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December 6, 2013

REDACTED – FOR PUBLIC INSPECTION

By Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Ameritech Operating Companies Tariff F.C.C. No. 2 – Transmittal No. 1803; BellSouth Communications, LLC Tariff F.C.C. No. 1 – Transmittal No. 71; Nevada Bell Tel. Co. Tariff F.C.C. No. 1 – Transmittal No. 254; Pacific Bell Tel. Co. Tariff F.C.C. No. 1 – Transmittal No. 498; Southern New England Tel Co. Tariff F.C.C. No. 39 – Transmittal No. 1061; Southwestern Bell Tel. Co. Tariff F.C.C. No. 73 – Transmittal No. 3383
Request for Confidential Treatment of AT&T

Dear Ms. Dortch:

For AT&T Services, Inc. on behalf of the subsidiaries and affiliates of AT&T Inc. (hereinafter collectively referred to as "AT&T"), please find enclosed an original and four copies of the confidential version of the Reply of AT&T to Petitions to Suspend and Investigate AT&T Transmittal Nos. 1803, 71, 254, 498, 1061 (the "Reply"). One original and four copies of the redacted version of the Reply are being filed concurrently. The Reply contains information for which confidential treatment is appropriate. The confidential information is delineated by the phrases "**[BEGIN CONFIDENTIAL]**" and "**[END CONFIDENTIAL]**."

Pursuant to Section 1.773(b)(3) of the Commission's Rules, copies of the Reply are being served in accordance with the attached service list. Additionally, one copy of the redacted version of the Opposition is being submitted via the Electronic Tariff Filing System.

REQUEST FOR CONFIDENTIAL TREATMENT

AT&T requests confidential treatment of certain information contained in the Reply. Specifically, the Reply contains information regarding the number of AT&T circuits sold to customers under specific plans. AT&T keeps this information as highly confidential in the course of business and it would be detrimental to release this information to the public. For the reasons discussed below, this information should be treated as confidential under the Commission's standard protective order for tariff review proceedings and under Sections 0.457 and 0.459 of the Commission's Rules.

CONFIDENTIALITY UNDER THE COMMISSION'S STANDARD PROTECTIVE ORDER FOR TARIFF REVIEW PROCEEDINGS

The Commission has adopted a Standard Protective Order[1] for Tariff Review filings submitted pursuant to Section 204(a)(3) of the Communications Act.[2] The Commission has decided to employ the Standard Protective Order if "the carrier has made a good faith showing in support of confidential treatment."[3] According to the Commission, carriers may meet this good faith requirement by demonstrating that the information, under the Commission's rules regarding confidentiality with respect to the Freedom of Information Act ("FOIA") should be afforded confidential treatment.[4] As discussed below, the designated information in the Reply is eligible for confidentiality given the Commission's rules for the treatment of confidential information under FOIA. AT&T respectfully requests that the Bureau afford the designated information confidential treatment and protection from disclosure under the Standard Protective Order.[5]

CONFIDENTIALITY UNDER SECTION 0.457 OF THE COMMISSION'S RULES

AT&T seeks protection for confidential business information that is proprietary to and kept confidential by AT&T. The information is "commercial" and "financial," and is "not routinely available for public inspection."[6] Further, the information is "privileged or confidential commercial, financial, or technical data," and AT&T considers this information to be highly

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[1] AT&T is seeking confidential treatment of designated information in the Opposition and attached exhibit in accordance with the Commission's Standard Protective Order for Tariff Review Proceedings. *See* Report and Order, *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶ 40 (1998) ("*Standard Protective Order*").

[2] *See* Report and Order, *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd. 2170, ¶¶ 91-95, Appendix B (1997) ("*Streamlined Tariff Order*").

[3] *Id.* ¶ 91.

[4] *Id.*; 47 C.F.R. §§ 0.457, 0.459.

[5] Under a non-disclosure agreement, AT&T is willing to make the confidential version of the Opposition available to parties. *See Standard Protective Order* ¶ 40.

[6] *See* 47 C.F.R. § 0.457(d).

confidential "trade secret[]" material.[7] Therefore, this information should be considered as material that is "not routinely available for public inspection."[8]

CONFIDENTIALITY UNDER SECTION 0.459 OF THE COMMISSION'S RULES

AT&T seeks confidential treatment for information that also qualifies for protection under Section 0.459 of the Commission's Rules.[9] Pursuant to subsection (b) of the Rule, AT&T provides the following reasons for withholding the materials from public inspection.

