

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

In the Matter of)	
)	
Southwestern Bell Telephone Company)	Transmittal No. 3383
Tariff F.C.C. No. 73)	
)	
Pacific Bell Telephone Company)	Transmittal No. 498
Tariff F.C.C. No. 1)	

**PETITION TO REJECT OR SUSPEND AND INVESTIGATE
AT&T's PROPOSED TARIFF REVISIONS**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
I. INTRODUCTION AND SUMMARY	1
II. LEGAL STANDARD.....	6
III. THE COMMISSION SHOULD REJECT OR SUSPEND AND INVESTIGATE THE TRANSMITTAL BECAUSE AT&T’S PROPOSED NEW RATES ARE UNJUST AND UNREASONABLE, AND THEREFORE VIOLATE SECTION 201 OF THE COMMUNICATIONS ACT.....	7
A. AT&T’s Proposal to Eliminate Five-Year Term Pricing is an Unjust and Unreasonable Price Increase	7
B. AT&T’s Proposed Rate Increases are Unjust and Unreasonable Because They do Not Reflect the Cost Reductions Resulting from Increased Demand and Efficiencies in Providing Special Access	10
C. AT&T’s price increase for DS1/DS3 circuits impedes the IP transition	12
IV. AT&T’S PROPOSED TARIFF REVISIONS VIOLATE THE <i>SIERRA-MOBILE</i> DOCTRINE	12
A. AT&T’s Proposed Revisions Modify the Bargain Between AT&T and Its Contract Tariff Customers	12
B. Sierra Mobile Doctrine	15
V. IF THE COMMISSION DOES NOT REJECT AT&T’S TRANSMITTAL, THE COMMISSION SHOULD SUSPEND AND INVESTIGATE THE TARIFF BECAUSE THERE ARE SUBSTANTIAL QUESTIONS OF ITS LAWFULNESS	16
VI. THE COMMISSION SHOULD REJECT OR SUSPEND THE TRANSMITTAL BECAUSE IT FAILS TO MEET THE “SUBSTANTIAL CAUSE” TEST	17
VII. CONCLUSION.....	18

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Consolidated Communications, Inc. ("Consolidated") on behalf of its CLEC and IXC operating companies, hereby petitions the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, to reject the proposed tariff rate increases filed by Southwestern Bell Telephone ("SWBT"), and Pacific Bell Telephone Company ("PacBell") (SWBT and PacBell, collectively "AT&T") bearing Tariff FCC No. 73 (SWBT), associated with Transmittal No. 3383 and Tariff FCC No. 1 in Transmittal 498 (PacBell).

I. Introduction and Summary

Consolidated has CLEC and IXC operations in AT&T's ILEC territories in Texas, California, Kansas, Illinois and Missouri.¹ In these states, Consolidated purchases special access circuits from AT&T pursuant to contract tariffs filed with the FCC. In Consolidated's view, there

¹ In addition, other Consolidated companies operate as ILECs in California, Texas, Illinois and Pennsylvania, and as a CLEC in Pennsylvania. For more information concerning Consolidated, *see* <http://www.Consolidated.com/>.

should be no doubt that the tariff revisions proposed by AT&T are price increases.² AT&T's proposed rate increases impede Consolidated's ability to compete. Consolidated provides its business end-users with high capacity data services. Consolidated's customers frequently have multiple locations, including some locations in Consolidated's ILEC territories and others in territories of ILECs such as AT&T. Consolidated purchases special access services from AT&T so that it may serve small and medium sized businesses in AT&T's ILEC territory where Consolidated cannot economically deploy its own network facilities or obtain facilities from third party providers. The finished retail services that Consolidated provides to its business customers incorporate the DS1 and DS3 inputs it obtains from AT&T under AT&T's special access tariffs and contract tariffs. At the vast majority of end user locations in AT&T's markets. Consolidated relies on AT&T for "last mile access" by purchasing special access or DS1 and DS3 circuits, to combine with Consolidated's network to provide customized services to meet its customer's needs.

