

increase by more than \$21M between the proposed effective date and December 31, 2020,¹
with current Ameritech Operating Companies rates for these services increasing by more

than 21 percent. For the reasons discussed below, elimination of the discounts would constitute an unlawful, unjust, and unreasonable practice under Section 201 of the Act. Therefore, pursuant to Section 1.773 of the Commission’s rules, the Commission should suspend and investigate the Transmittal.²

ARGUMENT

Section 204 of the Act, 47 U.S.C. § 204, grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness.³ As the Commission has recognized, suspension and investigation of tariffs is a particularly essential element of fulfilling the core mandate to ensure just and reasonable rates where, as here, tariffs that raise substantial questions of lawfulness are filed on a streamlined basis.⁴

¹ It should be noted that the cost increases quantified above do not take into consideration any additional cost increases that may result from AT&T potentially eliminating their three-year term plan offerings and discounts in 2017, using this same “chronological” logic.

² Windstream has previously discussed many of the reasons why the Transmittal is contrary to public policy in an *ex parte* letter filed in related Commission dockets. Letter from Eric N. Einhorn, Senior Vice President, Government Affairs, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5, GN Docket No. 12-353, WC Docket No. 10-90, filed Nov. 21, 2013.

³ *See, e.g., July 1, 2007 Annual Access Charge Tariff Filings*, DA 07-2862, WCB/Pricing No. 07-10, Order, 22 FCC Rcd 11619, ¶¶ 6, 9 (rel. Jun. 28, 2007) (suspending tariffs “[o]n our own motion” because “we conclude that the tariffs . . . raise questions of whether rates would remain just and reasonable”).

⁴ *See, e.g., July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, WC Docket No. 04-372, FCC 04-277, 19 FCC Rcd 23877, ¶ 7 (rel. Nov. 30, 2004) (“When tariffs . . . are filed pursuant to the ‘deemed lawful’ provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates”).

Section 1.773 of the Commission's rules also provides ground for suspending the Transmittal (although the Commission need not rely on its rules if it otherwise finds that suspension is appropriate under Section 204 of the Act).⁵ The rule provides that a tariff may be suspended if: (1) "there is a high probability the tariff would be found unlawful after investigation"; (2) "any unreasonable rate would not be corrected in a subsequent filing"; (3) "irreparable injury will result if the tariff filing is not suspended"; and (4) "the suspension would not otherwise be contrary to the public interest."⁶ These elements are satisfied here, because for the reasons set forth below, there is a high probability that the tariff will be found unlawful; there is no indication that AT&T's rates are likely to be corrected; irreparable injury will result if anticompetitive rates are "deemed lawful"; and by preventing harm to competition, suspension is consistent with, rather than contrary to, the public interest.

1. There Is A High Probability That The Transmittal Would Be Found Unlawful After Investigation.

Eliminating its five-year and longer term commitments, which offer the most reasonable pricing options for competitive local exchange carriers ("CLECs") providing competitive access services based on DS1 and DS3 circuits, constitutes an unjust and unreasonable practice that would be unlawful under Section 201(b) of the Act, 47 U.S.C. § 201(b). The Commission has previously held that anticompetitive conduct can constitute an unjust and/or unreasonable

⁵ *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, CC Docket No. 83-1145, FCC 84-70, 1983 FCC LEXIS 396, ¶ 8 n.6 (rel. Oct. 19, 1983) (rejecting argument that a "request for suspension should be denied as premature and not in compliance with Section 1.773" and finding that the Commission "need not reach these arguments, since the Commission has the authority on its own motion to suspend and investigate tariffs, 47 U.S.C. § 204(a), and we [the Commission] have concluded that the circumstances of this case warrant such action").

⁶ 47 C.F.R. § 1.773.

practice under Section 201.⁷ The Commission already considers competitive issues in the special access market in particular to be sufficiently important to be conducting a multi-year data collection of unprecedented scope and scale.⁸ AT&T should not be permitted to prejudge the outcome of such investigation, particularly under the guise of a substantial unilateral price increase that would not be sustainable in a competitive market. Information derived from the upcoming special access data collection should be utilized to determine whether near-term rate increases should be permitted, or whether – as Windstream believes – meaningful competition among multiple last-mile fiber providers still fails to exist and is highly unlikely in the foreseeable future for most buildings.