(1) Identification of the specific information for which confidential treatment is sought. The Confidential information in AT&T's Reply contains the number of circuits for specific services sold by AT&T under specific plans, including trends over time. This is information that AT&T keeps highly confidential in the ordinary course of its business.

(2) Identification of the Commission's proceeding in which the information was submitted or a description of the circumstances giving rise to the submission. The information is being submitted as part of a Reply to the above-referenced proceeding in which Petitions have been filed to suspend AT&T's tariff filings.

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret that is privileged. The AT&T information contains company-specific, competitively-sensitive, confidential and/or proprietary, commercial, financial information. This information can be used to determine information about AT&T's operations and financial position and is sensitive for competitive and other reasons. This information would not customarily be made available to the public and customarily would be guarded from all others, especially competitors. If this information were not protected, AT&T's competitors could use it in an effort to determine how best to undercut AT&T's business.

(4) Explanation of the degree to which the information concerns a service that is subject to competition. The confidential information at issue relates to AT&T's provision of wireline services, for which it is subject to intense competition. If the information is not protected, AT&T's competitors will be able to use it to their competitive advantage.

(5) Explanation of how disclosure of information could result in competitive harm. AT&T seeks confidential treatment for information that is commercial and financial data that AT&T keeps as highly confidential in the course of business, and considers to be confidential and privileged trade secret information. AT&T sells wireline services through different plans

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[7] *See id.* § 0.457(d)(2).
[8] *Id.*
[9] *See* 47 C.F.R. § 0.459.

and rates, and faces intense competition in negotiating these services in the marketplace. If released, this commercially and competitively sensitive information would have a detrimental impact on AT&T's business. Competitors could use this information to gain an unfair advantage against AT&T. AT&T has not shared any of its information for which it is seeking confidential treatment with any competitors or Petitioners.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure; and (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties. In the past and going forward, AT&T continues to hold the information for which it seeks confidential treatment as highly confidential in its business. AT&T does not make its information for which it is seeking confidential treatment available to the public and has not disclosed this information to any third parties, including other carriers in this proceeding.

(8) Justification for the period during which the submitting party asserts that material should not be available for public disclosure. As release or disclosure of this information would cause AT&T significant competitive harm, AT&T cannot determine a period for which this information should be considered confidential. AT&T requests that this information be withheld from public disclosure in perpetuity.

Very truly yours,

/s/ David L. Lawson
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Counsel for AT&T

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Encl.

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Ameritech Operating Companies Tariff F.C.C. No. 2	)	Transmittal No. 1803
BellSouth Telecommunications, LLC Tariff F.C.C. No. 1	)	Transmittal No. 71
Nevada Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 254
Pacific Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 498
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	)	Transmittal No. 3383
The Southern New England Telephone Company Tariff F.C.C. No. 39	)	Transmittal No. 1061

REPLY OF AT&T SERVICES INC.
TO PETITIONS TO SUSPEND AND INVESTIGATE

Pursuant to Section 204(a)(1) of the Communications Act, 47 U.S.C. § 204(a)(1), and Section 1.773 of the Commission's Rules, AT&T Services Inc., on behalf of the subsidiaries and affiliates of AT&T, Inc. (hereinafter collectively referred to as AT&T), respectfully requests that the Commission deny the Petitions to suspend or reject the above captioned tariffs.

INTRODUCTION AND SUMMARY

The industry is in the midst of an historic transition to all-Internet Protocol (IP) networks,[1] and facilitating that transition is a major goal of the Commission.[2] The transition to all-IP networks is both inevitable and well under way. Indeed, the Commission's Technology Advisory Council has recommended that the TDM-based PSTN be retired by 2018,[3] and Chairman Wheeler has noted the need to "move with urgency" on technology trials intended to address the myriad issues that inevitably will arise in that transition.[4] For its part, AT&T has publicly stated its intention of migrating all customers off its legacy TDM networks by 2020.