The record in the Commission's special access proceeding demonstrates that AT&T is the exclusive owner of vital last-mile connections to end user locations to the vast majority of business locations in its incumbent markets. At such locations, AT&T maintains bottleneck control over upstream inputs Consolidated needs to provide service in the downstream market. As a result, AT&T has powerful incentives to engage in anticompetitive price discrimination in

² See e.g. *Ex Parte* Letter from Eric N. Einhorn, Windstream Corp., GN Docket Nos. 13-5, 12-353 WC Docket Nos. 10-90, 05-25 (filed Nov. 22, 2013) at p. 2; *Ex Parte Letter of State and Regional Trade Associations and OI Communications*, GN Docket Nos. 13-5, 12-353 WC Docket Nos. 10-90, 05-25 (filed Nov. 8, 2013) at p. 2; *Ex Parte* Letter of Thomas Jones, Counsel for Cbeyond Communications, LLC, Earthlink, Inc., Integra Telecom, Inc. Level 3 Communications, LLC and twc telecom inc., Attachment WC Docket No. 05-25 (filed Nov. 20, 2013) at p. 1.

the provision of those inputs to competitors,³ and long-term lock-up contracts that artificially reduce the size of competitors' addressable market, among others.⁴

Because AT&T realizes that for the most part, its special access customers have nowhere else to turn for connectivity at the vast majority of locations in its territory, AT&T is proposing to leverage that dominant market position to raise its rivals' costs. It is no accident that AT&T proposes to eliminate five-year and seven-year term pricing. These pricing plans appear to be the preferred pricing option for bulk purchasers of AT&T's special access services, including its competitors such as Consolidated that use AT&T's special access services to reach customers that Consolidated would otherwise be unable to reach economically through deployment of its own last mile facilities or use of third-party facilities. Further, AT&T prices its DS1/DS3 special access services to encourage customers to subscribe to the longer terms. This benefits AT&T by guaranteeing it a predictable revenue stream and allowing AT&T to lock up demand, by imposing heavy shortfall and early termination penalties as a condition of the lower five-year pricing.

Below is a table comparing AT&T's five year term pricing in SWBT territory to its pricing in SWBT territory for one year, 3 year and longer terms.

³ See *Applications of Ameritech Corp., Transferor and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion and Order*, 14 FCC Rcd 14712, ¶ 202 (1999); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 12 FCC Rcd 15756, ¶ 28 (1997) ("LEC Classification Order").

⁴ *Pricing Flexibility Order*, ¶ 79 ("An incumbent can forestall the entry of potential competitors by 'locking up' large customers by offering them volume and term discounts at or below cost"). See also *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶¶ 114-116 (rel. Jan. 31, 2005) ("*Special Access NPRM*").

Rate Element	USOC	1 year	3 year	5 year	7 year	SWBT Contract Tariff Offer 183 ⁵ Discount (5 year pricing only)
DS1 Channel Termination ⁶	TMECS ZONE 1	160	112	92	90	5%
	TMECS Zone 2	170	116	100	95	5%
	TMECS Zone 3	180	125	110	105	5%
DS1 Channel Mileage Fixed	1L5XX Zone 1	50	39	34	32.5	5%
	1L5XX Zone 2	55	42.5	37.5	35	5%
	1L5XX Zone 3	57.5	45	40	37.5	5%
DS1 Channel Mileage per mile	1L5XX Zone 1	14.5	13	10	9.5	5%
	1L5XX Zone 2	15	13.5	10.5	10	5%
	1L5XX Zone 3	15.25	14	11	10.5	5%
DS3 Rate Element	USOC				⁷	Discount
Channel Termination - electrical	TUZPX ⁸ Zone 1	1850	1150	800	800	5%
	TUZPX Zone 2	1900	1200	825	825	5%
	TUZPX Zone 3	1900	1250	850	850	5%
Channel Termination - optical	TKZPX ⁹ Zone 1	1900	1250	1025	1025	5%
	TKZPX Zone 2	1950	1645	1492	1430	5%
	TKZPX Zone 3	2000	1645	1492	1430	5%
Channel Mileage Fixed	10XHX Zone 1 ¹⁰	650	550	450	450	5%
	Zone 2	675	575	475	475	5%
	Zone 3	700	600	500	500	5%
Channel Mileage per mile	1J5HS ¹¹ Zone 1	90	70	45	45	5%
	Zone 2	95	75	50	50	5%
	Zone 3	100	80	55	55	5%

⁵ SWBT Tariff FCC No. 73, Section 41.83.

