In the Matter of

Petition for Declaratory Ruling to Clarify
That Technology Transitions Do Not Alter
the Obligation of Incumbent Local Exchange
Carriers to Provide DS1 and DS3 Unbundled
Loops Pursuant to 47 U.S.C. § 251(c)(3)

Technology Transitions

JOINT COMMENTS OF GRANDE COMMUNICATIONS NETWORKS, LLC
AND U.S. TELEPACIFIC CORP.

Pursuant to the Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) on January 6, 2015, Grande Communications Networks, LLC (“Grande”) and U.S. TelePacific Corp. (“TelePacific”) (collectively, “Joint Commenters”), through their undersigned counsel, submit the following comments in support of Windstream’s Petition for Declaratory Ruling to “confirm that an incumbent local exchange carrier’s (“ILEC’s”) obligations to provide DS1 and DS3 capacity loops on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. §§ 51.319(a)(4) and (5) are not altered or eliminated either by replacement of copper with fiber or by the conversion of transmission from TDM to Internet Protocol (“IP”) format.”


2 Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter the Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops...
I. BACKGROUND

Grande provides multichannel video programming, wired telephony, and wired high-speed Internet access services to Texas customers in North Dallas, San Antonio/San Marcos/Austin, Waco, Corpus Christi, and Midland/Odessa. TelePacific is the third largest carrier in California, after AT&T and Verizon, and primarily utilizes its own network to offer a full suite of competitive broadband services to its small and medium business customers, school, health care, and community anchor institution customers. TelePacific’s assets comprise 29 switches and more than 57,000 fiber miles, including fiber to 108 LEC wire centers, to many data centers and to more than 200 commercial buildings. TelePacific is collocated in nearly 300 ILEC central offices and relies primarily on the ILECs for last mile access to its customers.

II. COMMISSION RULES AND PRECEDENT REQUIRE THAT DS1 AND DS3 CAPACITY LOOP UNBUNDLING SURVIVE THE IP TRANSITION

Section 251(c)(3) of the Communications Act of 1934, as amended, requires ILECs to provide requesting carriers with “nondiscriminatory access to network elements on an unbundled basis.”\(^3\) Section 251 is technology neutral, and as such, it makes no difference whether network elements are offered using copper or fiber facilities, or provisioned in TDM or IP formats. Rather, in determining what network elements should be made accessible, the Commission considers whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”\(^4\) As Windstream states, the Commission determined that CLECs are impaired without access to DS1 and DS3 capacity loops, recognizing that “the barriers to entry impeding


\(^3\) 47 U.S.C. § 251(c)(3).

competitive deployment of loops are substantial,”\textsuperscript{5} given that “competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.”\textsuperscript{6}

Notwithstanding these Commission findings, in network change notices, Verizon has implied that after retiring copper it will “no longer be required to offer UNEs….”\textsuperscript{7} Although the notice recognizes Verizon’s legal obligation to “offer to requesting carriers a 64 Kbps voice grade channel over fiber loops that have been deployed where copper loops were retired,” Verizon does not recognize its continuing legal obligation to offer DS1 and DS3 capacity UNE loops.

Any assertions that ILECs are no longer obligated to continue providing unbundled DS1 and DS3 capacity loops as unbundled network elements (“UNEs”) when they retire copper or transition to IP services are fundamentally flawed and inconsistent with Section 251 and current rules. The \textit{Technology Transitions NPRM} emphasized that the Commission “must ensure that the customers of both incumbent and competitive LECs who currently depend on legacy services continue to have appropriate access to either adequate legacy or IP-based service alternatives,”\textsuperscript{8} noting that “the mere fact that a carrier obtains discontinuance authorization under section 214(a) for [TDM- or copper-based] services has no legal bearing on his obligation to provide UNEs.”\textsuperscript{9}

\textsuperscript{5} \textit{Windstream Petition} at 4 (citing \textit{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, 2617, ¶ 153 (2005) (“\textit{TRRO}”).

\textsuperscript{6} \textit{TRRO}, 20 FCC Rcd at 2616, ¶ 150.


\textsuperscript{8} \textit{Technology Transitions, et al., Notice of Proposed Rulemaking and Declaratory Ruling}, FCC 14-184, ¶ 29 (rel Nov. 25, 2014) (“\textit{Technology Transitions NPRM}”).

\textsuperscript{9} \textit{Id.} at ¶ 109.
Maintaining CLEC access to DS1 and DS3 capacity loops necessary to provide competitive telecommunications services to end-user customers must be a critical component of the Commission’s competition policy. The transition from copper to fiber, or from TDM to IP, should have no bearing on ILEC obligations under this framework.

