

WINDSTREAM SERVICES II, LLC

4005 Rodney Parham Road
Little Rock, Arkansas 72212

Nicole Winters
Senior Counsel

501.748.6313
Email: Nicole.Winters@windstream.com



August 23, 2023

**Re: INFORMATIONAL COPY
Windstream Application for Authority Pursuant to Section 214 of the
Communications Act of 1934 to Discontinue the Provision of Certain Services**

Dear Sir or Madam:

Windstream respectfully provides this informational copy of the attached Application as filed with the FCC regarding the discontinuance of certain services. This informational copy is provided in compliance with Section 63.71(i) of the FCC's Rules – 47 C.F.R. § 63.71(i).

Any questions regarding this matter should be directed to my attention at 501-748-6313 or via email to Nicole.Winters@windstream.com.

Sincerely,

A handwritten signature in cursive script that reads 'Nicole Winters'.

Nicole Winters
Senior Counsel

Enclosure

RECEIVED-FPSC
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COMMISSION
CLERK

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

In the Matter of)
)
Section 63.71 Application of Windstream)
For Authority Pursuant to Section 214 of)
The Communications Act of 1934, As)
Amended, to Discontinue The Provision of)
Certain Packet-Based And Wavelength)
Business Services as Common Carriage)
Services and to Instead Offer Those)
Services as Private Carriage Services)

WC Docket No. _____

**SECTION 63.71 APPLICATION OF WINDSTREAM FOR DISCONTINUANCE AND
RECLASSIFICATION AS PRIVATE CARRIAGE**

Windstream¹ hereby applies for authority under Section 214(a) of the Communications Act, as amended, 47 U.S.C. § 214, and Section 63.71 of the Commission's rules, 47 C.F.R. § 63.71, to discontinue offering interstate Switched Ethernet, Dedicated Ethernet, and Wavelength Services on a nationwide common carrier basis and to reclassify those services as private carriage.

In support of its Application, Windstream provides the following information pursuant to Section 63.71 of the Commission's rules:

1. Name and Address of the Carriers:

Windstream Services, LLC
4005 North Rodney Parham Road
Little Rock, AR 72212

¹ This Application is filed on behalf of the Windstream Services, LLC affiliates listed in Appendix A.

2. Date of Planned Service Discontinuance:

Effective immediately upon Commission approval, Windstream will no longer offer interstate Switched Ethernet, Dedicated Ethernet, and Wavelength Services (“Services”) on a nationwide common carriage basis. Customers that currently subscribe to the Services as of the date of this Application would retain their existing services and Windstream will honor all existing contracts. Windstream is not seeking authority to cease offering the Services, but merely to discontinue offering these services on a common carriage basis and to instead offer them on a private carriage basis.

3. Points of Geographic Areas of Service Affected

The relief sought in this Application applies everywhere Windstream offers the following services:

a. Switched Ethernet Services:

i. Ethernet Private Line Services available in:

Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas

ii. Ethernet Virtual Private Line Services available in:

Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas

b. Dedicated Ethernet Services:

i. Ethernet Transport Services is available in:

Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas

ii. Ethernet Private Line Services is available in:

Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas

c. Wavelength Services:

i. Ethernet Private Line Services is available in:

Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas

ii. Data Network Backhaul is available in:

Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas

4. Brief Description of Types of Service Affected:

Switched Ethernet Services are switched services purchased by business, government, and educational institution customers to connect multiple locations using Ethernet protocol in speeds up to 100 Gbps. Dedicated Ethernet Services are used by business, government, and educational customers to connect multiple locations with dedicated fiber facilities in bandwidths up to 100 Gbps. Wavelength Services are a fully managed private network solution provided over fiber facilities offering high levels of availability, reliability, and security, in bandwidths up to 100 Gbps. The attached Declaration of Marc J. Dyman (**Attachment C**) contains additional information about each of these services.

As further explained in the attached Statement in Support of this Application² and in the Declaration of Marc J. Dyman³ Windstream is seeking reclassification of these Services as private

² See Attachment B.

³ See Attachment C.

carriage to obtain regulatory parity with its competitors. Many cable companies and CLECs, and at least two other ILECs that provide services in competition with these services do so on a private carriage basis and thus have greater flexibility to make competitive offers free of Title II restrictions. Reclassification of these services as private carriage would give Windstream the same regulatory flexibility to meet or beat those competitive offers, which will promote even greater competition and benefit customers. The public convenience and necessity will not be adversely affected by the reclassification of these services, because Windstream will honor all existing contracts, customers are being given significant notice of these changes, and the reclassification of these services to private carriage will enhance competition.

5. Brief Description of the Dates and Methods of Notice to All Affected Customers

Windstream sent notices to the affected customers, in accordance with Section 63.71(a) of the Commission's Rules, by United Parcel Service or U.S. Mail on August 18, 2023. A copy of the customer notification is attached to this Application (**Attachment A**).

6. Regulatory Classification of Carrier

Windstream offers these services pursuant to nondominant carrier regulation.

7. Other Information

In accordance with Section 63.71(a) of the Commission's Rules, a copy of this Application is being mailed concurrently with its filing to the entities listed on the attached certificate of service.

8. Conclusion

The public convenience and necessity will not be adversely affected by the discontinuance and reclassification of these services as private carriage. Windstream respectfully requests the Commission approve this Section 63.71 Application to discontinue and reclassify these services as private carriage.

Respectfully Submitted,

/s/ Nicole Winters
Nicole Winters
Senior Counsel
Windstream Services, LLC
4005 N. Rodney Parham Rd.
MS: 1170-B1F03-53A
Little Rock, AR 72112
(501) 748-6313
Nicole.Winters@windstream.com

August 23, 2023

Appendix A

FRN	ENTITY NAME
4967741	Georgia Windstream, LLC
4966552	Oklahoma Windstream, LLC
4967808	Texas Windstream, LLC
3783123	Valor Telecommunications of Texas, LLC dba Windstream Communications Southwest
1856145	Windstream Accucomm Telecommunications, LLC
4966594	Windstream Alabama, LLC
6580518	Windstream Arkansas, LLC
8343162	Windstream Buffalo Valley, Inc.
1687813	Windstream Communications Kerrville, LLC
3762010	Windstream Concord Telephone, LLC
5386172	Windstream Conestoga, Inc.
3271871	Windstream D&E, Inc.
4967337	Windstream East Texas, LLC f/k/a Windstream Sugar Land, LLC
4967360	Windstream Florida, LLC
4967725	Windstream Georgia Communications, LLC
4967840	Windstream Georgia Telephone, LLC
4967030	Windstream Georgia, LLC
3911385	Windstream Iowa Communications, LLC
5095856	Windstream Kentucky East, LLC
4967816	Windstream Kentucky West, LLC
3738416	Windstream Lakedale, Inc.
1959758	Windstream Lexcom Communications, LLC
4967774	Windstream Mississippi, LLC
4965992	Windstream Missouri, LLC
3708575	Windstream Montezuma, LLC
4966099	Windstream Nebraska, Inc.
4967055	Windstream New York, Inc.
4967634	Windstream North Carolina, LLC
6236608	Windstream Ohio, LLC
4967790	Windstream Oklahoma, LLC
4967683	Windstream Pennsylvania, LLC
4967014	Windstream South Carolina, LLC
4207239	Windstream Standard, LLC
4967691	Windstream Western Reserve, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Section 63.71 Application was served this 23rd day of August, 2023, by mailing true and correct copies thereof, postage prepaid, to the following persons to the addresses listed below.