⁶ Rates from SWBT Tariff FCC No 73. Section 7..3.10, Transmittal No. 3383, 5th revised Page 7-189.54.

⁷ SWBT Tariff FCC No. 73 contains 10 year instead of 7 year terms for DS elements.

⁸ Rates from SWBT Tariff FCC No 73. Section 39.5.12.1(A)(4)-(6), Volume Option 1, Kansas, Transmittal 3383, 2nd Revised Page 39-202.1 - 2nd Revised Page 39-202.2.

⁹ Rates from SWBT Tariff FCC No 73. section 39.5.12.1(B)(4)-(6), Volume Option 1, Kansas, Transmittal 3383, 2nd revised Page 39-202.5 - 2nd revised Page 39-202.6.

¹⁰ Rates from SWBT Tariff FCC No 73. section 39.5.2.12.1(C)(4)-(6), Kansas, Transmittal 3383, 1st Revised Page 39-202.9.

¹¹ Rates from SWBT Tariff FCC No 73. section 39.5.12.1(D)(4)-(6), Volume Option 1, Kansas, Transmittal 3383, 1st Revised Page 39-202.12-2nd revised page 39-202.13.

This table shows the significant price increase resulting from AT&T's proposed tariff revision. For example, DS1 Zone 1 channel termination pricing increases by 10.8% when moving from a five-year to a three-year term. In Zone 3 the increase is 13.6%. For DS3 channel terminations the increase is even higher: 43.8% for Zone 1 (electrical).

The Commission should not allow AT&T to exploit its market power by permitting it to impose an effective increase in its special access rates. Such increases harm competition in the provision of the many voice, data, and Internet services that depend upon special access.

AT&T asserts that its proposed rate increases "are an initial step toward implementing AT&T's plan to upgrade its network to meet growing demand for next generation broadband services and to migrate its legacy TDM network to IP-based network facilities and services."¹² The Commission should not allow AT&T to use the evolution of telecommunications networks to IP as cover for imposing price increases on its customers and the businesses that use AT&T's services (whether directly or indirectly.) There is nothing in AT&T's tariff (including its contract tariffs) that prevents AT&T from transitioning its special access services from copper to fiber. The same fiber cables used to provide DS1 and DS3 services can also be used to provide next-generation broadband services, such as Ethernet.

Further, AT&T has indicated that it currently can not provide fiber-based services to all of the business customer locations in its network footprint. In fact, AT&T's latest broadband expansion plan is far less ambitious, seeking only to expand fiber to 50 percent of the business locations with six or more business customer tenants in its 22 state territory.¹³ AT&T has not announced plans to serve these locations with fiber, yet it seeks to preclude its wholesale

¹² AT&T Accessible Letter Attached to Trade Association Ex Parte, p. 1.

¹³ See Laying a Foundation for Future Growth, AT&T Analyst Conference, Nov. 7, 2012 at p. 11.

customers from obtaining reasonably priced special access facilities to serve these customers with existing network technology.

AT&T's price increases also threaten a valuable resource in the competitive provider's toolkit for bringing IP-based Ethernet services to business customers that have typically purchased TDM-based service. Bonding DS1s, while less effective than Ethernet over Copper ("EoC"), helps competitors deliver low and mid-band Ethernet to customers at reasonable prices where fiber deployment remains uneconomic and EoC is unavailable due to distance limitations. Without reasonably priced access to Ethernet services at such locations, end users may forego next-generation services further delaying the IP transition.

As demonstrated below, the Commission should reject AT&T's proposed rate increases in SWBT FCC Tariff No. 73 associated with Transmittal No. 3383 and PacBell FCC No. 1 associated with transmittal 498 because the rate increases are unjust and unreasonable. Moreover, given the efficiencies AT&T experiences in provisioning special access circuits, its special access rates should be decreasing rather than increasing. For these reasons, AT&T's proposed rate increases are unlawful. In the alternative, the Commission should suspend and investigate AT&T's proposed rate increases because there remain substantial questions as to their lawfulness.