Despite investing billions of dollars in recent years to expand and upgrade its network throughout its incumbent (“ILEC”) and competitive local exchange areas, Windstream’s substantial CLEC operations still rely on AT&T’s ILEC facilities for last-mile access to serve business consumers in AT&T operating territories. In most cases, it is not economically feasible for Windstream, or any other competitive provider, to extend its non-incumbent facilities over the “last-mile,” especially when addressing single-tenant buildings; Windstream instead purchases large quantities of last-mile access from AT&T under special access tariffs.⁹ Thus, by

⁷ See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report & Order, WT Docket No. 99-217, FCC 00-366, 15 FCC Rcd 22983 (rel. Oct. 25, 2000); *AT&T’s Private Payphone Commission Plan*, Memorandum Opinion & Order, File No. ENF-87-19, DA 88-1513, 3 FCC Rcd 5834, ¶ 26 (rel. Oct. 3, 1988), reconsideration and review denied, 7 FCC Rcd 7135 (1992).

⁸ 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, WC Docket No. 05-25, RM-10593.

⁹ This focus on special access, rather than DS1 and DS3 unbundled network element (UNE) loops, is in large part due to AT&T’s implementation of the *Triennial Review Remand Order* that provides limitations on DS1 and DS3 unbundled network element (UNE) loops in many urban wire centers. *Review of Unbundled Access to Network Elements, Review of Section*

eliminating five-year and longer term discounts, AT&T inhibits competition in downstream business service retail markets in which CLECs otherwise could provide business consumers with attractive alternatives.

AT&T's decision to eliminate its five-year and longer term commitment discounts on relatively short notice demonstrates the continued, substantial market power wielded by AT&T. AT&T remains the only facilities-based provider of DS1 and DS3 last-mile connections to most of the buildings in its operating territory. Small to medium-sized businesses, and in particular those located in single-tenant buildings, still rely on AT&T's tariffed DS1 and DS3 services for their communications needs. The effective price increase that would result from the Transmittal would not only serve as a dramatic exercise of market power by AT&T capitalizing on this competitive vacuum, but would also, among other negative effects, lead to higher prices charged to many American small to medium-sized business consumers.

Circuits provided through AT&T's special access tariff (and subject to the discounts that would be eliminated as a result of the Transmittal) remain critical to CLECs' ability to provide competitively relevant alternatives to AT&T because Ethernet often is not a substitute for DS1 and DS3 connections.¹⁰ As an initial matter, Ethernet is not ubiquitous – in particular, many single-tenant buildings are not served by fiber. While AT&T “offers” to construct fiber to such buildings, its special construction charges are exorbitant, and may be further inflated by unexplained charges that may increase such already high price quotations by more than 50

251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*”).

¹⁰ Windstream's discussion of AT&T's Ethernet services refers to Ethernet over fiber. To the extent that Windstream seeks to deploy Ethernet over copper, it must purchase the very copper-based special access services that would be affected by AT&T's plans.

percent.¹¹ In addition, the length of time for AT&T to complete such special construction can result in substantial delays in the process of Windstream's initiating service to new customers.

Second, even where Ethernet service is present, it currently is not substitutable for DS1 special access service, due to the pricing structure of AT&T's lower-capacity Ethernet service. Ethernet is built to be a particularly high-capacity service and, as a result, is rarely purchased today at speeds lower than 10 Mbps.¹² Low-bandwidth customers in single-tenant buildings – which often are small businesses – instead typically purchase service in the capacity range of 1.5 to 3 Mbps, because DS1 pricing at five-year and longer terms is far more favorable than Ethernet pricing. AT&T's recent action suggests that the company effectively is seeking to increase the prices charged to these low-bandwidth customers by raising prices for their special access services and ultimately driving them to a more expensive Ethernet offering.¹³ This shift contravenes the Commission's efforts to ensure that customers only pay for the communications services they need, and no more.¹⁴

AT&T's Transmittal also would have the effect of creating an unreasonable rate structure in violation of Section 201 due to the fact that the eliminated discounts were previously used by AT&T as the basis to lock CLECs into significant circuit volume commitments AT&T currently

¹¹ For example, Windstream received a 10 Mbps Ethernet special construction quote two months ago from AT&T affiliate Southwestern Bell Telephone Company for \$99,685 (material, labor, and taxes) to which "revenue recovery charges in the amount of \$53,125" also applied.

¹² And even if there were demand for it, as indicated above, this product today likely would have limited availability given the lack of ubiquitous fiber coverage.