Secretary of Defense
Attn: Special Assistance for
Telecommunications
Pentagon
Washington, DC 20301

Alabama Public Service Commission
Attn: Walter L. Thomas, Secretary
P.O. Box 304260
Montgomery, AL 36130

Office of Governor Kay Ivey
600 Dexter Avenue
Montgomery, AL 36130

Arkansas Public Service Commission
Attn: Commission Secretary
P.O. Box 400
Little Rock, AR 72201

Office of Governor Sarah Huckabee Sanders
State Capitol Room 250
500 Woodlane Ave.
Little Rock, AR 72201

Florida Public Service Commission
Attn: Clerk's Office
2540 Shumard Oak Boulevard
Gerald Gunter Building
Tallahassee, FL 32399

Office of Governor Ron DeSantis
400 S Monroe St
Tallahassee, FL 32399

Georgia Public Service Commission
Attn: Reece McAlister, Executive Secretary
244 Washington Street
Atlanta, GA 30334

Office of Governor Brian Kemp
206 Washington Street
Suite 203, State Capitol
Atlanta, GA 30334

Iowa Utilities Board
Attn: Board Secretary
1375 E Court Ave
Des Moines, IA 50319

Office of Governor Kim Reynolds
State Capitol
1007 East Grand Ave.
Des Moines, IA 50319

Kentucky Public Service Commission
Attn: Commission Records Office
211 Sower Boulevard
Frankfort, KY 40601

Office of Governor Andy Beshear
700 Capitol Ave., Suite 100
Frankfort, KY 40601

Minnesota Public Utilities Commission
Attn: Executive Secretary
121 Seventh Place East
Suite 350
St. Paul, MN 55101-2147\

Office of Governor Tim Walz
130 State Capitol
75 Rev Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Mississippi Public Service Commission
Attn: Executive Secretary
501 North West Street
Woolfolk State Office Bldg.
Jackson, MS 39201-1174

Office of Governor Tate Reeves
550 High St.
Sillers Building, 19th Floor
Jackson, MS 39201

Missouri Public Service Commission
Attn: Clerk's Office
200 Madison Street, P.O. Box 360
Jefferson City, MO 65102-0360

Office of Governor Michael Parson
P.O. Box 720
Jefferson City, MO 65102

Nebraska Public Service Commission
1200 N. Street, Suite 300
Lincoln, NE 68508

Office of Governor Jim Pillen
P.O. Box 94848
Lincoln, NE 68509-4848

New Mexico Public Regulation Commission
Attn: Records Management Office
1120 Paseo de Peralta
Santa Fe, NM 87501-1269

Office of Governor Michelle Lujan Grisham
490 Old Santa Fe Trail Room 400
Santa Fe, NM 87501

New York State Public Service Commission
Attn: Kathleen Burgess, Secretary to the
Commission
Three Empire State Plaza
Albany, NY 12223-1350

Office of Governor Kathy Hochul
NYS State Capitol Building
Albany, NY 12224

North Carolina Utilities Commission
Attn: Chief Clerk
430 North Salisbury Street
Dobbs Building, 5th Floor
Raleigh, NC 27603

Office of Governor Roy Cooper
20301 Mail Service Center
Raleigh, NC 27699-0301

Public Utilities Commission of Ohio
Attn: Marianne Townsend
180 East Broad Street
Columbus, OH 43215-3793

Office of Governor Mike DeWine
77 South High Street, 30th Floor
Columbus, OH 43215-6117

Oklahoma Corporation Commission
Jim Thorpe Office Building
2101 North Lincoln Boulevard
Oklahoma City, OK 73105-2000

Office of Governor Kevin Stitt
2300 N. Lincoln Blvd., Suite 212
Oklahoma City, OK 73105

Pennsylvania Public Utility Commission
Attn: Rosemary Chiavetta
Secretary to the Commission
Harrisburg, PA 17105

Office of Governor Tom Wolf
508 Main Capitol Building
Harrisburg, PA 17120

South Carolina Public Service Commission
Attn: Clerk's Office
101 Executive Center Drive, Suite 100
Columbia, SC 29210-8411

Office of Governor Henry McMaster
1100 Gervais Street
Columbia, SC 29201

Office of Regulatory Staff
Attn: Telecommunications
1401 Main Street, Suite 900
Columbia, SC 29201

Public Utility Commission of Texas
Attn: Docket Control
1701 North Congress Avenue
Austin, TX 78701-3326

Office of Governor Greg Abbott
P.O. Box 12428
Austin Texas 7871

/s/ Nicole Winters
Nicole Winters

Customer Name
 Address Line 1
 Address Line 2
 City, State Zip

August 18, 2023

**Important Notice Regarding Windstream's Switched Ethernet,
 Dedicated Ethernet and Wavelength Services
Change Effective October 15, 2023**

Dear Customer,

Windstream appreciates our ongoing business relationship. We want to make you aware of a planned change in regulatory status for Switched Ethernet, Dedicated Ethernet, and Wavelength Services offered by Windstream. Our records indicate that you subscribe to one or more of the below listed services. Effective September 30, 2023, the services listed below will cease to be provided on a "common carrier" basis, after that date these services will be offered on a "private carriage" basis in all areas in which they are offered.¹ Please note, this change will have no impact on any of your existing services, Windstream will continue to provide and honor existing contracts.

Service Details:

<u>Switched Ethernet Services</u>	<u>Dedicated Ethernet Services</u>	<u>Wavelength Services</u>
<ul style="list-style-type: none"> • Ethernet Private Line • Ethernet Virtual Private Line 	<ul style="list-style-type: none"> • Ethernet Transport • Ethernet Private Line 	<ul style="list-style-type: none"> • Ethernet Private Line • Data Network Backhaul

The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments as soon as possible, but no later than 30 days after the Commission releases public notice of the proposed discontinuance. You may file your comments electronically through the FCC's Electronic Comment Filing System using the docket number established in the Commission's public notice for this proceeding, or you may address them to the Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, Washington, DC 20554, and include in your comments a reference to the § 63.71 Application of Windstream Services, LLC. Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service.