For this goal to be met, however, all stakeholders need to undertake the important work now of identifying and removing obstacles to that transition. One of the most daunting obstacles AT&T faces is the most obvious one – successfully migrating customers off of the legacy services that will replaced by new technologies and services. Industry experience teaches that large-scale customer migrations take considerable time. Thus, a smooth and successful transition requires that AT&T begin planning now. Waiting until the last minute with the expectation that

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[1] FCC, Connecting America: The National Broadband Plan, at 59 (2010) ("the convergence of all communications around IP-based networks and the innovative services those networks support" will bring "extraordinary opportunities to improve American life and benefit consumers").

[2] *See* Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC Rcd 17663, ¶ 783 (rel. Nov. 18, 2011) ("*Connect America Order*") (vowing to "facilitate the transition" away from the TDM-based network and toward the all-IP network of the future); *id.* ¶ 1335; Notice of Proposed Rulemaking, Order and Notice of Inquiry, *Numbering Policies for Modern Communications et al.*, 28 FCC Rcd. 5842, ¶ 54 (rel. Apr. 18, 2013) ("The Commission has already set its goal to 'facilitate the transition to an all-IP network . . .'").

[3] *See* Technology Advisory Council, Status of Recommendations, at 11, 15-16 (June 29, 2011), http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf.

[4] "Wheeler says there's 'urgency' about IP transition trials," TR's State News Wire, Nov. 7, 2013.

large numbers of customers will be migrated successfully in a short period of time is a recipe for failure. It is for this reason that AT&T can no longer justify a generally available tariff offering five- and seven-year term plans that would commit AT&T to maintaining legacy TDM networks into the next decade, including well after the date AT&T has established for migrating all customers to IP-based services.

At the same time, AT&T recognizes that it must work to minimize disruption for its customers during this transition. Although several customers have filed petitions to suspend and investigate AT&T's IP transition-enabling tariff revisions, those petitions largely reflect confusion over the purpose of those revisions and how the sunset of these term plans will actually operate. Many of the Petitioners also greatly overstate the practical effects of these tariff changes. As shown below, Petitioners' calculations assume that their five- and seven-year rates immediately flash cut to AT&T's current three-year term rates. That is not the case: all of Petitioners' existing five- and seven-year plans are grandfathered and in some cases are further protected by other contract or tariff provisions. Moreover, well before these term plans and contracts approach expiration, AT&T stands ready to negotiate alternative arrangements that meet the needs of its customers in a manner consistent with the imperatives of the transition. Technology transitions are always challenging, and AT&T understands that some customers continue to have concerns about how to manage this transition in the context of their individual special access arrangements and agreements. AT&T has actively reached out to many customers both before the tariff was filed and in the days since, and AT&T is confident that this continuing dialogue will produce solutions that address customer concerns while facilitating AT&T's ability to move forward expeditiously with its transition to an all-IP network.

These are business-to-business issues, however, and there is no legal basis for the Commission to suspend or investigate these tariff filings.

First, it plainly is not an unjust and unreasonable practice in violation Section 201(b) for AT&T to revise its special access tariffs to eliminate (and grandfather for existing customers) certain rate discount offers. The Communications Act establishes a regime of carrier-initiated rates and does not require AT&T to offer *any* particular discount arrangement. *BellSouth v. FCC*, 469 F.3d 1052, 1057 (D.C. Cir. 2006). Indeed, Petitioners' Section 201(b) argument is, in effect, a collateral attack on the reasonableness of the rate offers that will remain available in AT&T's tariffs – rate offers that have never been challenged, much less found to be unjust and unreasonable. AT&T's tariff filing does not change the rates or any other terms of its month-to-month or term plan offerings of less than 36 months in length, or its contract tariffs. Therefore those rates and terms cannot be "suspended" or investigated here. To the contrary, AT&T filed those rates previously in full compliance with the tariffing, price cap and pricing flexibility rules, and those rates now are not only presumptively reasonable, but in most cases are deemed lawful.

Petitioners use this proceeding to reiterate their rhetoric about special access prices generally. The Commission is already considering Petitioners' broad – and baseless – attacks on special access pricing in a rulemaking proceeding, and the Commission has already held that it cannot assess Petitioners' "market power" claims without the comprehensive competitive data that it has not yet begun to collect. That rulemaking (or a complaint proceeding challenging specific rates and terms) is the proper forum for Petitioners' arguments, and Petitioners' rhetoric here provides no basis for suspension.

