docket No. 13-5, filed on July 8, 2013 by the following wireless carriers: Sprint at 12 (“The Commission should reaffirm that all Section 251 and 252 obligations extent to the exchange of traffic [via] IP interconnection.”); T-Mobile at 7-10 (“The record developed in response to the AT&T and NTCA IP transition petitions demonstrate why carriers’ negotiations toward IP interconnection agreements must occur with a clearly defined regulatory backdrop. . . . T-Mobile previously demonstrated that the Commission has authority to oversee IP interconnection under Sections 251, 252 and other provisions of the Act.”); Reply Comments of Competitive Carriers

and CLECs⁷⁰ – on the critical need for Commission action to ensure incumbent LECs fulfill their obligations under Sections 251 and 252 of the Act with regard to IP interconnection.⁷¹ The record is replete with legal arguments and the supporting factual basis for such confirmation.

Moreover, the Public Interest Commenters raise a critical public safety issue regarding the need for new networks to support reverse 911 functions.⁷² This requirement will prove difficult to fulfill in cases where the service provider of the calling party and the service provider operating the ESInet which services the PSAPs, are not one and the same. In the absence of IP

Association, GN Docket Nos. 13-5, 12-353, at 4-5 (filed Aug. 7, 2013).

⁷⁰ See e.g., Comments filed *In the Matter of Connect America Fund, et al*, Before the Federal Communications Commission, WC Docket No. 10-90 *et al*, filed on Feb. 24, 2012 by the following competitive carriers: COMPTTEL at 13-20; XO at 12-15; Cbeyond *et al* at 20-25; U.S. TelePacific *et al* at 7-14.

⁷¹ See e.g., Comments filed *In the Matter of Technology Transition Policy Task Force*, Before the Federal Communications Commission, GN Docket No. 13-5, on July 8, 2013, by the following parties: Matrix Telecom at 5 (“Specifically, the remaining impediment is the refusal of the RBOCs to negotiate agreements for IP interconnection pursuant to the framework of sections 251 and 252 of the Act.”); Peerless Networks at 6 (“Competitive carriers have difficulty *only* with directly connecting in IP format with ILECs and their affiliates.”) (*emphasis added*); Sprint at 7 (“The fact that Sprint has yet to obtain IP-to-IP interconnection for voice traffic from any of the major ILECs is evidence of their unwillingness to comply with their obligations under the Act.”); Bullseye Telecom and Access Point (“Bullseye Telecom *et al*”) at 12-13 (“The impediment remains the refusal of the RBOCs to negotiate IP agreements under the framework of Sections 251 and 251 of the Act.”); XO Communications at 8 (“Managed IP interconnection is far from ubiquitous at this time, in part because most ILECs refuse to abide by interconnection obligations under Section 251 of [the Act], to exchange IP-based voice traffic with requesting carriers.”); T-Mobile at 2 (“For T-Mobile [VoIP Interconnection] is typically with wireless carriers, cable operators, and [CLECs] rather than [ILECs] with whom, in T-Mobile’s experience, it has been exceedingly difficult to negotiate IP interconnection agreements.”); Cablevision at 2 (“While Cablevision has successfully negotiated IP interconnection agreements with competitive providers and IXCs, it has been unable to obtain IP interconnection from the ILECs.”); Letter from Ross Lieberman, ACA, Karen Reidy, COMPTTEL, Rebecca Murphy Thompson, CCA, and Catherine R. Sloan, CCIA, to Marlene H. Dortch, FCC, GN Docket No. 12-353 (filed Mar. 21, 2013); Comments of Cablevision Systems Corporation, GN Docket No. 12-353, at 6-7 (filed Jan. 28, 2013).

⁷² Public Interest Commenters Comments at 18.

interconnection between different carriers, not only is ALI information in question, but the ability for the calling PSAP to identify and seize a viable route to that subscriber is also in question. Until such IP interconnection is achieved, neither ALI information nor call routing information can be relied upon to accurately reflect the total subscriber base that is at risk and, therefore, should be targeted for participation in reverse 911 calling campaigns.

Further, the National Emergency Number Association is in the process of defining and standardizing its i3 reference framework for Next Generation 911 services. IP interconnection will be required among all carriers in a serving area and the carrier providing ESInet services to the PSAP in order to support the future emergency services envisioned in NENA's i3 framework. It is reasonable to expect that, to the extent PSAPs expand to support other forms of communication — such as text, video and image transmission — subscribers of non IP-interconnected service providers will be impaired in their access to such enhancements.