If you have questions concerning the above, please contact at **888-969-3981** or **Windstream.Kinetic.Wholesale.Sales.Inquiry@windstream.com** so that we may assist you. We appreciate your business and look forward to serving your future business needs.

Sincerely,

Windstream

¹ All Windstream locations in Alabama, Arkansas, Florida, Georgia, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas.

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

In the Matter of)
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Section 63.71 Application of Windstream)
For Authority Pursuant to Section 214 of)
The Communications Act of 1934, As)
Amended, to Discontinue The Provision of)
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Business Services as Common Carriage)
Services and to Instead Offer Those)
Services as Private Carriage Services)

WC Docket No. _____

**STATEMENT IN SUPPORT OF WINDSTREAM'S APPLICATION FOR
DISCONTINUANCE AND RECLASSIFICATION AS PRIVATE CARRIAGE**

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(501) 748-6313
Nicole.Winters@windstream.com

Attorney for Windstream

August 23, 2023

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WC Docket No. _____

**STATEMENT IN SUPPORT OF APPLICATION FOR DISCONTINUANCE AND
RECLASSIFICATION AS PRIVATE CARRIAGE**

Windstream¹ hereby applies for authority under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), and Section 63.71 of the Commission's rules, 47 C.F.R. § 63.71, to discontinue offering Switched Ethernet, Dedicated Ethernet, and Wavelength Services as common carriage and to reclassify those services as private carriage.²

I. INTRODUCTION AND SUMMARY

In the *BDS Order*, the Commission held that the packet-based business data services (BDS) of the major cable companies, as well as those of a CLEC (BT Americas) and an ILEC (ACS), are private carriage.³ In December 2019, the Commission extended this private carriage classification

¹ This application is filed on behalf of the Windstream affiliates listed in Appendix A.

² For ease of exposition, Windstream will refer to these services in this Statement as "packet-based services," although some of these services also use wavelength technologies.

³ *Business Data Services in an Internet Protocol Environment*, WC Docket No. '16-143, Report and Order, 32 FCC Red 3459, ¶¶ 267-85 (2017) ("*BDS Order*"), *remanded in part, Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991 (8th Cir. 2008), *mandate stayed* (Order, 8th Cir., November 9, 2018).

to AT&T's packet-based BDS.⁴ These classification decisions underscored a significant regulatory disparity between these providers, which offer packet-based services on a private carriage basis, and carriers like Windstream, which have presumptively offered such packet-based services on a common carrier basis. To restore regulatory parity with its competitors, Windstream submits this Application to reclassify the packet-based business services listed in its Application and described in the supporting declaration of Marc J Dyman,⁵ as private carriage.⁶

The current regulatory disparity hinders full and fair competition, which harms customers of packet-based business services. These packet-based services are offered in an intensely competitive marketplace, and the complexity and sophistication of these services often require the ability to engage in targeted offers to win customers. As private carriers, cable companies and others have broad flexibility to tailor their offerings to the individualized needs of each customer. Windstream often cannot respond to these offers as aggressively as it would like because of its common carrier obligations. Subjecting Windstream to common carrier obligations that do not apply to its competitors thus skews competition and reduces Windstream's ability to be fully responsive to its customers.

When packet-based technologies emerged more than two decades ago, ILECs originally offered those services as tariffed common carrier offerings, while CLECs and cable

⁴ See *Comments Invited on Section 214 Application(s) to Discontinue Domestic Non-Dominant Carrier Telecommunications Services Provided on a Common Carriage Basis and Reclassify Those Services as Private Carriage Services*, WC Docket No. 19-323, Public Notice, 32 FCC Red 11069 (2019) (noting that AT&T's application would be deemed granted automatically on December 28, 2019 unless the Commission notified AT&T that its grant would not be automatically effective) (Public Notice of AT&T Application).

⁵ Declaration of Marc J. Dyman in Support of Application, attached to Application as Attachment C ("Dyman Declaration.").

⁶ Windstream is seeking reclassification of these services to the extent they are offered on an exchange access or interstate, interexchange basis.

companies offered competitive alternatives on a largely unregulated basis. In 2007 and 2008, the Commission declined to grant Windstream and other ILECs forbearance from Title II for their packet-based services.⁷ The agency's principal reason ironically was to maintain regulatory parity, as the agency *assumed* that all non-ILEC packet-based services were also subject to common carrier regulation.⁸ The *BDS Order* was the first time the Commission actually considered whether any particular cable or CLEC packet-based service was common or private carriage on a full record, and it found, contrary to its prior assumptions, that many of these services had been private carriage all along.

Now that the Commission has clarified that most of Windstream's competitors are private carriers, the principle of regulatory parity cuts the other way. Indeed, in the *BDS Order*, the Commission made clear that it was not "prejudg[ing]" the classification of any other packet-based services in today's marketplace, and that an ILEC's services "potentially could be appropriately classified as private carriage, as well." The Commission did explain, however, that if a carrier subject to Section 214 offered a packet-based service initially as common carriage, that carrier "would first need to obtain discontinuance approval" under Section 214 to have its services reclassified as private carriage. Although the Commission has never made a formal determination regarding the status of Windstream's current packet-

⁷ See *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Red 19478 (2007) ("*Embarq Frontier Forbearance Order*"). *aff'd sub nom. Ad Hoc v. FCC*, 572 F.3d 903 (2009); *Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Red 12260 (2008).

⁸ See, e.g., *Embarq Frontier Forbearance Order* ¶ 59 (finding that Embarq and Frontier are "ask[ing] us to go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow them to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in regulatory treatment between petitioners and their competitors").

based services, the Commission's prior orders have assumed that those services are common carriage. Thus, Windstream is filing this "discontinuance" application to have the services covered by this application formally reclassified as private carriage.

Reclassification of these services easily meets Section 214's standard, which requires the change to have no adverse effect on the public convenience and necessity. There is ubiquitous facilities-based competition for the packet-based services at issue. The customers for these services are highly sophisticated enterprises or other large purchasers, such as wireless carriers, who negotiate the rates and terms for their services on a case-by-case basis. As the Commission found in the BDS Order, "[o]ur market analysis does not show compelling evidence of market power in incumbent LEC provision of [packet-based] services, particularly for higher bandwidth services." Indeed, in the context of today's marketplace; retention of common carriage restrictions on Windstream but not its competitors harms customers by constraining Windstream's ability to meet competition.

The transition of these services to private carriage will be seamless. Although Windstream must seek this relief in the form of "discontinuance," Windstream has no plans to discontinue any current service. Granting this application would not require any immediate changes in any of these services, and Windstream would honor existing contracts and continue to make any required universal service contributions. Rather, "discontinuance" would merely give Windstream greater flexibility in how it offers and prices these services in the future. The Commission should thus promptly grant the Application.

