Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Business Data Services in an Internet Protocol Environment

Technology Transitions

Special Access for Price Cap Local Exchange Carriers

AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services

DECLARATION OF JOSEPH HARDING

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June 23, 2017
DECLARATION OF JOSEPH HARDING

I, Joseph Harding, hereby declare as follows:

1. I am the Executive Vice President and Enterprise Chief Marketing Officer at Windstream, a position I have held since February 2015. I have more than 20 years of experience in the telecommunications industry. In my current capacity I am responsible for all aspects of marketing for Windstream’s enterprise business unit. I am over 18 years old and am competent to make this declaration. I submit this declaration in support of Windstream’s motion for stay pending judicial review.

2. Windstream is a communications service provider with interests split relatively evenly between incumbent and competitive carrier operations. It is both the fifth largest incumbent local exchange carrier (“ILEC”) and one of the largest competitive local exchange carriers (“CLECs”) in the nation. Windstream provides advanced communications and technology solutions, including managed services and cloud computing, to hundreds of thousands of business, government, and nonprofit locations throughout the continental United States.

3. Windstream has invested billions of dollars to build and acquire an intra- and inter-city network comprising more than 147,000 miles of fiber across the United States. Like other communications providers, however, to furnish its finished business communications services to its retail customers, Windstream requires the ability to transmit traffic over the “last mile” between a traffic aggregation point and the customer location, known as a channel termination. These last mile connections provide a necessary bridge between Windstream’s extensive fiber network and business consumer locations. Business data services ("BDS"), both
based on packet-switched Ethernet and on time-division multiplexing DS1 and DS3 special access lines, which offer guaranteed levels of performance and reliability for data transmitted over the last mile, are essential inputs that enable Windstream and other providers to offer communications solutions to retail customers.

4. Outside of its ILEC service areas, Windstream cannot feasibly build its own last-mile facilities to provide communications solutions to the vast majority of business locations, including the vast majority of its customers’ business locations. In particular, for customers of services with bandwidth at or below that of a DS3 (i.e., approximately 45 Mbps), Windstream cannot economically construct its own last-mile facilities in virtually all cases.

5. Where it does not have its own last-mile connections for channel terminations and associated local area transport to customer locations, Windstream usually depends on its access to wholesale BDS inputs to provide a competitive option to business services customers. For customer locations that have lower bandwidth demand, Windstream’s options for BDS inputs are usually limited to DS1 and DS3 special access service provided over the last-mile facilities of the ILEC. Although other options, such as local loops provided as unbundled network elements, are sometimes available for Windstream to purchase as an alternative, various contractual, regulatory, and technical constraints limit their availability.

6. Windstream purchases BDS inputs on a wholesale basis through typically multiyear agreements. For DS1 and DS3 services in markets subject to price cap regulation, Windstream may purchase inputs through ILECs’ term and volume commitment plans that provide credits against the tariffed rates. Windstream also has wholesale agreements in place for Ethernet-based BDS inputs from ILECs and from competitive fiber-based providers, if available.
7. While Windstream purchases Ethernet-based BDS for some customer locations, those services are not always available or cost-effective, and in many cases customers wish to continue using their existing equipment rather than purchase new equipment that is compatible with Ethernet-based BDS. ILECs’ DS1 and DS3 services therefore remain crucial inputs for Windstream to be able to provide lower bandwidth services to business retail customers that want data services at locations where Windstream or other CLECs do not have their own last-mile facilities. DS1 and DS3 services comprise the majority of the wholesale last-mile BDS connections Windstream leases.

8. The cost of DS1 and DS3 BDS inputs needed to reach retail customers, including channel termination and transport, is the largest component of network costs for Windstream’s CLEC enterprise and small and medium business (“SMB”) segments. As of the end of the first quarter of 2017, this cost accounts for approximately **BEGIN HIGHLY CONFIDENTIAL*** of the network interconnection costs for Windstream’s CLEC enterprise and SMB businesses, and represents **BEGIN HIGHLY CONFIDENTIAL*** of the total costs of those businesses.

9. Given these high costs, the availability of DS1 and DS3 inputs at reasonable rates for any given customer’s location is an essential factor in Windstream’s ability to offer a competitive solution to that customer. As of the end of the first quarter of 2017, DS1 and DS3 circuit costs (which includes channel termination and mileage charges) account for approximately **BEGIN HIGHLY CONFIDENTIAL*** of Windstream’s total spend on last-mile access outside of its ILEC territory. Using these wholesale BDS inputs, Windstream provides services to approximately
10. In most cases, Windstream’s retail enterprise and SMB customers purchase finished communications solutions pursuant to contracts with multiyear terms, typically three or five years. For potential new customers, Windstream usually will negotiate the rates and terms of the agreements. Given the significance of last-mile access and local transport costs, the prices Windstream is able to offer its potential customer depend on the prices of BDS inputs available to Windstream over the entire term of a customer’s service agreement.