II. Legal Standard

A tariff is subject to rejection when it is *prima facie* unlawful, in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order.¹⁴ Under Section 201(b) of the Communications Act of 1934 (the "Act"),¹⁵ as amended, a common carrier, such as AT&T, acts unlawfully if it assesses unjust and unreasonable rates in its tariffs. The

¹⁴ See e.g., *American Broadcasting Companies, Inc. v. AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI v. AT&T*, 94 F.C.C.2d 332, 340-341 (1983).

¹⁵ 47 U.S.C. § 201(b).

elimination of price cap regulation in Phase II pricing flexibility areas does not excuse AT&T from its obligation to comply with Section 201 of the Act and otherwise permit it to charge unjust and unreasonable rates in its tariffs. In determining whether rates in a tariff are unjust and unreasonable and therefore, unlawful, the Commission has “broad discretion.”¹⁶

An alternative to rejecting a tariff outright for unlawfulness is suspending and investigating it when the tariff raises substantial issues of lawfulness.¹⁷ Moreover, the Commission has the authority to reject a proposed tariff modification or suspend and investigate if substantial cause justifies doing so.¹⁸

III. The Commission Should Reject Or Suspend And Investigate The Transmittal Because AT&T’s Proposed New Rates Are Unjust And Unreasonable, And Therefore Violate Section 201 Of The Communications Act

As demonstrated below, AT&T’s proposed rate increases associated with SWBT FCC Tariff No. 73 in Transmittal No. 3385 and in PacBell FCC Tariff No. 1 in Transmittal No. 498 are not just and reasonable as required by Section 201(b) of the Act.

A. AT&T’s Proposal to Eliminate Five-Year Term Pricing is an Unjust and Unreasonable Price Increase

One of the principal reasons AT&T’s proposed rate increases are unreasonable is that for most business locations in its territory, wholesale customers such as Consolidated lack alternatives for reaching business customers. The Commission recently found that competitive

¹⁶ See, e.g., *Southwestern Bell v. FCC*, 168 F.3d at 1352; *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

¹⁷ See *AT&T, Transmittal No. 148*, Memorandum Opinion and Order, 56 RR2d 1503 (1984); *ITT (Transmittal No. 2191)*, 73 F.C.C.2d 709, 716, n.5 (1979) (*citing AT&T (Wide Area Telecommunications Service)*), 46 F.C.C.2d 81, 86 (1974).

¹⁸ *RCA American Comms., Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

deployment of last mile access facilities has generally not occurred except in areas with significant concentration of business demand.¹⁹ Thus, in some of AT&T's markets, 60 percent of the zip codes lacked any competitively provided wireline service,²⁰ and the Commission predicted that it would be unlikely to identify conflicting trends in different markets, including those covered by SWBT FCC No. 73 and PacBell FCC No. 1.²¹ Although the Commission found that business demand for service is highest and most concentrated in certain densely populated areas, the Commission also found that "demand exists for ... services outside of these areas."²² Similarly, the Commission concluded that this demand — in areas where demand is less concentrated — cannot easily be served by extending competitive wireline networks from those areas where demand is concentrated.²³ In other words, there are significant swaths of the business market that for the foreseeable future will not have a choice between competing facilities-based networks.

Nor, given the economic factors entailed in deploying competitive telecommunications networks, should this be a surprise. Self-provisioning last mile facilities to small and medium size businesses end users is not an economic option. The Commission has long recognized the significant time, expense and disruption associated with fiber deployment.²⁴ As explained above,

¹⁹ See Special Access for Price Cap Local Exchange Carriers, WC Docket 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Report and Order, 27 F.C.C. Rcd. 10557, 10582, FCC 12-92 ¶ 49 (rel. Aug. 22, 2012) ("Special Access Order").

²⁰ *Id.*

²¹ *Id.* ¶ 50.

²² *Id.* ¶ 53.

²³ *Id.* at ¶¶ 34, 60, 55.