II. REGULATORY BACKGROUND

Although the Commission has never formally considered whether Windstream's current packet-based offerings are common carriage or private carriage, the Commission has

always assumed they were common carriage, and Windstream has abided by common carrier requirements accordingly. Nonetheless, many of Windstream's competitors are offering these same services with the additional flexibility that private carriage allows. To place this Application in context, it is useful to review this regulatory history, and how this harmful, asymmetrical regulatory regime arose.

Forbearance Petitions from the 2000s. In the earliest days of packet-based services, ILECs offered such services as tariffed common carrier services, whereas both CLECs⁹ and cable providers¹⁰ could offer competing services on a more deregulated, and de-tariffed basis. Verizon was the first ILEC to seek greater regulatory parity. In December 2004, it filed a petition for forbearance from common carriage requirements for all of its "packet-switched services capable of 200 Kbps in each direction," which specifically included its "IP-VPN services and Ethernet services."¹¹ A four-member Commission, however, failed to reach

⁹ *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CC Docket No. 97-146, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 12 FCC Red 8596 (1997) (granting petitions seeking permissive de-tariffing for provision of interstate exchange access services by providers other than the incumbent ILEC). The Commission had also deemed all traditional interexchange carriers non-dominant and adopted mandatory de-tariffing of their interexchange services-rulings that applied to common carrier packet-based services to the extent they were offered on an interexchange basis. See *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Red 3271 (1995) (reclassifying legacy AT&T as a non-dominant interexchange carrier), subsequent history omitted; *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, as Amended, Second Report and Order, 11 FCC Red 20730 (1996) ("*Interexchange Forbearance Order*") (Commission would "no longer require or allow non-dominant interexchange carriers to file tariffs pursuant to Section 203 for their interstate, domestic, interexchange services"), subsequent history omitted.

¹⁰ See *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Red 4798 (2002) ("*Cable Broadband Order*"), subsequent history omitted. In the *Cable Broadband Order*, the Commission held that cable broadband internet access service was an information service, but also held that: (1) cable broadband transmission offered wholesale to third-party ISPs was private carriage (*id.* ¶55); and (2) even if cable modem service were a common carrier service, the Commission tentatively concluded that it would nonetheless forbear from applying Title II requirements to such services (*id.* ¶95).

¹¹ Letter from Edward Shakin, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 04-440, dated February 7, 2006, at 2 & Attachment 1; see also *Petition of the Verizon Telephone Companies for Forbearance*, WC Docket No. 04-440 (filed Dec. 20, 2004) (seeking forbearance from applying "Title II and the *Computer Inquiry* rules" to "any broadband services offered by Verizon").

a majority on Verizon's Petition within the statutory time period, and it was therefore "deemed granted" in 2006.¹² Thus, beginning in 2006, Verizon was freed from all common carriage regulation for its packet-based services.

The other ILECs quickly filed their own petitions for similar relief, but the Commission declined to give the ILECs the same relief that Verizon had gained. Instead, the Commission only granted forbearance from dominant carrier regulation, including the tariffing requirements and price cap regulation.¹³ In separate orders, it granted the same relief for BOC provided packet-based services to the extent they were provided on an interstate, interexchange basis.¹⁴ In granting such relief, the Commission specifically acknowledged that, even as of 2007, the marketplace for packet-based services was subject to intense competition from cable companies, CLECs and others.¹⁵ As a result of these orders, Windstream and other ILECs generally obtained relief from rigid *ex ante* rate regulation, which gave them a degree of flexibility to respond more efficiently to competitive offers.

But the Commission declined to grant forbearance from Title II, including Sections 201,

¹² See *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiries Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (released March 20, 2006). See also *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007) (holding that the Commission's deadlocked vote did not constitute reviewable agency action).

¹³ See, e.g., *Embarq/Frontier Forbearance Order* ¶¶ 16-55. De-tariffing was mandatory, to ensure consistency with the mandatory de-tariffing of interexchange services. See *id.* ¶41 ("to the extent petitioners wish to take advantage of the relief granted in this Order for any particular service specified in their petitions, they must follow our rules for nondominant services specified in their petitions, they must follow our rules for nondominant interexchange carriers in connection with that service").

¹⁴ See, e.g., *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Red 5207 (2007) (eliminating dominant carrier regulation of CenturyLink's interstate, interexchange voice and data services) ("*Qwest Section 272 Sunset Order*").

¹⁵ See, e.g., *Embarq/Frontier Forbearance Order* ¶21 ("There are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC's service territory," and "[t]hese competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against the petitioners").

202, and 208 of the Communications Act. Ironically, the Commission's principal reason for denying the request was ostensibly to *avoid* regulatory disparities. The Commission argued that the petitioning ILECs were "ask[ing] us to go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow it to offer certain broadband telecommunications services free of Title II regulation, thus *creating a disparity in regulatory treatment* between the petitioners and their competitors."¹⁶ The Commission claimed that such "preferential treatment" for those ILECs was not warranted.¹⁷ Notably, in making these findings, the Commission simply *assumed* that the competitors of Windstream and other ILECs were common carriers.¹⁸ The Commission did not actually consider the regulatory classification of any of Windstream's competitors' services, nor did it consider the possibility that many of those providers were offering packet-based services on a private carriage basis.

The effect of these decisions was that, while ILECs could more efficiently respond to competitive offerings (because it no longer had to modify tariffs to do so), the ILECs were still limited in their ability to tailor their offerings to the individualized needs of customers as its private carriage competitors were doing. Thus, while private carriers (like the cable companies) can target specific customers with uniquely tailored offers, the ILEC's ability to respond is constrained by the regulatory overhang of the Title II requirements.¹⁹

The BDS Proceedings. These issues next arose in the business data services (BDS) proceeding.²⁰ There, three major cable companies (Comcast, Charter, and Mediacom), along

¹⁶ *Id.* ¶59 (emphasis added).

¹⁷ *Id.*; see also *id.* ¶60 ("disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers").

¹⁸ See, e.g., *id.* ¶ 60.

¹⁹ See Dyman's Declaration. ¶¶ IV 3-6.

²⁰ *BDS Order* ¶¶ 267-85.

with a CLEC (BT Americas) and an ILEC (Alaska Communications Services (ACS)), argued that their packet-based services had always been private carriage offerings and should not be subjected to Title II.²¹ These providers argued that they make case-by-case decisions about whether to offer packet-based services to given customers and "make highly individualized decisions regarding any rates and terms they do offer for the relevant categories of service in order to meet the particular needs of a given customer."²² They also noted that their customers have the size and sophistication to demand such uniquely tailored offerings.²³ The Commission agreed that these companies' services were more properly categorized as private carriage, and thus it declined to subject their packet-based services to common carrier regulation.²⁴

The *BDS Order* was the first time the Commission made a classification determination with respect to any non-ILEC packet-based service. The Commission acknowledged that its decision formalized a significant regulatory asymmetry between services offered by cable companies and perhaps many CLECs as well (which generally have been private carriage) and ILEC services (which generally have been common carriage). In so doing, the Commission emphasized that it did not intend to "prejudge the classification of services being offered in the marketplace today or in the future, whether by competitive providers or incumbent LECs, which potentially could be appropriately classified as private carriage, as well."²⁵ The Commission nonetheless explained that "[w]here a provider subject to section 214 of the Act initially offers a given interstate service on a common carriage basis, that

²¹ *Id.* ¶¶ 271-73.