11. Many of Windstream’s enterprise customers, including government customers, ***BEGIN HIGHLY CONFIDENTIAL*** ***END HIGHLY CONFIDENTIAL***. As a result, faced with ILEC price increases on BDS inputs during the term of a contract for services that use those inputs, ***BEGIN HIGHLY CONFIDENTIAL*** ***END HIGHLY CONFIDENTIAL***. Windstream thus must factor in any anticipated DS1 and DS3 input price increases during the term of its contract with an enterprise customer when it initially makes a bid for that contract. In contrast, the ILEC bidding for the same customer contract, as the underlying facilities owner, does not face the risk of increases to its own input costs but can raise the costs for a competitor such as Windstream.

12. Based on the results of the FCC’s competitive market test adopted in the BDS Report and Order, Windstream estimates that once they take effect, the FCC’s new rules would result in the elimination of currently effective price cap protections in ***BEGIN HIGHLY CONFIDENTIAL*** ***END HIGHLY CONFIDENTIAL*** counties in which
Windstream operates a competitive provider. These counties also include approximately
***BEGIN HIGHLY CONFIDENTIAL*** of Windstream’s total DS1 and DS3 circuit costs as of the end of the first quarter of 2017.

Approximately ***BEGIN HIGHLY CONFIDENTIAL*** Windstream enterprise and SMB customer locations are either entirely or
partially located in those counties, which collectively represent approximately ***BEGIN
HIGHLY CONFIDENTIAL*** in recurring revenue on an annual basis.

13. The vast majority of Windstream’s DS1 and DS3 purchases in the counties in
which price cap regulation will be eliminated are currently made pursuant to term and volume
commitment plans. The plans provide discounts, typically as a percentage off of ILECs’ tariffed
rates.

14. In addition, even in the counties deemed to be non-competitive under the FCC’s
new rules, transport service will also no longer be subject to price cap protections. Although
transport, compared to channel termination, is a smaller component of Windstream’s overall
costs for BDS interconnection inputs, it still accounted for approximately ***BEGIN HIGHLY
CONFIDENTIAL*** in spend based on annualizing the first quarter of 2017.

15. The FCC’s broad deregulation of the markets for DS1 and DS3 special access,
including for both channel terminations and transport, will impose significant costs on
Windstream that cannot be recovered later, and will undermine Windstream’s ability to offer a
competitive alternative to customers. The resulting lost revenue cannot be recovered even if the
new rules are ultimately invalidated by the court.
16. Although ILECs, including AT&T and Verizon, have not yet announced price increases following the elimination of price caps, nor committed to maintaining rates at current tariffed levels, Windstream expects that the DS1 and DS3 rates in at least some markets will increase as soon as the ILECs are able to do so after the FCC’s new rules go into effect on August 1. ILECs that choose to detariff can raise existing tariffed rates without further delay. ILECs that continue to file tariffs during the 36-month transition period may begin raising DS1 and DS3 channel termination prices after 6 months.

17. This expectation is based on Windstream’s past experience as a wholesale customer that also offers competing retail services with these ILECs. With respect to Ethernet-based BDS, which is not currently subject to rate constraints under the FCC’s rules, ILECs have engaged in price squeezes against Windstream by pricing their wholesale BDS inputs sold to competitive providers close to or even higher than the ILEC’s own rates for finished retail communications solutions that use those inputs. Windstream expects that once ILECs are no longer constrained by price cap regulation, they will engage in the same type of practice for DS1 and DS3 channel terminations in counties that are deemed competitive as well as for transport services nationwide.

18. Also, prior to the FCC’s suspension in 2012 of its rules allowing for new grants of pricing flexibility, Windstream experienced ILEC price increases routinely if not always following the FCC’s grant of pricing flexibility in a given metropolitan statistical area. Windstream expects a similar result in the counties where prices will be deregulated as a result of the new competitive market test.

19. Most recently, just days before the BDS Report and Order was adopted, AT&T announced that 10 and 15 percent price increases for certain intrastate private line DS3 services
would take effect “on or after” the date of the Commission’s scheduled vote. While these intrastate private line services are not subject to the *BDS Report and Order*, this drastic price increase affecting seven states further demonstrates that ILECs, where insufficiently constrained by regulation, can—and will—raise prices on DS1 and DS3 services.