IV. The Commission Should Make Clear That Incumbents May Not Charge for Special Construction In Lieu of Performing Sufficient Maintenance on Existing Facilities and/or When the Incumbent Plans to Use the New Network Infrastructure for Its Own Operations

Multiple commenters agree with COMPTTEL that there is a need for the Commission to confirm that an incumbent may not charge for special construction (1) where existing copper facilities are not retired and the existing facilities, if maintained or repaired, would be adequate for requested wholesale service, or (2) for new deployment of network delivery infrastructure (e.g., trenching and conduit) that the ILEC plans to use for its own operations.⁷³ The first recommended finding, in fact, effectively is even supported by some of the large ILECs' comments. AT&T agrees generally that the existing rules require it to “restore [] copper loop to

⁷³ See Ad Hoc Comments at 19; Birch *et al.* Comments at 14-16; XO Comments at 11.

serviceable condition” upon request of a competitor.⁷⁴ Moreover, CenturyLink notes that its general practice is not to disable copper loops or “de facto” retire them, and it replaces loops or subloops when they become inoperable.⁷⁵ These carriers’ practices establish the reasonableness of COMPTEL’s request for confirmation that the ILECs cannot assess special construction charges when existing copper facilities should be able to support the ordered service.

Competitors should not have to pay for new facilities as a result of an ILEC’s failure to maintain or repair legacy facilities that it has not followed the appropriate process to retire.

With respect to the latter finding, Ad Hoc notes that its members—including many large businesses—are experiencing the same ILEC abuses of special construction charges as COMPTEL’s members.⁷⁶ For example, Ad Hoc recounts that “ILECs have claimed that special construction charges apply when any construction of new facilities occurs, even when the new facility construction is a mere expansion of capacity on existing routes to accommodate increased marketplace demand or is part of a network build-out that can serve a segment of the market at large and not only the customer being required to pay the charges.”⁷⁷ Ad Hoc further explains that ILECs are often able to get away with these abuses, because “the business need for

⁷⁴ AT&T Comments at 31 (*citing* 47 C.F.R. sec. 51.319(a)(3)(iii)(B)). *See also* Comments of Cincinnati Bell Telephone Company LLC at 11 (“Certainly, copper cable that continues to be used for the provision of telecommunications service should be maintained to a standard that delivers appropriate service to customers and meets structural and safety standards. But, it would be a waste of resources to spend money on upkeep for a facility that has no immediate prospect of being used. If an actual request to use the facility is made, the ILEC has an obligation to make it serviceable.”).

⁷⁵ CenturyLink Comments at 31, fn.88.

⁷⁶ Ad Hoc Comments at 19 (“Ad Hoc members can attest first hand that ILECs have repeatedly demanded payment of special construction charges when none of the conditions required under the tariff are present.”).

⁷⁷ *Id.*

the service is so pressing that customers do not have the luxury of delaying service so they can seek formal relief from the Commission.”⁷⁸ These comments submitted by the ILECs’ larger retail customers – in addition to the comments filed by wholesale customers – confirm the need for FCC action on the second recommended finding as well.⁷⁹

If the Commission does not step in now to affirm ILECs’ obligations with respect to special construction charges, these charges may increasingly be used by ILECs to effect de facto price hikes for last-mile inputs. As COMPTTEL noted in its initial comments, permitting unconstrained increases in special construction charges burdens competition, competitors, and their customers,⁸⁰ and could undermine the Commission’s intention to ensure IP replacement products are not priced higher than comparable TDM inputs.

V. The Commission Should Confirm That ILECs’ Obligation to Provide DS1 and DS3 Capacity Loops on an Unbundled Basis is Not Altered by the Technology Transitions

The record reflects abundant support for Windstream’s petition for declaratory ruling that the incumbent LECs must continue to provide DS1 and DS3 loops on an unbundled basis following the transition from copper to fiber and from TDM to IP. AT&T argues that Windstream’s petition is not needed to “terminate a controversy” but rather seeks a fundamental change in the incumbent LEC existing unbundling obligations. Therefore, it argues, the petition is procedurally flawed. But while AT&T claims there is a “bright line” unbundling rule and clarification is not necessary, even the incumbent LECs are not in agreement on what this “bright

⁷⁸ *Id.*

⁷⁹ *See also* Birch *et al.* Comments at 14-16; XO Comments at 11.