²² *Id.* ¶¶ 271-72.

²³ *Id.* ¶ 272.

²⁴ *Id.* ¶¶ 267-85.

²⁵ *See id.* ¶ 279.

provider first would need to obtain discontinuance approval for that common carrier offering before offering that service on a private carriage basis."²⁶ Thus, to the extent Windstream's services today remain common carriage, the Commission invited ILECs, like Windstream, to file discontinuance applications to formally reclassify their existing packet-based services as private carriage.

III. RECLASSIFICATION OF WINDSTREAM'S PACKET-BASED SERVICES AS PRIVATE CARRIAGE WOULD BE IN THE PUBLIC INTEREST

Windstream is seeking regulatory parity with cable companies and other competitors by filing this discontinuance application to reclassify the following packet-based offerings as private carriage: Switched Ethernet, Dedicated Ethernet, and Wavelength Services. These services are described in more detail in the accompanying Declaration of Marc J. Dyman.²⁷ In the context of these highly competitive services, the Section 214 standards for "discontinuing" and reclassifying these services as private carriage are easily satisfied.

Section 214 of the Communications Act provides that no carrier shall discontinue service unless the Commission certifies that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinuance.²⁸ Unlike the typical discontinuance case, however, Windstream is not proposing to cease offering any of these services, but merely to "discontinue" the common carriage classification of these existing services.²⁹ The question here, then, is whether reclassification of these existing services as

²⁶ *Id.* ¶ 279 n.700. "By contrast, that would not be the case with respect to a service that a provider introduces as a private carriage offering in the first instance." *Id.*: see also *id.* ¶ 273. n.678 (decision that ACS's Ethernet services are private carriage does not apply to any services listed in ACS's forbearance petition for which it received forbearance only from dominant carrier regulation in 2007).

²⁷ Dyman Declaration. ¶¶ III.1 A-C.

²⁸ 47 U.S.C. § 214(a).

²⁹ In a typical discontinuance case, in which the carrier is in fact ceasing to offer the service, the Commission considers "a number of factors in balancing the interests of the carrier and the affected user community," including "(1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and

private carriage would adversely affect the public convenience and necessity. That inquiry turns principally on the Commission's assessment of whether the reclassification would adversely affect competition.³⁰ Here, reclassification would be strongly in the public interest.

First, Windstream offers these services in an environment that is intensely and irreversibly competitive. The Commission has repeatedly and consistently found that packet-based services are subject to the fiercest type of competition. In its *BDS Order*, the Commission explained that "[o]ur market analysis does not show compelling evidence of market power in incumbent LEC provision of [packet-based] services, particularly for higher bandwidth services."³¹ As Mr. Dyman explains, "virtually every customer opportunity [for these services] is contested, typically by multiple facilities-based providers."³² Given this level of competition, the Commission has already determined that a variety of providers' packet-based offerings, including cable, CLEC, and ILEC offerings, can be properly classified as private carriage. Now that the Commission has clarified that many of Windstream's competitors are private carriers, the logic of the Commission's *Embarq/Frontier Forbearance Order* and analogous orders applies here: "disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that

adequacy of alternatives; and (5) increased charges for alternative services, although this factor may be outweighed by other considerations." *In re Verizon Telephone Companies, Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Red. 22737, 22742 (2003).

³⁰ Compare *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities: Universal Serv. Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III & ONA Safeguards & Requirements; Conditional Petition of the Verizon Tel. Companies for Forbearance Under 47 U.S.C. § 160(c)*, 20 FCC Red 14853, 14907-08 (2005) ("*Wireline Broadband Order*").

³¹ *BDS Order* ¶ 87; see also *id.* ¶ 83. See also *Citizens*, 901 F.3d at 1012 (affirming decision not to re-impose any regulation on Ethernet services); *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 904, 909-10 (D.C. Cir. 2009) (affirming original 2007 decision to forbear from tariffing and price cap regulation for Ethernet services).

³² See Dyman Declaration, ¶¶ II, 1.

may harm consumers."³³

The packet-based marketplace has become only more competitive since the Commission made its findings in the BDS proceeding. Many facilities-based providers offer packet-based services (and other competing services), and no provider has a high national market share.³⁴ Vertical Systems, which analyzes Ethernet services, has reported that among other things price compression and an expanding competitive landscape are challenges cited by ethernet service providers.³⁵

Given the intensely competitive nature of the packet-based marketplace, Windstream cannot exercise market power over the pricing or terms of such services. Accordingly, there is no longer any need to subject these Windstream services to common carrier regulation, particularly when many of its competitors are not subject to such restrictions. To the contrary, in today's competitive environment, the fact that some competitors are private carriers and some are common carriers *harms* consumers because retention of the Title II pricing standards prevents common carriers from fully responding to private carriers' more flexible marketplace offers. In a marketplace as complex and sophisticated as business level, packet-based services, competitors must be ready to respond to the marketplace with offers tailored to individual customer's needs. Windstream's private carrier competitors can and do engage in these types of individualized offers, but Windstream's ability to respond is hampered by the legacy Title II restrictions.

As Marc Dyman explains, Windstream's private carriage competitors "are increasingly

³³ *Embarq/Frontier Forbearance Order* ¶ 60.

³⁴ *See, e.g.*, 2022 U.S. Carrier Ethernet Leaderboard, Vertical Systems (Feb. 2023), <https://www.verticalsystems.com/2023/02/15/2022-u-s-ethernet-leaderboard/>.

³⁵ *Id.*

targeting individual customers or specific groups of customers with offerings that are specifically tailored to their individualized needs."³⁶ Windstream would often like to counter these offers with similarly tailored offers, but the overhang of Title II regulation constrains Windstream's ability to do so.³⁷ And regardless of how Windstream chooses to respond, Windstream must spend time and resources to consider the implications of common carrier regulation, time and resources that its private carriage competitors are able to avoid, allowing them to be quicker and more efficient than Windstream.³⁸

For these reasons, reclassification would not "adversely affect" competition or the public interest; to the contrary, it would *promote* competition by facilitating more aggressive competitive offers made more quickly. In that regard, Windstream's lack of market power over these packet-based services should be determinative. In the *BDS Order*, the Commission acknowledged that "our precedent has generally identified market power as a prerequisite for potentially compelling common carriage" for services that are currently offered as private carriage.³⁹ Just as the Commission would have no grounds to *compel* Windstream to offer these types of services today as common carriage in the first instance, so too would the Commission have no basis to force Windstream to *continue* to offer these services as common carriage by denying this Application.