¹³ If the latter, these network expansions for lower revenue opportunities, likely will be subsidized by special construction charges paid by wholesale purchasers of AT&T's Ethernet service.

¹⁴ *See, e.g.*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298524A1.pdf (advising customers to "choose a service tier that offers the best value"). To help customers determine which service offers them the best value, the Commission released a "Broadband Speeds Guide," available at <http://www.fcc.gov/guides/broadband-speed-guide>.

offers DS1 and DS3 special access circuits at substantial “discounts” based on the length of the term commitment the purchaser is willing to make. Special access customers, such as Windstream and other CLECs, must buy special access circuits under five- or seven-year term commitments to qualify for AT&T’s lowest pricing – far lower than shorter-term (or month-to-month) pricing. In addition to individual circuit term commitments, these contract tariff volume discount plans require carriers to maintain paid circuit volumes at levels attained prior to the execution of these agreements over the full term of the contract (often three to seven years) to continue to qualify for any of these discounts (also referred to as the “lock-up” provisions).¹⁵ Not only does AT&T receive a relatively guaranteed revenue stream from the CLEC over the term of each individual circuit due to the customary large early termination liability that applies to breaking a term commitment, these “lock-up” provisions also assure AT&T of maintaining the aggregate revenue stream over the full term of the tariff discount plans. Furthermore, the circuit commitment levels in AT&T’s current attainment plans, such as those in the Discount Commitment Plan, were set assuming the availability of circuits at five-year and longer-term discounts. The elimination of these discounts will likely require CLECs to offset the increased cost with increases to end user rates, which then undermines their ability to fulfill the contractual volume commitments negotiated in good faith as a condition to the rate structure. It would be unreasonable to permit AT&T to maintain the current attainment minimums in such plans while simultaneously undercutting the ability of subscribing carriers to meet such demand levels by dramatically increasing rates.

¹⁵ See Ameritech Operating Companies, Tariff F.C.C. No. 2, § 7.4.13, 10th Revised Page 309.5 through 9th Revised Page 309.7.1 (all references to tariff pages as currently in effect). Level 3 has previously explained its own experience with such lock-up provisions. See Letter from Erin Boone, Senior Corporate Counsel-Federal Regulatory Affairs, Level 3 to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and 10-90, RM-10593, filed Mar. 1, 2012.

Finally, AT&T's Transmittal would produce an undue windfall for AT&T. With little or no alternatives available for last-mile connections in most buildings, most business consumers currently addressed by CLECs and other purchasers of special access still will require access to an AT&T last-mile connection on an ongoing basis. This means that AT&T *still* will benefit from business consumers' ongoing use of its special access or other higher-priced connectivity, but AT&T now will be able to charge more for this continued connectivity. AT&T will realize this windfall in one of two ways: (1) by subjecting CLECs to higher wholesale rates (which at least will occur in the near term while CLECs maintain service to fulfill their contractual commitments to business consumers); or (2) by charging business consumers retail rates that are no longer checked by meaningful marketplace competition (the likely result in the long run, given significantly higher wholesale costs will prevent CLECs from offering competitively-priced alternatives in the future). Marketplace conditions – which can be best assessed once the special access data collection is completed – suggest that AT&T's windfall is likely to be significant. The presence of this windfall, to the ultimate detriment of business service consumers, is further evidence that the Transmittal would create an unreasonable rate structure.

2. There Is No Indication That The Unreasonable Aspects of AT&T's Transmittal Would Be Corrected In A Subsequent Filing.

AT&T has provided no reason to believe that it will correct the unreasonable aspects of its Transmittal. To the contrary, AT&T has publicly stated that the Transmittal was being filed over the protests of special access purchasers.¹⁶ Moreover, although AT&T has asserted that it delayed filing the Transmittal to seek customer input and “has reviewed input and feedback from

¹⁶ See <http://www.attpublicpolicy.com/uncategorized/the-end-of-the-beginning-of-the-ip-transition/> (Bob Quinn, Senior Vice President-Federal Regulatory and Chief Privacy Officer, “The End of the Beginning of the IP Transition,” AT&T Public Policy Blog, posted Nov. 25, 2013).

our customers regarding these tariff changes,” there is no evidence that AT&T altered its plans at all – besides a slight delay of its intended schedule – to accommodate any customer input.¹⁷