III. 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.

The Commission has long recognized that, if not required to provide access to DS1 and DS3 elements, ILECs “could exercise market power . . . to foreclose long-term competition.” The Commission reasoned that “barring access to UNEs based on the availability of tariffed alternative creates an unacceptable risk of significant abuse by incumbent LECs,” and that ILECs would have “substantial incentive to raise prices . . . creating price squeeze and foreclosing competition.” This remains as true today as when the Commission recognized it in 2005 in the TRRO and in 2010.

Unbundled DS1 and DS3 capacity loops provided by ILECs are vital to Joint Commenters’ continued provision of competitive communications services. Access to these last-mile facilities is critical for the Joint Commenters to provision competitive telecommunications and broadband services to many of their customers. For example, where fiber is not available

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10 Id. at 2568, ¶ 59.
11 Id. (internal quotation omitted).
12 See, e.g., 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, FCC 10-113, 25 FCC Rcd 8622, 8670, ¶ 90 (2010) (noting that “there are a number of reasons to be skeptical of the [concept] that incumbent LECs, even if not required to offered UNEs, would have an incentive to make attractive wholesale offerings.”) (internal quotation omitted).
and Ethernet over copper is not a viable option, TelePacific can use a DS1 UNE loop to offer Ethernet over DS1 speeds of 10 Mbps.\textsuperscript{13}

The Joint Commenters use DS1 and DS3 capacity loops to bridge the last-mile gap between customer locations and the Joint Commenters’ respective fiber networks. In a 2012 survey of available on-net buildings from 27 alternative providers in 30 wire centers, TelePacific found non-ILEC last mile access facilities were available from a provider other than the ILEC at only 12.5\% of TelePacific’s customer service addresses.\textsuperscript{14} More recently, TelePacific’s 2014 survey of three sample wire centers showed that fiber may be available to only about 20\% of their 120,000 customer locations. When customers are looking for a provider to service all their locations, Grande also has to use a mix of on-net and off-net facilities in order to provide service to the customer. Although Grande has tried to use other providers to get to some of these off-net customer locations, third parties are also limited by their footprint and, in many cases, the ILEC is the only provider with loops to the off-net customer’s premise.

By granting the Windstream Petition for Declaratory Ruling and ensuring that CLECs continue to have access to DS1 and DS3 capacity loops, at reasonable rates and terms, the Commission will help to ensure that the market for telecommunications and broadband services remains competitive. Broadband over UNEs has the potential to bring affordable broadband to small businesses, especially community and anchor institutions such as schools, libraries, and rural health care providers, who cannot afford higher-priced, and do not need higher-bandwidth,

\begin{itemize}
\item \textsuperscript{13} TelePacific has negotiated agreements with AT&T that enable TelePacific to accelerate its migration to IP-based services such as Ethernet data and IP voice, allowing for the smooth migration to IP-based services while legacy TDM services remain available. See April 10, 2014 press release available at \url{http://www.telepacific.com/about/press/release-template.asp?id=2263}.
\item \textsuperscript{14} See U.S. TelePacific Corp., \textit{Request to Refresh Record and Take Expedited Action to Update Copper Retirement Rules to Promote Affordable Broadband Over Copper}, WC Docket Nos. 10-188, 12-353; GN Docket Nos. 09-51, 13-5; RM-11358, at 6 (Jan. 25, 2013).
\end{itemize}
fiber-based broadband. In short, continued availability of DS1/DS3 capacity loops has the potential to speed up broadband deployment by increasing broadband adoption rates where price is the primary reason for lack of adoption.

Although Joint Commenters believe current rules are clear, failure to grant Windstream’s request likely will make more difficult continued CLEC access to these important last-mile network elements as ILECs refuse such access based on their unfounded interpretation of Commission rules. The Commission should grant Windstream’s request so that CLECs retain the access to DS1/DS3 capacity loops they need in order to offer real competitive options, especially to the small and medium business market.

* * *
V. CONCLUSION

The Joint Commenters look forward to working with the Commission to ensure that the interests of CLECs are considered as the Commission reviews its rules to keep up with technology changes. For the reasons above, the Joint Commenters respectfully urge the Commission to grant Windstream’s Petition for Declaratory Ruling and ensure that CLEC access to DS1 and DS3 capacity loops on an unbundled basis are maintained pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.319, regardless of the facility or technology used to provide those services. The Commission’s rules are technology neutral, and competitive access to these unbundled network elements should not be affected by the replacement of copper for fiber, or by the conversion of TDM to IP.

Respectfully submitted,

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