The Commission also recognized in the *BDS Order* that, "[a]lthough some commenters seek to minimize the perceived extent of regulatory burdens that would flow from compelled common carriage [on cable companies], the Commission itself has acknowledged

³⁶ See Dyman Declaration, ¶ IV, 4.

³⁷ See *id.* ¶ 12-15.

³⁸ See *id.* ¶¶ 3, 15.

³⁹ *BDS Order* ¶ 282.

that meaningful burdens do, in fact, flow from common carrier treatment."⁴⁰ Today, many of Windstream's competitors offer their packet-based services on a private carriage basis, including not just the major cable companies AT&T, and Centurylink's successors, but perhaps a number of CLECs as well. Given the competitiveness of the packet-based marketplace, and the fact that many competitors in that marketplace are already private carriers, there is no longer any legitimate justification for continuing to subject Windstream to the "meaningful" burdens of common carriage.⁴¹

Second, reclassification would not adversely affect the public convenience. Windstream plans to continue offering these services and will honor existing contracts. The only difference will be the change in regulatory classification. And, in that regard, customers will perceive little or no difference in the manner in which these services are offered, other than Windstream will be free to compete more aggressively and to consider each opportunity on its own merits.⁴²

Indeed, Windstream's packet-based services, as offered today, already share certain characteristics with private carriage.⁴³ For example, Windstream's services are operationally

⁴⁰ *Id.*

⁴¹ The FCC also found "generalized assertions" about the "perceived benefits" of common carriage or "remedying perceived risks of harms" from private carriage (such as "strategic denials" of service) were not sufficient to declare the cable companies' services to be common carriage. *BDS* Order ¶284.

⁴² Reclassification also would theoretically give Windstream the ability to make case-by-case decisions about whether to offer service to any particular customer, but this change should have little practical effect. *See, e.g., NARUC v. FCC*, 525 F.2d 630,641 (D.C. Cir. 1976) ("*NARUC I*") ("a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal"). In today's intensely competitive environment, Windstream typically has no marketplace incentive to turn away potential customers. Moreover, as explained above, facilities-based competition for these packet-based services is so robust and entrenched that, even if Windstream did decline to serve a potential customer, other facilities-based competitors would rush in to fill the gap. In all events, reclassification would merely give Windstream the same flexibility that many of its facilities-based competitors have.

⁴³ The D.C. Circuit has explained that some characteristics of a communications service exist within a "grey area" between "*per se* common carriage" and "*per se* private carriage," and thus can be consistent with either classification. *See, e.g., Cellco P'ship v. FCC*, 700 F.3d 534, 547- 49 (D.C. Cir. 2012).

very similar to its private carriage competitors' offerings, and are direct substitutes that compete head-to-head with them in the marketplace.⁴⁴ The rates and terms for these packet-based services are, by their nature, highly negotiated.⁴⁵ As the Commission has noted, the customers for such services "include large wireless carriers, other large service providers, or enterprises."⁴⁶ Accordingly, like its private carriage competitors, Windstream makes individualized decisions about rates and terms to meet the needs of a given customer, within the limits permitted by common carriage. As the Commission noted in the *BDS Order*, the types of customers that purchase packet-based services have the "size and sophistication" to demand uniquely tailored offerings.⁴⁷

The Commission also noted that the cable companies maintained generally available marketing materials, standard terms of agreement, and rate sheets, but held that these materials did not constitute an indifferent holding out of the services. Specifically, the Commission held that the rate sheets did not constitute a formal, take-or-leave-it offer but were intended to act as a starting point for negotiations. The Commission concluded that the mere existence of uniform terms in this context did not mean that the provider expected any potential user to accept them outright, as if ordering from a tariff.⁴⁸ Windstream similarly sometimes lists standard rates and terms for its packet-based services in its Interstate Service Guides, but like the cable companies, in practice these service guides are often the starting point for negotiations.⁴⁹ For all these reasons, reclassification will have no negative impact on

⁴⁴ See *Dyman Declaration* ¶¶ II, 2-7.

⁴⁵ See *Id.*

⁴⁶ *BDS Order* ¶ 272.

⁴⁷ *Id.*; see also *id.* ¶ 276 and n.686.

⁴⁸ *Id.* ¶ 278.

⁴⁹ See *Dyman Declaration* ¶ II, 2-7.

customers.

Finally, reclassification will not adversely affect universal service. Section 254(d) of the Act gives the Commission the authority to require any "provider of interstate telecommunications... to contribute to the preservation and advancement of universal service if the public interest so requires."⁵⁰ The Commission has exercised that authority to require universal service contributions from certain types of private carriers.⁵¹ In the *BDS Order*, when it declared the cable companies' services to be private carriage, the Commission noted that "the Commission's universal service rules require certain contributions from private carriers" and emphasized that "[n]othing in this Order modifies those universal service contribution rules."⁵² The same would be true here and Windstream will continue to make universal service support contributions to the same extent that its private carrier competitors are contributing on their private carriage services.

⁵⁰ 47 U.S.C. § 254(d).

⁵¹ See, e.g., *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 et al., Further Notice of Proposed Rulemaking, 27 FCC Red 5357, 9 (2012) (explaining that in 1997, the Commission exercised its permissive authority under Section 254(d) of the Act to require private carriers to contribute to the Fund).

⁵² *BDS Order* ¶ 282 n.716 (responding to Public Knowledge argument that cable companies providing packet-based services should still be required to contribute to the universal service fund if they were declared to be private carriage).

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the Application.

Respectfully Submitted,

/s/ Nicole Winters

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August 23, 2023

Appendix A

FRN	ENTITY NAME
4967741	Georgia Windstream, LLC
4966552	Oklahoma Windstream, LLC
4967808	Texas Windstream, LLC
3783123	Valor Telecommunications of Texas, LLC dba Windstream Communications Southwest
1856145	Windstream Accucomm Telecommunications, LLC
4966594	Windstream Alabama, LLC
6580518	Windstream Arkansas, LLC
8343162	Windstream Buffalo Valley, Inc.
1687813	Windstream Communications Kerrville, LLC
3762010	Windstream Concord Telephone, LLC
5386172	Windstream Conestoga, Inc.
3271871	Windstream D&E, Inc.
4967337	Windstream East Texas, LLC f/k/a Windstream Sugar Land, LLC
4967360	Windstream Florida, LLC
4967725	Windstream Georgia Communications, LLC
4967840	Windstream Georgia Telephone, LLC
4967030	Windstream Georgia, LLC
3911385	Windstream Iowa Communications, LLC
5095856	Windstream Kentucky East, LLC
4967816	Windstream Kentucky West, LLC
3738416	Windstream Lakedale, Inc.
1959758	Windstream Lexcom Communications, LLC
4967774	Windstream Mississippi, LLC
4965992	Windstream Missouri, LLC
3708575	Windstream Montezuma, LLC
4966099	Windstream Nebraska, Inc.
4967055	Windstream New York, Inc.
4967634	Windstream North Carolina, LLC
6236608	Windstream Ohio, LLC
4967790	Windstream Oklahoma, LLC
4967683	Windstream Pennsylvania, LLC
4967014	Windstream South Carolina, LLC
4207239	Windstream Standard, LLC
4967691	Windstream Western Reserve, LLC