20. Further destabilizing prices is the potential for DS1 and DS3 prices to increase immediately after the new rules go into effect if ILECs detariff, which they are permitted to do at any time under the new rules. ILECs’ term and volume commitment plans provide discounts to the wholesale customer through various mechanisms that most commonly result in a percentage of the tariffed rate that is either reduced or credited to the customer. The plans require a minimum number of purchases at tariffed rates to effect these discounts.

21. However, if an ILEC detariffs prior to the end of the term of the volume commitment plan, the continued validity of the agreed-upon prices in the commitment plans would be in doubt. Windstream expects that ILECs will take the position, one with which Windstream disagrees, that immediate detariffing relieves the ILECs’ of their contractual obligation to maintain existing tariffed rates referenced in the term and volume commitment plans for the duration of the terms of those plans. In addition, I understand that although the Order placed a freeze on tariffed channel termination rates for a period of 6 months from the effective date of the new rules, that freeze would not apply if an ILEC were to detariff voluntarily within that 6-month timeframe. To Windstream’s knowledge, none of the large ILECs—AT&T, Verizon, CenturyLink, and Frontier—has committed to maintaining its tariffs for the full term of its respective term and volume commitment plan or otherwise shown any willingness to renegotiate these commitments.
22. The prospect of rate increases creates uncertainty over the short- or even medium-term for inputs, which will raise the prices of the communications solutions in Windstream’s bids for prospective customers and current customers whose contracts are up for renegotiation.

23. Windstream estimates that approximately ***BEGIN HIGHLY CONFIDENTIAL*** enterprise and SMB customer locations either entirely or partially in a county that will lose rate protections under the FCC’s new rules, will need to be renegotiated within the next 12 months. These contracts represent approximately ***BEGIN HIGHLY CONFIDENTIAL*** in recurring revenue on an annual basis.

24. In the absence of the FCC’s new BDS rules, Windstream would have projected, based on past performance, to enter into approximately ***BEGIN HIGHLY CONFIDENTIAL*** new contracts over the next 12 months in the newly deregulated markets, representing a projected ***BEGIN HIGHLY CONFIDENTIAL*** in recurring revenue on an annual basis. The specter of significant increases in DS1 and DS3 input prices over the next 12 months will force Windstream either to forgo bidding or to submit higher bids for new or renegotiating customers, and to increase the rates for customers that are on month-to-month arrangements, where the customer contract allows Windstream to do so.

25. Either way, increases in the costs of DS1 and DS3 inputs in the newly deregulated counties put Windstream at a severe competitive disadvantage compared to the large ILECs. These ILECs will not face the same cost pressures because they are the owners of the underlying last-miles facilities, which have been fully or near fully depreciated. Mirroring their current practices with deregulated Ethernet inputs, the large ILECs will use their control of the pricing of
DS1 and DS3 inputs to raise Windstream’s costs of serving retail customers compared to the ILECs’ own costs, squeezing Windstream’s margins and prices and pushing it out of the market.

26. This problem is particularly acute for ***BEGIN HIGHLY CONFIDENTIAL*** located either entirely or partially in newly deregulated markets. The pricing instability caused by the FCC’s new rules, and Windstream’s expectation of higher input costs, mean that Windstream ***BEGIN HIGHLY CONFIDENTIAL***.

27. As a result, Windstream expects to ***BEGIN HIGHLY CONFIDENTIAL***. Because the lost customers will enter into multiyear contracts with another provider—most likely the ILEC—Windstream would not be able to recoup revenue lost during the pendency of this appeal or prevent ongoing lost revenue from those customers. Moreover, for current retail customers that have contractually locked in rates, Windstream will also fully absorb the loss caused by increases in DS1 and DS3 input costs for the duration of those contracts, which Windstream estimates to be ***BEGIN HIGHLY CONFIDENTIAL*** over 12 months on a 20% increase in input costs. In both cases,
Windstream would not be able to recover those losses even if the FCC’s rules are invalidated by a court on review.

28. In addition to driving price increases for its retail products, the expectation of higher BDS input costs will also cause Windstream to reevaluate its ability to remain in certain markets. ***BEGIN HIGHLY CONFIDENTIAL***

In such markets, customers of lower bandwidth services in particular will be affected because the limited revenue potential of these customers cannot economically support the extension of competitive fiber facilities to their locations.

29. The competitive disadvantage caused by the ILECs’ anticompetitive pricing power, which will be magnified by the FCC’s new rules, harms Windstream’s ability to compete effectively not just in the newly deregulated markets. Lost revenue and lower market share will further force Windstream to reduce staff and other resources, and to forego investments in its network, all of which will injure Windstream’s position in the market and reduce customers’ competitive choice of service provider. These effects of these harms will remain and continue even if the FCC’s new rules are set aside by the court.
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: June 22, 2017

[Signature]

Joseph Harding