²⁴ See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board, Report*

such deployment is rarely economic in areas outside of the most densely populated business centers.²⁵ The Commission has consistently found that all competitive carriers, including cable companies, “face extensive economic barriers” to the deployment of competitive facilities where they lack existing facilities needed to serve the customer.²⁶ These barriers include significant sunk costs along with substantial economies of scale and scope.²⁷ These barriers continue to make deployment of competitive last mile access facilities “costly and difficult.”²⁸

Absent the ability to construct its own facilities economically or obtain them from independent parties, Consolidated and other competitors rely on AT&T, the only carrier with ubiquitously deployed wholesale last-mile facilities in AT&T’s ILEC territory. Without the ability to obtain AT&T’s five-year pricing for special access, Consolidated’s options would be limited to purchasing more expensive three-year plans from AT&T or purchasing AT&T’s Ethernet services. But as described above, AT&T does not offer fiber-based Ethernet to every business customer location.²⁹ In fact, AT&T has stated that it only intends to deploy fiber to fifty percent of the business end user locations in its 22 state operating territory with six or more

and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17668, 17669 ¶¶ 4-5, 7 (2011); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 7 (2003) (“TRO”), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, aff’d in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand*, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) (“TRRO”), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006), ¶¶ 85-91.

²⁵ *Supra* n. 19.

²⁶ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8670 ¶ 90 (citing *TRO* ¶¶ 85-91).

²⁷ *TRO* ¶ 86.

²⁸ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8661 ¶ 73.

²⁹ *See* AT&T, *Laying a Foundation for Future Growth*, at p. 11.

tenants, leaving the rest without fiber-based service.³⁰ Thus the choice for Consolidated becomes paying AT&T's excessive special construction costs to fund AT&T's fiber network or paying higher rates for three-year TDM pricing.

In many instances this is not a viable option. As other competitors have observed, AT&T's wholesale Ethernet service, particularly at the lower speeds comparable to DS1 service, is not priced competitively.³¹ This pricing becomes even less competitive when AT&T's excessive special construction costs are included. Thus, whether the wholesale customer switches to a three-year plan or to Ethernet (where available), the result is a price increase to wholesale customers such as Consolidated and to their retail business end users. It is also possible that the resulting price increases could suppress demand for high-speed services, even at a time when businesses need more bandwidth, not less.

B. AT&T's Proposed Rate Increases are Unjust and Unreasonable Because They do Not Reflect the Cost Reductions Resulting from Increased Demand and Efficiencies in Providing Special Access

AT&T's proposed rate increases are also unreasonable because they run counter to the cost reductions generally associated with increased demand and efficiencies in productivity that AT&T experiences in provisioning special access circuits. AT&T's price cap rates were originally set at levels based on the rates that existed when the Commission instituted price caps in 1991.³² These initial price cap rates were a product of "rate-of-return" regulation, under which AT&T calculated its access rates using projected costs and projected demand for access

³⁰ *Id.*

³¹ *Ex Parte* Letter from Eric N. Einhorn, Windstream Corp., GN Docket Nos. 13-5, 12-353 WC Docket Nos. 10-90, 05-25 (filed Nov. 22, 2013) at p. 3.

³² *See Special Access NPRM*, ¶¶ 3 & 10-11.

services.³³ The rate of return in effect at the time of the transition to price caps was 11.25%.³⁴ Over time, the total demand for special access services has, however, increased exponentially, increasing from 4,035,297 lines in 1990 to 303,117,659 lines in 2007.³⁵ As a result, AT&T “realized special access scale economies throughout the entire period of price cap regulation, including before and after...pricing flexibility w[as] implemented.”³⁶ The fact that “special access line demand increased at a significantly higher rate than did operating expenses and investment throughout these periods,” in itself suggests that AT&T “realized scale economies in both periods.”³⁷ This remains the case. Data from the Bureau of Labor Statistics shows that for the period from 1999 through 2009, overall U.S. nonfarm business productivity growth averaged 2.4% per year,³⁸ while the wired telecommunications sector exceeded that by a significant margin – growing an average of 3.09%.³⁹ Despite benefiting from these efficiencies, AT&T has not reduced its special access rates; instead it now proposes to increase them.

³³ *Id.* ¶¶ 10-11. Since 1981, the Commission has permitted certain smaller incumbent LECs to base their access rates on historic, rather than projected, cost and demand. *See* 47 C.F.R. § 61.39.