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

In the Matter of)
)
Section 63.71 Application of Windstream)
For Authority Pursuant to Section 214 of)
The Communications Act of 1934, As)
Amended, to Discontinue The Provision of)
Certain Packet-Based And Wavelength)
Business Services as Common Carriage)
Services and to Instead Offer Those)
Services as Private Carriage Services)

WC Docket No. _____

**DECLARATION OF MARC J. DYMAN
IN SUPPORT OF APPLICATION**

Dated: August 23, 2023

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Services and to Instead Offer Those)	
Services as Private Carriage Services)	

**DECLARATION OF MARK J. DYMAN
IN SUPPORT OF APPLICATION**

I. QUALIFICATIONS AND BACKGROUND

1. My name is Marc J. Dyman. I am the Executive Vice President of Business and Wholesale Services. In this position, I am the executive responsible for Switched Ethernet Services for its wholesale sales channel. I have been employed by Windstream for two years and have been in the telecommunication industry for 31 years. Prior to my current position, I held various positions in other companies managing services similar to Windstream's SONET, and Switched and Dedicated Ethernet services.

II. PURPOSE AND SUMMARY

1. In this declaration, I describe the services covered by Windstream's Application and why granting it will benefit competition and consumers. In short, the services subject to the Application are packet-based and wavelength services offered to sophisticated customers, including business, government, and educational institution entities. The marketplace for these services is intensely competitive and includes, among others, cable companies, CLECs, ILECs, resellers, and systems

integrators. Virtually every customer opportunity is contested, typically by multiple facilities-based providers. However, Windstream's services are subject to different regulatory requirements than many of its competitors' services, which impedes Windstream's ability to respond effectively to competitive offers, thus harming competition and consumers.

2. I understand that the Commission has formally acknowledged that many of the packet-based services offered by cable companies, two ILECs, and one CLEC are "private carriage" services.¹ By contrast, Windstream's packet-based and wavelength services have historically been considered "common carriage."² This regulatory asymmetry gives cable companies and other entities a significant and entirely arbitrary competitive advantage. Private carriage competitors are permitted to tailor their offerings to the individualized needs of each customer, and Windstream's private carriage competitors are increasingly competing in this way. Windstream, by contrast, is constrained in its ability to tailor its offers to the individualized needs of customers because Windstream's services are treated as common carrier services. Consequently, Windstream often cannot respond to its competitors' offers as aggressively as it would like because of its common carrier obligations. In addition, unlike its private carriage competitors, Windstream spends time and money evaluating the implications of common carriage requirements when assessing how best to respond to the tailored and individualized offerings of its private carriage competitors. For all these reasons, granting private carriage status for the services included in the Application will enable Windstream to compete more effectively against its private carriage rivals.

¹ See Windstream Statement in Support of Application, at 9-10 (citing *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, ¶¶ 267-85 (2017) ("BDS Order"), remanded in part, *Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991 (8th Cir. 2008), mandate stayed (Order, 8th Cir., November 9, 2018)).

² I understand that the regulatory classification of the Windstream packet-based and wavelength services at issue here is not absolutely clear because these services have never been formally classified as "common carriage." However, I also understand that regulators and others have historically assumed that Windstream's packet-based and wavelength services are subject to "common carriage" regulation. Windstream has thus complied with the common carriage requirements for these services.

3. The remainder of this declaration is organized as follows. In Section III, I describe the specific packet-based and wavelength services that Windstream is seeking to offer as private carriage, and I identify the corresponding services offered by a number of Windstream's competitors.³ In Section IV, I describe the harms to Windstream, competition, and consumers caused by the current regulatory asymmetry, and why granting Windstream's application will address those harms.

III. THE SERVICES COVERED BY WINDSTREAM'S APPLICATION

1. Windstream's Application seeks to formally classify the following packet-based and wavelength business services as private carriage.

A. Switched Ethernet Services

i. Switched Ethernet Services are switched services purchased by business, government, and educational institution customers to connect multiple locations using Ethernet protocol in speeds up to 100 Gbps. These services connect each customer location to an Ethernet switch in a Windstream office, and Windstream's network manages the routing of traffic to and from the connected locations. Switched Ethernet Services are provisioned over mostly fiber facilities and are available within and outside Windstream's ILEC footprint.⁴ Windstream offers Switched Ethernet Services to wholesale and retail customers of all sizes. To order Switched Ethernet Services, customers generally must contact a Windstream sales representative, or already have a previously negotiated contract in place for future circuits. Although Windstream offers standard rates, terms, and conditions for some Switched Ethernet Services upon request, most

³ Although I understand that Windstream must technically apply to "discontinue" these services to reclassify them as private carriage, Windstream does not plan to actually "discontinue" any service. Windstream plans to continue offering these services and to honor all existing contracts.

⁴ Within and Outside Windstream's ILEC service territory these services are called Ethernet Private Line, and Ethernet Virtual Private Line. In this declaration, I collectively refer to these services as "Switched Ethernet Services."

customers negotiate individualized rates and terms that reflect their unique circumstances. Windstream's Switched Ethernet Services compete with numerous analogous services offered by other providers.⁵

B. Dedicated Ethernet Services

- i. Dedicated Ethernet Services are used by business, government, and educational institutions to connect multiple locations with dedicated fiber facilities. They are typically used by customers for local or long-distance data transport. They are available within and outside Windstream's ILEC footprint in bandwidths up to 100 Gbps.⁶ To order service, customers generally must contact a Windstream sales representative. Although Windstream offers standard rates, terms, and conditions for some of these Dedicated Ethernet Services upon request, most customers negotiate individualized rates and terms. Windstream's Dedicated Ethernet Services compete with numerous analogous services offered by other providers.⁷

C. Wavelength Services

- i. Wavelength Services are dedicated services used by business, government, and educational institutions. They are a fully managed private network solution provided over fiber facilities offering high levels of availability, reliability, and security. They are available in bandwidths up to 100 Gbps.⁸ To order service customers generally must contact a Windstream sales representative and negotiate

⁵ See Exhibit B, hereto (listing a sample of the products offered by Windstream's competitors that compete directly with Windstream's Switched Ethernet services).

⁶ Within and Outside Windstream's ILEC service territory, these services are called Ethernet Transport Service and Ethernet Private Line Service.