⁸⁰ COMPTTEL Comments at 35-37.

line” is. For example, AT&T alleges that the rules “expressly” state that they are not required to unbundle fiber loops, whereas Verizon at least acknowledges that it is required to provide DS1 and DS3 loops over fiber that already has TDM equipment.⁸¹ CenturyLink further recognizes that the Commission’s so-called “bright-line” with “unbundling of new packet-based facilities” was in the context of mass market loops.⁸² In fact, the existing unbundling rules for DS1 and DS3 are technology neutral and – as addressed in the comments of state commissions, competitors, small incumbent carriers, public interest groups, and consumers – this issue is far too critical for the Commission to allow the ILECs to continue to decide for themselves what they are obligated to provide.⁸³

COMPTTEL has often stated that the technological evolution of underlying facilities

⁸¹ See AT&T Opposition at 9 and 13 (“Although DS1 and DS3 capacity traffic can be carried over transmission media other than copper, including fiber...the rules expressly state that the ILECs are ‘not required’ to provide unbundled access to all-fiber loop...Windstream’s Petition also invites the Commission to repudiate the decision not to require unbundled access to fiber loop.”) compared to Verizon’s Opposition at 1 (“Consistent with the limitation on the unbundling rules, Verizon provides DS1 and DS3 to wholesale customers in wire centers that...already have TDM equipment necessary to provide DS1 and DS3 service *over fiber loops*.”)(emphasis added)

⁸² CenturyLink Comments at 7 (conceding that the *Triennial Review Order*’s analysis of limits placed on unbundling pertaining to fiber loops “focused on loops used to serve mass market customers”). Verizon ignores the fact that the *Reconsideration Order* it repeatedly refers to in its comments likewise was addressing mass market loops. *Review of the Section 251 Unbundled 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*, Order on Reconsideration, 19 FCC Rcd 20293 (2004)(“Reconsideration Order”).

⁸³ See, e.g., Public Interest Commenters Comments at 16; Pennsylvania Public Utility Commission Comments at 3; NTCA at 4, fn.3; XO Comments at 27-28; Ad Hoc at 20; COMPTTEL at 37-39; Birch *et al* Comments at 39-40; Joint Comments of Grande Communications Networks LLC and U.S. TelePacific Corp. at 2; Granite Comments at 3; Reply Comments of the Vermont Public Service Board and Vermont Public Service Department at 2-3 (filed Feb. 27, 2015).

comprising ILEC networks should have little effect on the availability of services provided over those facilities. This is because, in the development of virtually every technological enhancement, developers necessarily acknowledge the business requirement to support popular present-day services while, at the same time, providing for the introduction of new services. Further, the provider of those present-day services normally benefits from a reduction of cost realized by the advancements made in the underlying infrastructure.

Such is the reason that most ILECs began replacing native 4-wire T1 carrier technology (including that used to provide DS1 UNE loops) with 2-wire HDSL2 technologies in the early 2000s. By replacing T1 carrier with HDSL2 as the technology that “carried” the DS1 signal, ILECs found that they were able to benefit by greatly expanding the capacity of binder groups for other services. The move to IP over fiber, from HDSL2 as the underlying technology for DS1, and for DS3s facilities is no different in purpose or ease of transition than the transition from native T1 carrier to HDLS2. Both benefit from the economics of a more efficient underlying technology and both can provide an unchanged interface to the customer using interface boxes at each end.⁸⁴ Thus, compliance with the unbundling rules for DS1 and DS3 loops is not a hindrance to the IP transition.

While the Eighth Circuit found that ILEC may not be required to alter their networks substantially to provide *superior* access, competitors merely are asking for access to IP and fiber-based transmission that the ILEC is already implementing for itself. This Court decision, therefore, is not in conflict with Windstream’s petition. Moreover, ILECs are required to make modifications to their facilities to the extent necessary to meet the obligations imposed by

⁸⁴ The interface boxes were exchanged when ILECs substituted HDSL2 for T1 carrier and will also need to be exchanged when the underlying facilities are transitioned from HDSL2 to IP.

sections 251(c)(2) and 251(c)(3).⁸⁵ So while ILECs are not required to upgrade to IP facilities, they are required to make modifications (e.g., install interface boxes if needed) to ensure compliance with the unbundling rules such as those for DS1 and DS3 loops.

Conclusion

The Commission needs to take prompt action – as proposed by the Commission, COMPTEL and other commenters – to ensure the continued availability, throughout and upon completion of the technology transitions, of viable wholesale access to ILEC services and facilities, as such access has created and continues to support retail competition.

Respectfully submitted,

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⁸⁵ *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813, n. 33 (8th Cir. 1997).