

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition of Windstream Corporation for)	WC Docket No. 15-1
Declaratory Ruling Regarding Unbundled)	
Access to DS1s and DS3s)	GN Docket No. 13-5
)	
)	

**COMMENTS OF
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

ITTA – The Voice of Mid-Size Communications Companies hereby submits its comments in response to the January 6, 2015 Public Notice¹ issued by the Federal Communications Commission (“FCC” or “Commission”) requesting comment on a petition for declaratory ruling (“Petition”) filed by Windstream Corporation on December 29, 2014.² In its Petition, Windstream requests that the Commission issue a declaratory ruling to confirm that an incumbent local exchange carrier’s (“ILEC’s”) obligation to provide DS1 and DS3 loops on an unbundled basis is not altered or eliminated either by replacement of copper with fiber or by the

¹ “Wireline Competition Bureau Seeks Comment on Windstream’s Petition for Declaratory Ruling Seeking to Confirm ILECs’ Continued Obligation to Provide DS1s and DS3s on an Unbundled Basis After Technology Transitions,” Public Notice, WC Docket No. 15-1, GN Docket No. 13-5, DA 15-4 (rel. Jan. 6, 2015).

² Petition of Windstream Corporation for a Declaratory Ruling, WC Docket No. 15-1, GN Docket No. 13-5 (filed Dec. 29, 2014).

conversion of transmission from Time-Division Multiplexing (“TDM”) to Internet Protocol (“IP”) format.³

The Commission must deny the relief sought in the Petition. As explained below, Windstream’s assertion that ILECs are obligated to offer DS1 and DS3 loops on an unbundled basis when they have converted from copper to fiber networks or have transitioned from TDM to IP transmission has no basis in the statute or the Commission’s unbundling rules. Reaching this conclusion would require the Commission to reverse its well-founded determination more than a decade ago (and subsequently upheld by the courts) that declining to impose such obligations would fuel deployment of broadband infrastructure. Given that the Commission’s decision has led to massive investment in next-generation networks and vibrant competition in the market for broadband services, there is no valid justification for the Commission to depart from precedent.

DISCUSSION

The FCC’s rules require ILECs to provide unbundled access to certain DS1 and DS3 loops and transport pursuant to Section 251(c)(3) of the Act,⁴ except in those geographic areas where certain triggers have been met demonstrating that competitors would not be impaired without such access.⁵ When the Commission adopted these requirements, it made clear that the obligation to unbundle DS1 and DS3 loops applies only to “TDM-based services.”⁶ Thus, any obligation to provide unbundled access to DS1 and DS3 loops is limited to those situations

³ *See id.* at 1.

⁴ 47 U.S.C. § 251(c)(3).

⁵ 47 C.F.R. ¶¶ 51.319(a)(4), (5).

⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338, ¶ 294 (Aug. 21, 2003) (“TRO”).

where TDM-based transmission remains in place; no high-capacity loop unbundling obligations would survive the complete transition to IP technology.

Windstream nonetheless claims that if the requirement to unbundle DS1 and DS3 loops were to cease upon either copper loop retirement or conversion of a loop to IP, it would undermine the technology transition and harm competition.⁷ Windstream maintains that for ILECs to obtain relief from unbundling obligations for high-capacity loops, ILECs must seek a rule change or forbearance through Commission-approved channels.⁸ In the absence of a change in rules or a grant of forbearance, Windstream contends, “ILECs remain obligated to provide access to DS1 and DS3 capacity loops [regardless] of whether the loop is copper or fiber, or whether transmissions over the loop are in a TDM or IP format.”⁹

There is nothing in the Commission’s rules or related law or public policy that requires ILECs to provide such access when TDM capabilities no longer exist, or to maintain TDM capability solely to accommodate CLEC demands for unbundled network elements (“UNEs”). Such a result would in fact be contrary to the investment in and deployment of next-generation facilities and services, a central focus of the FCC’s policy agenda.

The Commission determined more than a decade ago in the *Triennial Review Order* that, on a national basis, CLECs were not impaired without access to packet switching, and that eliminating any obligation to unbundle such facilities would encourage broadband deployment by ILECs and CLECs alike.¹⁰ It therefore declined to require that packet switching be made

⁷ Petition at 2.

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *TRO* at ¶ 537.

available as a stand-alone UNE.¹¹ For the same reasons, the Commission ruled in the *TRO* that ILECs were not required to provide unbundled access to the packet switched features, functions, and capabilities of hybrid loops,¹² but rather, were required only to provide unbundled access to the legacy TDM features, functions, and capabilities of such loops.¹³ Thus, under the Commission's existing unbundling rules, once an ILEC retires TDM facilities and equipment, it has no obligation to unbundle packetized loop transmission facilities (with the limited exception of providing a 64 kbps voice channel in certain circumstances).¹⁴ Instead, the ILEC fulfills any remaining loop unbundling obligations by making available unbundled copper loops and subloops (to the extent it has not retired those facilities) to which requesting carriers can attach their own electronics to serve their customers.

The Commission's conclusions were upheld on appeal by the D.C. Circuit, and there is no reason to depart from this precedent.¹⁵ In fact, modifying the rules to require ILECs to unbundle packet-switched loops would contravene the Commission's sound judgment that

¹¹ *Id.*

¹² *Id.* at ¶ 288. In the *Section 271 Forbearance Order*, the Commission later forbore from enforcing the requirements of Section 271 with regard to the broadband elements, including FTTH and FTTC loops, the packetized functionality of hybrid loops, and packet switching, that it had relieved from unbundling in the *Triennial Review Order* and subsequent orders. *In the Matter of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c), et al.*, Memorandum Opinion and Order, WC Docket No. 01-338, ¶ 19 (Oct. 27, 2004).