⁷ See Exhibit B, hereto (listing a sample of the products offered by Windstream's competitors that compete directly with Windstream's Dedicated Ethernet services).

⁸ Within and Outside Windstream's ILEC service territory, these services are called Ethernet Private Line Service and Data Network Backhaul.

customized rates and terms. Wavelength customers typically are larger business or wholesale customers that require Windstream's most reliable data networking connectivity. Customers include large banks and financial institutions, retailers, pharmaceutical companies, defense contractors, data center providers, government agencies, and wholesale service providers. Windstream's Wavelength services compete with numerous analogous services offered by other providers.⁹

IV. GRANTING THE APPLICATION WILL ENABLE WINDSTREAM TO COMPETE MORE EFFECTIVELY, BENEFITING COMPETITION AND CONSUMERS

1. Granting the Application will enable Windstream to respond more effectively to competitive offerings, which will further enhance competition for packet-based and wavelength business services.

2. Windstream offers all the services subject to this Application in a highly competitive marketplace, where cable companies are among the fastest growing competitors. Virtually every customer opportunity is contested, typically by multiple facilities-based providers. The FCC recently stated that "competition" for packet-based services is "sufficient enough to discipline pricing."¹⁰ And Vertical Systems (an analyst firm that tracks competition among providers for Ethernet services) has reported that among other things price compression and an expanding competitive landscape are challenges cited by ethernet service providers.¹¹

3. Notwithstanding this highly competitive marketplace, Windstream's services are subject to more regulation than those of most of its competitors. Although the Commission has not formally designated Windstream's packet-based and wavelength services as either "private carriage" or

⁹ See Exhibit B, hereto (listing a sample of the products offered by Windstream's competitors that compete directly with Windstream's wavelength services).

¹⁰ *BDS Order* ¶ 83.

¹¹ See, e.g., 2022 U.S. Carrier Ethernet Leaderboard, Vertical Systems (Feb. 2023), <https://www.verticalsystems.com/2023/02/15/2022-u-s-ethernet-leaderboard/>

“common carriage,” I understand that the Commission has generally assumed that Windstream’s packet-based and wavelength services are “common carriage,” and that is how Windstream has treated them. By contrast, the Commission has formally acknowledged that the analogous services offered by larger cable companies and certain other competitors, including AT&T, are “private carriage” services.¹² This regulatory asymmetry allows Windstream’s competitors to make offers to customers that Windstream cannot match.

4. Specifically, Windstream’s private carriage competitors, especially cable companies, are increasingly targeting individual customers or specific groups of customers with offerings that are specifically tailored to their individualized needs. Windstream would like to meet or beat many of these competitive offers. However, because Windstream treats its packet-based and wavelength services as “common carriage,” I understand that Windstream often lacks the regulatory flexibility to do so in the same manner.

5. For example, cable companies have been successful in winning small business customers from Windstream by offering promotions that are tailored to each customer’s (or group of customers’) individualized needs. Windstream would like to respond to these competitive offers. However, as a “common carrier” of these services, Windstream is somewhat constrained in its ability to make similarly tailored offers. Thus, although Windstream often could meet or beat its rivals’ offers for packet-based and wavelength services, its common carrier obligations sometimes prevent it from doing so. The issue is not limited to pricing, but rather sometimes includes one-off terms and conditions.

¹² See, e.g., *BDS Order*, ¶¶ 267-285 (formally classifying packet-based business services offered by cable companies and certain ILECs and CLECs as private carriage services); *Comments Invited on Section 214 Application(s) to Discontinue Domestic Non-Dominant Carrier Telecommunications Services Provided on a Common Carriage Basis and Reclassify Those Services as Private Carriage Services*, WC Docket No. 19-323, Public Notice, DA 19-1216, 34 FCC Rcd 11069 (Nov. 27, 2019) (noting that AT&T’s application would be deemed granted automatically on December 28, 2019 unless the Commission notified AT&T that its grant would not be automatically effective).

6. The artificial and arbitrary differences in the regulatory classifications for Windstream's packet-based and wavelength services and its competitors' analogous services can limit Windstream's ability to respond to competitive offerings, causing Windstream to lose customers and reducing Windstream's competitive impact in the marketplace.

7. It is also important to note that Windstream, as a common carrier, incurs additional burdens that are not borne by its private carriage competitors. When Windstream considers its response to a competitor's individualized offer, Windstream must expend substantial time and resources evaluating the extent to which its response must be curtailed due to its common carriage obligations. This additional cost places Windstream at a further disadvantage relative to its private carriage competitors, and this additional time makes Windstream a less nimble competitor.

V. CONCLUSION

1. For all the reasons set forth above, granting Windstream's Application will benefit competition and consumers.

VERIFICATION

I hereby swear under penalty of perjury that, based on the best information available to me, the foregoing is true and correct.

/s/ Marc J. Dyman

Marc J. Dyman

Dated: August 23, 2023

EXHIBIT A

**DESCRIPTIONS OF PACKET-BASED AND
WAVELENGTH SERVICES SUBJECT TO APPLICATION**

Services	Windstream	Representative Website Reference
Switched Ethernet	Windstream Affiliates	<u>Ethernet Private Line</u> https://www.kineticwholesale.com <u>Ethernet Virtual Private Line</u> https://www.kineticwholesale.com
Dedicated Ethernet	Windstream Affiliates	<u>Ethernet Transport</u> https://www.kineticwholesale.com <u>Ethernet Private Line</u> https://www.kineticwholesale.com
Wavelength	Windstream Affiliates	<u>Ethernet Private Line</u> https://www.kineticwholesale.com <u>Data Network Backhaul</u> https://www.kineticwholesale.com

EXHIBIT B

**SAMPLE OF SERVICES OFFERED BY OTHER PROVIDERS
THAT COMPETE DIRECTLY AGAINST THE WINDSTREAM SERVICES SUBJECT TO THE APPLICATION**

Windstream	AT&T	Verizon	Century Link	Comcast	Cox	Charter	Level 3	Verizon – Formerly XO
Switched Ethernet Services	ASE	Switched E-LAN, Switched E-Line	Switched Ethernet Services	Ethernet Network Svc., Metro Ethernet, EVPL	E-LAN (MP2MP), EVPL (Hub-Spoke)	EPLAN, VPL	E-line, VPLS	Ethernet Hub Service, Ethernet VPLS
Dedicated Ethernet Services	ADE	Dedicated E-Line	Dedicated Ethernet Services	EPL	Dedicated EPL (ICB only)	Wavelength Services	Intercity and Metro EPL	Ethernet Private Line
Wavelength Services	EPLS-WAN, VPN	Dedicated E-Line, Wavelength Services	Wavelength Services	EPL	Dedicated EPL (ICB only)	Wavelength Services	Waves	Wavelength