Equally spurious are various procedural arguments premised on the notion that AT&T's tariff changes constitute a "restructured" rate under Rule 61.49(e).[5] That contention, which applies only to AT&T's rates that are subject to price caps, simply does not fit the facts. The Commission has made clear that a restructuring occurs only when a carrier *replaces* or *rearranges* an existing service – for example, by substituting usage or distance sensitive charges for flat rates. AT&T's tariff filing did not replace or rearrange one option with another and thus there is no restructuring. Indeed, the five- and seven-year plans were originally filed as *new* services, which are defined as services that add an option without removing any existing options. The initial tariffing of these lower-cost options did not, under Commission rules, create headroom for price increases for other special access options, and their withdrawal must be treated consistently; otherwise, the Commission's tariffing rules would create a one-way ratchet under which the establishment of a new discount plan has no immediate effect on other rates, but the withdrawal of that plan does. Indeed, under Petitioners' theory, the withdrawal of a higher-priced term plan would likely create immediately available headroom for rate *increases.* That is why, contrary to Petitioners' argument, the Commission's rules do not require a carrier that merely sunsets a discount offer to submit mid-term recalculations of its various price cap indices. To the extent that these tariff changes result in a shift in future demand to other AT&T rate plans (and the grandfathering combined with wide availability of substitutes ensure that any such shift, if it occurs, will be quite gradual), that will be accounted for in subsequent annual price cap filings.

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[5] *See, e.g.*, Petition of Cbeyond, Integra, Level 3 and TW Telecom to Suspend and Investigate, *Ameritech Operating Cos. Tariff FCC No. 2 et al,* at 12-15, 19-20 ("Cbeyond"); Petition of Sprint Corp. to Reject and to Suspend and Investigate, *Ameritech Operating Cos. Tariff FCC No. 2 et al,* at 12-14 ("Sprint").

Some Petitioners also raise various contract-specific arguments, but these arguments are based entirely on misunderstandings. For example, Windstream and Consolidated raise concerns that customers will no longer be permitted to purchase circuits pursuant to certain contract tariffs and optional pricing plans at the rates, such as five-year term plan rates, authorized by those contract tariffs and optional pricing plans. As AT&T explains below, these concerns are misplaced, and existing customers with such contracts will continue to be entitled to purchase circuits at the rates and terms provided in their contracts.

Finally, there is no merit to Petitioners' claims that suspension would be merited under Rule 1.773(a)(1)(iv) (a rule that some Petitioners argue does not even apply here). As explained below, AT&T's tariff is plainly lawful, and there is not remotely "a high probability the tariff would be found unlawful after investigation."[6] Nor will "irreparable injury . . . result if the tariff filing is not suspended."[7] Petitioners asserted harms are greatly exaggerated – for example, Level 3 and XO erroneously assume that *all* existing circuits purchased under terms greater than three years will *immediately* be migrated to an AT&T three-year plan, when in fact the grandfathered term plans will only gradually expire in the coming years (and even then customers may choose Ethernet or other alternatives). Petitioners also cannot establish that "suspension would not . . . be contrary to the public interest."[8] In fact, everyone recognizes the need to facilitate an orderly transition to an all-IP world, and suspension would therefore be contrary to the public interest by hindering that transition and creating perverse incentives for

[6] 47 C.F.R. § 1.773(a)(1)(iv)(A).

[7] 47 C.F.R. § 1.773(a)(1)(iv)(C).

[8] 47 C.F.R. § 1.773(a)(1)(iv)(D).

customers to continue purchasing TDM-based services rather than migrating to next-generation IP-based services.

STANDARD OF REVIEW

Petitioners disagree as to the proper standard of review in this proceeding. Some argue that Rule 1.773(a)(1)(iv), 47 C.F.R. § 1.773(a)(1)(iv), sets the appropriate standard of review. Others argue that the Commission should apply a "significant issues or questions" standard under Section 204 of the Act, 47 U.S.C. § 204. As shown below, however, Petitioners have not met the standards for suspension regardless of which standard may apply, because AT&T's filing does not raise any colorable issue under either Section 201(b) or the price cap rules.

ARGUMENT

I. AT&T'S FILING DOES NOT VIOLATE SECTION 201(b).

Several Petitioners contend that AT&T's tariff filings "raise significant questions of lawfulness" and should be suspended because the tariffed changes allegedly constitute an unreasonable practice under 47 U.S.C. § 201(b).[9] According to the Petitioners, AT&T's decision to grandfather but otherwise sunset certain long-term discounts would leave customers with no "adequate substitute" and "force" them to purchase services at "substantial" but "less favorable discounts" – and ultimately at rates that they say are "unjust and unreasonable."[10] These arguments lack merit, and provide no basis for suspension of AT&T's tariff filings.