³⁴ *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Red 6786, 6814, 6816, ¶¶ 230, 247 (1990) *aff’d* *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

³⁵ *See* Statistics of Communications Common Carriers 2006/2007 edition at Table 4.10, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301505A1.pdf.

³⁶ Special Access NPRM, ¶ 29.

³⁷ *Id.*

³⁸ *See* United States Department of Labor, Bureau of Labor Statistics, Major Sector Productivity and Costs, Nonfarm Bus. Labor Productivity - PRS85006092, *available at* <http://data.bls.gov/cgi-bin/surveymost>. To arrive at this figure, the average percentage of the reported year-to-year index growth was calculated from 1999 to 2009.

³⁹ *See* United States Department of Labor, Bureau of Labor Statistics, Industry Productivity and Costs, Wired Telecommunications Carriers, *available at* <http://data.bls.gov/cgi-bin/surveymost>. To arrive at this figure, the average growth percentage of the reported year-to-year index was calculated from 1999 to 2009.

The fact that AT&T is benefiting from significant efficiency gains, but is not sharing these gains or excessive earnings with customers and is instead raising rates is yet another reason why AT&T's proposed rate increases are unreasonable and should be rejected.

C. AT&T's price increase for DS1/DS3 circuits impedes the IP transition

Consolidated uses a mix of technology to provide Ethernet to business customers. Where it owns fiber or construction of fiber is economic, Consolidated provides fiber-based Ethernet. However, for many locations, Consolidated cannot extend its fiber network efficiently to reach the end user. In such circumstances, Consolidated will use EoC to provide service where copper loops are available and where the end user is located close enough to the central office to provide the necessary bandwidth. Where EoC is not a viable option, Consolidated and other competitive providers can provide Ethernet over TDM DS1 and DS3 circuits.⁴⁰ Using bonded DS1s helps build a customer base and helps transition customers from TDM to IP based services.⁴¹ Lack of access to reasonably priced TDM inputs — DS1s and DS3s — impedes Consolidated's ability to transition customers from TDM to Ethernet services and generate the type of demand needed eventually to justify the investment to provide fiber-based Ethernet. In short, limiting access to TDM circuits further delays the IP transition.

IV. AT&T's proposed tariff revisions violate the *Sierra-Mobile Doctrine*

A. AT&T's Proposed Revisions Modify the Bargain Between AT&T and Its Contract Tariff Customers

AT&T's special access contract tariff customers typically enter into such agreements to

⁴⁰ M. Vijay Raman, Vice President of Product Management and Marketing for Overture, Bridging the Ethernet-Over-Fiber Gap, High Bandwidth and Service Velocity Combine to Win the Service Speed Race, OSP Magazine, <http://www.ospmag.com/issue/article/Bridging-The-Gap>.

⁴¹ See e.g. Adtran, Ethernet over TDM, MX3112 Controller Card <http://www.adtran.com/web/page/portal/Adtran/product/1189901L2/471> (describing ability to enable Ethernet service across tariffed DS1 or DS3 facilities, including over copper).

obtain discounts associated with AT&T's five-year term pricing of the circuits they use to serve retail business end users. These discounts are in turn tied to annual minimum spending commitments with penalties for shortfalls and early termination penalties. Typically, the discounts and associated eligibility requirements apply to existing circuits, new circuit orders and renewal of circuits where the previous term commitment for that circuit expires during the period the contract tariff is applicable. Further, in most cases, the five-year term of the contract tariff and the term of the special access customer's circuits are not coterminous. Thus, in year three of a contract tariff, an AT&T contract tariff customer can still order new circuits on a five-year term and that term will extend beyond the end of the existing contract tariff.

AT&T's transmittal letter states that this "filing does not change rates for any existing customers, including existing customers on the term plan services that SWBT proposes to grandfather."⁴² Further, each page of the relevant sections providing the five-year term pricing explains that "Effective December 10, 2013, new DS1 TPP term plans greater than 36 months will no longer be available. There will be no change with respect to existing term plans."⁴³

This language appears to mean that customers with current five-year term pricing on circuits will continue to receive five-year term pricing on such circuits until the expiration of the circuit term. But it appears that such customers with time remaining on their contract tariff offers will neither be able to order new circuits with five-year pricing nor renew for five-year terms existing circuits with terms expiring after December 10, 2013.