¹³ *TRO* at ¶272. The Commission also subsequently concluded that ILECs are under no obligation to build TDM functionality into a new hybrid loop or into an existing hybrid loop that never had TDM functionality. *See* 47 C.F.R. ¶¶ 51.325-51.335; *In the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, CC Docket No. 01-338, ¶ 2 (Oct. 18, 2004).

¹⁴ 47 C.F.R. ¶ 51.319(a)(3)(iii). This 64 kbps requirement is only implicated if the ILEC retires the copper loop pursuant to the notice processes set forth in the FCC's rules. *See* 47 C.F.R. §§ 51.325, 51.329.

¹⁵ *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 581-87 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) ("USTA").

declining to require ILECs to provide unbundled access to broadband elements (including packet switching and packetized loops) would advance the Commission's objectives to promote the deployment of next-generation networks and facilitate the IP transition. As the Commission found in the *TRO*, this decision would promote the goals of Section 706 of the Act by providing incentives for both incumbent and competitive carriers to invest in and deploy broadband infrastructure.¹⁶ Specifically, the Commission stated:

“[O]ur decision not to unbundle stand-alone packet switching is also guided by the goals of, and our obligations under, Section 706 of the Act. In order to ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goal. Thus, we decline to require unbundling on a national basis for stand-alone packet switching because it is the type of equipment used in the delivery of broadband.”¹⁷

In upholding the Commission's conclusions, the D.C. Circuit found that “the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders [for high-capacity loops], even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.”¹⁸ As the Court observed, “[a]n unbundling requirement under these circumstances seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments' potential return.”¹⁹ The Court concluded that the “[a]bsence of unbundling, by contrast, will give all parties an incentive to take a shot at this potentially lucrative market.”²⁰

¹⁶ *TRO* at ¶538.

¹⁷ *Id.* at ¶ 541.

¹⁸ *USTA* at 580.

¹⁹ *Id.* at 584.

²⁰ *Id.*

Indeed, the Commission’s wise decision not to require unbundled access to packet-switching and packet-switched features unleashed a torrent of investment in broadband by ILECs, cable operators, wireless carriers, and CLECs, many of which have emerged as some of the largest providers of next-generation IP-based services. As Windstream observes, CLECs “are by far the most significant alternatives to the ILECs in [providing] small and medium-sized business customers” not only TDM-based transmissions, but also Ethernet services.²¹ According to recent data, tw telecom is the third-largest Ethernet provider in the United States, and XO and Level 3 are the sixth and eighth largest Ethernet providers, respectively.²² Cable companies like Cox and Time Warner Cable also are among the top eight providers of Ethernet services in the United States.²³

Those same opportunities and incentives for investment continue to be available to CLECs, and in fact, are now stronger than ever as the industry moves forward with the transition to an all-IP world. The Commission’s forward-looking decision not to require unbundled access of such elements laid the groundwork for investment in IP-enabled networks and services to flourish.

In any event, for the Commission to reverse course on this issue, it would have to conduct a formal rulemaking proceeding and reach a conclusion based on a complete record (as opposed to unsubstantiated claims) that CLECs are impaired without access to those facilities. Given the industry’s enormous investment in broadband and the existence of robust competition among

²¹ Petition at 2.

²² See *Mid-Year 2013 U.S. Carrier Ethernet Leaderboard; Cable MSOs and Regional Competitive Providers Show Strongest Gains*, Vertical Systems Group (Aug. 20, 2013), available at: <http://www.verticalsystems.com/vsglb/mid-year-2013-u-s-carrier-ethernet-leaderboard/> (last visited: Feb. 2, 2015).

²³ *Id.*

ILECs, cable providers, wireless providers, CLECs, and others in today's communications marketplace, the Commission's finding should remain undisturbed.

It is important to note that the lack of any obligation for ILECs to provide unbundled access to DS1 and DS3 loops as a result of the IP transition does not mean that CLECs will be left without any means to provide high-capacity services to their customers. CLECs will continue to have access to an ILEC's copper facilities as UNEs to the extent the ILEC continues to operate its copper facilities, and CLECs will have access to high-capacity loops as a commercial offering if the ILEC has retired those facilities. CLECs also will continue to have access to ILEC poles, conduit, and rights of way to deploy their own transmission facilities. This result comports with the FCC's objective in the *TRO* to incentivize CLECs to invest in their own equipment and facilities. In addition, there is every indication that service providers that have transitioned to IP-based technology will sell IP-based services to CLECs on commercially reasonable terms and conditions, which will enable CLECs to resell or use those services as inputs to their own services if they so desire.²⁴

²⁴ See, e.g., AT&T Reply Comments, GN Docket Nos. 13-5, 12-353, at 41 (filed Apr. 10, 2014).

CONCLUSION

For the foregoing reasons, the Commission should deny Windstream's request for a declaratory ruling that ILECs are required to provide unbundled access to DS1 and DS3 loops when they have retired their legacy copper facilities or transitioned from TDM to IP format. Such a finding has no basis in the relevant statute or the Commission's unbundling rules. Moreover, reversing the Commission's determination in the *TRO* would be inconsistent with its sound rationale, as upheld by the courts, that declining to impose such obligations would lead to development of a vibrantly competitive broadband ecosystem.

Respectfully submitted,

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