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[9] *See* Cbeyond at 2, 6-8, 15-18, 21; Sprint at 3, 7-14; Petitions of Windstream Corp. to Suspend and Investigate, *Ameritech Operating Cos. Tariff FCC No. 2 et al.*, Transmittal Nos. 1803, 71, 498, 1061, 3383, at 3-8 ("Windstream"); Consolidated Commc'ns Petition to Reject or Suspend and Investigate AT&T's Proposed Tariff Revisions, *Sw. Bell Tel. Co. Tariff FCC No. 73 et al.*, at 3-5 ("Consolidated"); Ad Hoc Telecommc'ns Petition to Suspend and Investigate, *Ameritech Operating Cos. Revisions to Tariff FCC No. 2 et al.*, at 2-7 ("Ad Hoc"); XO Commc'ns Petition to Suspend and Investigate, *Ameritech Operating Cos. Tariff FCC No. 2*, at 5 n.7 ("XO")

[10] *E.g.*, Cbeyond at 2, 7-8, 15.

First, and most fundamentally, Petitioners cannot argue that the mere elimination of a discount violates Section 201(b), because Section 201(b) does not obligate AT&T to maintain any specific type of discount plans. Indeed, as the D.C. Circuit has explained, any argument that it is an unreasonable practice not to keep certain discounts in place "neglect[s] a critical fact, namely" that a carrier generally has "no obligation to offer" any discount plans "at all, much less" specific types of discounts like the long term plans AT&T has grandfathered.[11] The Communications Act establishes a system of carrier-initiated rates,[12] and absent a prescription under Section 205, AT&T cannot be forced (through "suspension" or otherwise) to continue to offer any particular rate.[13]

Petitioners' real complaint here is not that AT&T has eliminated certain terms discounts, but that they ostensibly will be "forced" to purchase services at *other* tariffed rates that AT&T has not changed in this tariff filing. Thus, Petitioners' Section 201(b) claim is actually an impermissible collateral attack on AT&T's longstanding discount plans of terms less than 36

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[11] *BellSouth* 469 F.3d at 1057. Like any other discount offer, AT&T's long-term discount plans are "most naturally viewed as a bargain containing terms that both benefit and burden its subscribers." *BellSouth*, 469 F.3d at 1060. As market conditions change, the terms that "benefit and burden" customers will also necessarily need to change, and thus it is commonplace for carriers to revisit their tariffed offerings, including sunsetting "bargain[s]" that once made sense for carriers and customers alike but no longer are appropriate under new market conditions. Here, no one disputes that the transition to all-IP networks is progressing rapidly and demand for traditional TDM DS1/DS3 services is steadily decreasing. As a result of these changed circumstances, lengthy term plans that require AT&T to maintain outdated TDM circuits will increase, not reduce, AT&T's costs. The Petitioners' insistence that, regardless of market changes, they have a perpetual right to purchase lengthy term plans at heavily discounted rates is inconsistent with the very nature of a two-sided "bargain."

[12] *AT&T Co.* v. *FCC*, 487 F.2d 865, 871 (2d Cir. 1973).

[13] Indeed, "suspending" the sunsetting of a discount in effect impermissibly "compels [AT&T] to adhere to a fixed rate which can be revised only with prior Commission permission." *Id.* at 874-75 (there is "no difference between a 'prescription' of new rates and a 'freeze' of old rates").

months or its month-to-month offers, and a claim that *those* rates are unreasonably high in violation of Section 201(b).[14]

This proceeding is not the proper forum for such a claim. Under Section 204, the Commission's authority is limited to "suspend[ing]" and investigating "new or revised" charges or practices. 47 U.S.C. § 204. The only revisions AT&T made in its current tariff filings are the elimination and grandfathering of certain long-term discounts. AT&T has not revised or changed the rates that Petitioners claim are unreasonable, and therefore under Section 204 the Commission has no authority to "suspend" or investigate those rates in this proceeding. If Petitioners believe that AT&T's three-year, two-year, one-year or month-to-month rates are unjust or unreasonable, the Act provides them a remedy: they may pursue such claims in a formal complaint under Section 208 (or a petition to suspend any future tariff filings that actually do adjust those rates).