By prohibiting customers from renewing circuits with five-year terms or obtaining new circuits with five-year terms, AT&T has effectively abrogated the contract offer. The inability to

⁴² Southwestern Bell Telephone Company (SWBT) Tariff F.C.C. No. 73, Transmittal No. 3383, p. 1.

⁴³ Transmittal No. 3383, 2nd Revised Page 39-124.13.

renew circuits with expiring terms on the same five-year basis under which those circuits were originally ordered or to order new circuits on a five-year pricing basis alters the essence of the bargain struck between AT&T and the contract tariff customer. The contract tariff customers rarely enter these agreements with AT&T that come with substantial and harsh penalties for early termination, and significant minimum spending requirements simply to manage existing circuits. Customers such as Consolidated use these agreements to help grow their business and expand to new markets and new customers, as well as to renew circuits whose terms expire during the duration of the contract tariff. By denying access to new circuits with five-year terms, AT&T proposes to alter each and every contract tariff it has in effect covering five year pricing. And a cursory review of AT&T's current contract tariff offers that remain in effect shows that those contracts rarely contain terms covering anything other than five-year pricing.

AT&T's elimination of five year pricing will have a significant impact on Consolidated's pricing flexibility contract. One of the key issues for Consolidated was its ability to obtain portability terms that allow it to avoid early termination penalties provided it meets certain criteria set forth in the contract. This portability provision allows Consolidated to disconnect unused circuits its end users no longer need provided it meets the criteria set forth in the contract tariff, such as continuing to meet its minimum spending commitment.⁴⁴ But if AT&T does not allow contract tariff customers to add new circuits, it effectively requires them to keep old circuits in place because disconnecting them jeopardizes compliance with the spending commitment.

Another important factor is that AT&T made a significant effort to convince Consolidated to forego using unbundled network elements and use special access instead. The result was the contract tariff to which Consolidated agreed. But that agreement - and the conversion of a

⁴⁴ See SWBT Tariff FCC No. 73 § 41.183.8 (issuing credits for early termination liability under certain conditions).

significant volume of UNEs - was predicated on five-year pricing. AT&T should not be allowed to use this “bait and switch” tactic to eviscerate a core term — five year pricing — of Consolidated’s contract.

B. Sierra Mobile Doctrine

AT&T cannot unilaterally alter the essential terms of its contract tariffs without the consent of its customers. The Supreme Court has established that, in a regulatory regime that permits a regulated utility to establish its arrangement with customers by private contract, the regulated utility may not alter a material term of such a contract without the customer’s consent simply by filing a unilateral tariff amendment.⁴⁵ While the doctrine originated in cases concerning the Federal Power Act, Courts and the Commission have held that the doctrine applies equally to contracts filed at the FCC under the Communications Act.⁴⁶

Nor does it matter that AT&T’s special access contract tariffs reference terms in its general special access tariffs.⁴⁷ A contract tariff “may refer to rates included in a tariff and yet continue to enjoy protection under *Sierra-Mobile*.”⁴⁸

Absent the protection of the Sierra-Mobile doctrine, a common carrier such as AT&T “could simply amend its filed tariffs and alter the terms of [its customer] contract[s]” for any reason.⁴⁹ If the Commission allowed such conduct, its stated goals would be frustrated, and the contract tariff regime rendered meaningless. Thus AT&T’s conduct here is impermissible under

⁴⁵ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338–40, (1956); *Federal Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 352–53 (1956).

⁴⁶ *Global Access Limited v. AT&T Corp.*, 978 F. Supp. 1068, 1073 (S.D.Fla. 1997); *Bell Tel. Co. of Penn. v. FCC*, 503 F.2d 1250, 1278 (3rd Cir.1974).

⁴⁷ See *MCI v. FCC*, 665 F.2d 1300 (D.C. Cir. 1981).

⁴⁸ *Id.* at 1302 (citing *Richmond Power & Light v. FPC*, 481 F.2d 490 (D.C. Cir. 1973)).