3. Irreparable Injury Will Result If The Transmittal Is Not Suspended.

Significant, irreparable injury will result if the anticompetitive practices in the Transmittal are allowed to go into effect. Unless the Transmittal is suspended (at least for one day), the anticompetitive practices in the Transmittal will be “deemed lawful,” thus, authorizing such unlawful practices until such time as a party were to file a successful complaint against AT&T and, only then, on a going-forward basis. Windstream further notes that, as discussed above, CLECs, such as Windstream, purchase DS1s and DS3s as critical inputs for their competitive service. If the Transmittal is not suspended, these CLECs will be under substantial pressure shortly after any effective date of the Transmittal to raise the rates that they quote for DS1 and DS3 service offerings. AT&T will then have a unique opportunity to win business customers by undercutting the same CLEC retail pricing that it caused to be inflated through these special access price increases. It can then sign these business customers to contracts with termination liability, locking them into retail contracts at rates higher than what they otherwise should have paid. Thus, irreparable injury will result not only to the CLECs, but also to underlying business consumers in the form of locked-in, higher prices.

Furthermore, CLECs not only will lose the revenue opportunity from these customers, but also will lose economies of scale that will further increase their expenses. (This harm is in

¹⁷ *Id.* Instead, AT&T merely offers that its wholesale customers will have the opportunity to negotiate individualized contracts to continue to receive these services. According to Bob Quinn on the AT&T Public Policy blog, “Importantly, customers also will continue to have the opportunity to negotiate individualized contracts with AT&T to obtain these services.” *Id.* Conveniently, the Transmittal and Blog suggest that AT&T is moving the sale of its regulated DS1 and DS3 services away from the protections afforded its competitors by those regulations and into an individualized negotiating process where AT&T yields significant market power.

addition to what CLECs will suffer if they now are unable to achieve their volume discount minimums, a significant risk discussed above.) CLECs consequently will be handicapped in their ability to offer competitive pricing to current and potential customers, to the detriment of competitive choice.

4. Suspension of the Transmittal Would Not Otherwise Be Contrary To The Public Interest.

Suspension of the Transmittal would not be contrary to the public interest; instead it would be *in furtherance of* the public interest. As explained in detail above, the Transmittal would result in imminent harm to competition by establishing a rate structure that dramatically raises rates that competitors must pay for a critical service input provided by AT&T – DS1 and DS3 circuits. Such increases in circuit expenses would hinder the ability of CLECs to compete in the downstream retail small and medium-sized business market. CLEC customers either will have to pay significantly higher rates (as prices will increase for the lowest priced options for business class-services), or effectively they will be driven to AT&T service, where they will be locked into long-term retail contracts created in the absence of meaningful competitive choices. Either way, competition in the business consumer marketplace will be substantially impaired

It remains unclear how AT&T's stated desire to advance the "all IP" transition somehow offsets these severe marketplace harms to the competitive options available to American businesses. AT&T has made its desire to retire its TDM services by 2020 well known.¹⁸ Under the guise of unilateral efforts to effectuate this result through eliminating the possibility that AT&T would be bound to provide DS1 and DS3 service under term commitments beyond 2020,

¹⁸ See Petition to Launch a Proceeding Concerning the TDM-To-IP Transition, *AT&T Petition to Launch a Proceeding Concerning the TDM-To-IP Transition*, GN Docket No. 12-353 (filed Nov. 7, 2012).

AT&T is proposing to eliminate the most competitively significant service offerings from its special access tariffs – five- and seven-year term commitment pricing. AT&T, however, does not explain why it cannot offer the same level of discounts currently offered on its five-year and longer term plans to its three-year circuit term plans, and it is unclear how this measure would conflict with its stated motives of merely removing chronological hurdles.

CONCLUSION

Access to DS1 and DS3 TDM circuits remains critical to ensuring that American business and government entities continue to have meaningful competitive choices available to them. AT&T should not be permitted to revise its tariffs in a manner that dramatically increases the rates on circuits critical to enabling competition in the business services marketplace. For the reasons stated herein, the Commission should suspend and investigate the Transmittal.

Respectfully submitted,

/s/ Edward B. Krachmer

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Dated December 2, 2013

CERTIFICATE OF SERVICE

I, Edward B. Krachmer, do hereby certify that on this 2nd day of December, 2013, I have caused the foregoing Petition of Windstream Corporation to Suspend and Investigate Ameritech Operating Companies Transmittal No. 1803 to be served on the following parties:

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