In fact, suspension on such grounds would be particularly unwarranted here because AT&T's remaining rates are *presumptively* reasonable and in most cases deemed lawful. AT&T's other rate plans were filed previously in full compliance with the tariffing, price cap, and pricing flexibility rules. Those plans were submitted in tariffs filed pursuant to Section 204(a)(3), and when those tariffs went into effect without suspension, those rates became "deemed lawful" under the Act. In addition, the rate plans submitted in price cap areas were

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[14] *See, e.g.*, Cbeyond at 6 (arguing that AT&T's "undiscounted month-to-month rates for DS1 and DS3 special access services . . . [are] exorbitantly high"); *id.* at 8-9 (claiming that customers will "begin purchasing special access services from AT&T under three year term plans" and arguing that this will result in an unfair and unreasonable "increase in input costs"); Sprint at 15 (arguing that AT&T should "increase the discounts it currently offers under its three year term plans"); XO at 4; Windstream at 5-6; Ad Hoc at 1-2. Indeed, Consolidated (at 10-11) and Ad Hoc (at 5) even include collateral attacks complaining about the general operation of the Commission's price cap rules, issues obviously beyond the scope of this proceeding.

made in compliance with the price cap rules and, as the Commission and courts have made clear, thereby became presumptively just and reasonable.[15] Indeed, the very purpose of price cap regulation was to create a "no-suspension zone" for rates filed in compliance with the price cap rules,[16] and similarly the pricing flexibility rules lift the price caps altogether in Phase II areas because rates can be presumed reasonable.[17] It would be odd indeed (and patently unlawful) if the Commission were to suspend a tariff as possibly "an unreasonable practice" just because it leaves customers with a set of rates that, under the Act and Commission rules, are "deemed" or presumptively lawful.

Some Petitioners claim that the Commission can still find an unreasonable practice under Section 201(b) even when the rates at issue are lawful, but the examples they cite are not remotely on point.[18] The cases they cite primarily involved carriers that assessed lawful rates but in circumstances where it was impermissible to do so. This is obviously true of the Commission's "cramming" rules, and AT&T is not billing special access customers for services they have not requested. Likewise, the facts in *All American* and other access stimulation cases are plainly inapposite. In *All American*, competitive LECs billed the benchmark rates that CLECs may ordinarily be entitled to charge, but the Commission found that they did so under

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[15] *See, e.g., Nat'l Rural Telecom. Ass'n* v. *FCC*, 988 F.2d 174, 184-85 (D.C. Cir. 1993) (the Commission acted reasonably in allowing price cap carriers – even if they are classified as dominant – to "enjoy a presumption of reasonableness" for tariff filings below the caps and within band); *1993 Annual Access Tariff Filings*, 13 FCC Rcd. 6277, ¶ 91 (1997) (refusing to investigate a tariffed charge that was below cap and within band, because the "charge is a presumptively reasonable rate under price caps").

[16] *Price Cap Order* ¶ 291; *Price Cap Recon Order* ¶ 13 (filings within the caps and bands are "presumed lawful" and take effect under "streamlined review").

[17] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd. 14221, ¶¶ 153-55 (1999) ("*Pricing Flexibility Order*").

[18] *See, e.g.*, Cbeyond at 16-17.

"sham arrangements" that sought to "circumvent" Commission rules that would have brought the charges "to an end."[19] AT&T is grandfathering and eliminating its longest term discount plans not to circumvent the Commission's rules and obtain revenues that "could not otherwise be obtained by lawful tariffs," *All American* ¶ 24, but instead to avoid the unreasonable costs of indefinitely offering TDM circuits when the industry is migrating to all-IP networks.