⁴⁹ *Global Access*, 978 F. Supp. at 1074.

the Communications Act.⁵⁰

Except in limited exceptions not applicable here, *Sierra-Mobile* provides that a tariff amendment that is filed without the customer's consent contrary to the terms of the contract is "a nullity" and the "contract rate remain[s] the only lawful rate."⁵¹ The only avenue for AT&T to use the tariff revision to modify the terms of the filed contract requires AT&T to show that enforcement of the terms of the contract would harm the public to such an extent that it "might impair the financial ability of the public utility to continue its service."⁵² AT&T can make no such showing here.

Thus, the Commission should reject AT&T's proposed tariff revisions on the grounds they impermissibly alter the terms of existing special access contract tariffs. At a minimum, the Commission should suspend and investigate and require AT&T to amend its tariff revisions to provide clearly that customers subscribed to contract tariffs containing terms governing five or seven year pricing may continue to renew circuits and order new circuits for terms with durations consistent with the specific language of their underlying agreements with AT&T.

V. If the Commission Does Not Reject AT&T's Transmittal, the Commission Should Suspend and Investigate the Tariff Because There are Substantial Questions of Its Lawfulness

If the Commission does not reject AT&T's proposed rates, the Commission should suspend and investigate AT&T's tariff revisions because there are substantial questions of their lawfulness, thus meeting the Commission's standard for suspending and investigating such

⁵⁰ *Id.* at 1076.

⁵¹ *Mobile*, 350 U.S. at 347; see also *Richmond Power & Light v. Fed. Power Comm'n*, 481 F.2d 49, 493 (D.C. Cir. 1973).

⁵² *Id.*

tariffs.⁵³ As demonstrated herein, there is an exceedingly high probability that these tariffs will be found to be unlawful after investigation. In addition, apart from AT&T's desire to engage in monopolistic price gouging, any tariff suspension will not substantially harm other interested parties. However, if the tariff filing is not suspended, customers such as Consolidated will be irreparably harmed because the rates will be deemed lawful and if they are later changed, the Commission can only change them on a prospective basis and cannot order refunds.⁵⁴ Nor would a suspension be contrary to the public interest because a suspension will prevent substantial rate increases that ultimately are borne by consumers.

VI. The Commission Should Reject or Suspend the Transmittal Because it Fails to Meet the “Substantial Cause” Test

Under the “substantial cause” test, the Commission measures the reasonableness of a tariff modification by weighing two principal considerations: the “carrier’s explanation of the factors necessitating the desired changes at that particular time,” and the “position of the relying customer.”⁵⁵ Concerning the first leg of this test, AT&T has provided no reasonable explanation for its proposed rate increases. As discussed above, AT&T’s professed concern about the IP transition is not persuasive. The presence of five-year term pricing does not affect AT&T’s ability to deploy more IP and fiber in its network. In fact, increasing prices for TDM special access services makes it harder for competitors to market Ethernet services to end users that are looking to save money and cannot afford fiber-based Ethernet services; it will therefore likely delay rather

⁵³ See n.18, *supra*.

⁵⁴ See *July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd. 23877, ¶ 7 (2004) (“Rates that are ‘deemed lawful’ are not subject to refund”). See also, *Virgin Islands Telephone Corporation v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006).

⁵⁵ *RCA American Comms., Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

than hasten the IP transition. There simply is no legitimate reason for AT&T to raise rates.

Regarding the second leg of this test, AT&T's customers, *i.e.*, Consolidated and other competitive carriers, wireless carriers, business end users, and other access customers, will be adversely impacted by AT&T's proposed rate increases, as discussed above.

VII. Conclusion

For the reasons discussed herein, Consolidated respectfully requests that the Commission reject AT&T's proposed rate increases in Tariff FCC No. 14 associated with Transmittal 1187. If the Commission does not reject these tariff revisions, the Commission should, at a minimum, suspend and investigate the revisions proposed by AT&T.

Respectfully Submitted,

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December 2, 2013

December 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2013 a copy of the foregoing Petition to Reject or Suspend and Investigate AT&T's Proposed Tariff Revisions was served to the parties below by hand-delivery electronic mail or by facsimile and U.S. first-class mail to the following:

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