Equally important, Petitioners have offered no factual basis for their claims that AT&T's rates are unlawful under Section 201(b). Indeed, to justify suspension of AT&T's rates under Section 201(b) of the Act under Petitioners' theory, the Commission would have to find that AT&T's remaining rates violate Section 201(b) in *every* area where AT&T offers service. The Commission has repeatedly rejected such claims, and has specifically found "the record inadequate" to make any such determinations in the ongoing special access proceeding on a much larger record than exists here.[20]

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[19] Memorandum Opinion and Order, *AT&T Corp.* v. *All American Tel. Co.*, 28 FCC Rcd. 3477, 3491 ¶¶ 1, 31 (rel. Mar. 25, 2013) ("*All American*"). More generally, the Commission's determinations that access stimulation schemes are an unreasonable practice under Section 201(b) provide no support for a finding here that AT&T's decision to maintain discount plans with deemed lawful rates would nevertheless result in unjust practices or rates. The Commission found access stimulation to be unreasonable – in formal complaint or rulemaking proceedings with a complete and full record – because there was a "combination of significant increases in switched access traffic with unchanged access rates," which led to "inflated profits" that "almost uniformly" result in unjust rates that violation Section 201(b). *Connect America Order*, ¶ 657; Memorandum and Opinion Order, *Qwest Commc'ns Corp. v. Farmers & Merchs. Mut. Tel. Co.*, 22 FCC Rcd. 17973, ¶ 25 (rel. Oct. 2, 2007) ("*Farmers I*") (access stimulation arrangement unlawful because it led to increased minutes of use and revenue, but no "concomitant" increase in costs). Nothing of the sort is present here.

[20] *See, e.g.*, Order and Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd. 1994, 2035 ¶ 130 (2005) ("*2005 Notice*"); *see also* Brief of Respondent FCC at 23, *In re AT&T Corp., et al.*, (D.C. Cir. Filed July 1, 2004) (No. 03-1397) ("in order to justify the interim prescription relief sought by petitioners, the record would have to support the conclusion that *every* special access rate in *every* MSA in which Phase II pricing flexibility relief has been granted violates Section 201") (emphasis in original).

In this regard, Petitioners' claims that they lack competitive alternatives for AT&T's TDM-based services are supported by nothing but rhetoric that ignores the real world. The reality is that legacy TDM-based services are in sharp decline, as the industry is rapidly migrating to next generation IP-based services. Indeed, Petitioners are among the largest of these alternative providers. For example, tw telecom was recently identified as the third-largest Ethernet provider in the U.S., and Petitioners XO and Level 3 are the sixth and eighth largest Ethernet providers, respectively.[21] Cable companies, like Cox and Time Warner Cable, are also top 10 providers of Ethernet services in the U.S.[22] Moreover, Petitioners' unsupported claims that these Ethernet and other alternatives are not widely available cannot survive scrutiny. Petitioner Sprint, for example, recently announced that it "expects 90 percent of its backhaul to be driven by Ethernet over fiber and the remaining over microwave."[23] In other words, almost all of Sprint's cell sites – including those located in rural areas – will soon be served by alternatives to legacy TDM-based services.

Finally, the Commission is already considering Petitioners' broad attacks on special access pricing in a pending rulemaking, and the Commission's findings there further underscore that these petitions for suspension are not a proper avenue for addressing Petitioners' Section 201(b) claims. In the rulemaking proceeding, the Commission has emphasized that it has not yet collected the data necessary to draw any firm conclusions about the existing rates for special

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[21] *See Mid-Year 2013 U.S. Carrier Ethernet Leaderboard; Cable MSOs and regional Competitive Providers show strongest gains,* Vertical Systems Group (Aug. 20, 2013), *available at* http://www.verticalsystems.com/vsglb/mid-year-2013-u-s-carrier-ethernet-leaderboard/.

[22] *Id.*

[23] Phil Goldstein, Sprint plans to use 2.5 GHz spectrum to catch up to Verizon, AT&T in LTE, FierceWireless (Aug. 29, 2013), *available at* http://www.fiercewireless.com/story/sprint-plans-use-25-ghz-spectrum-catch-verizon-att-lte/2013-08-29?utm_source=rss&utm_medium=rss.

access. In particular, the Commission has previously explained that it does not have adequate data to justify "prescribing new special access rates." 2005 Notice ¶ 130. The fact that the Commission has repeatedly found that it needs a much larger record to evaluate Petitioners' claims – including far more extensive data from competitive carriers like the Petitioners themselves – simply confirms that this tariff proceeding is not the proper place for the Petitioners to litigate their broad claims with respect to special access pricing.

II. AT&T's FILING IS NOT A RESTRUCTURING OF SERVICES.

Cbeyond and Sprint argue that, for the services subject to price caps, AT&T's tariff revisions constitute a "restructured" rate under Rule 61.49(e) and that AT&T did not comply with the Commission's procedures for such filings, including submitting information necessary to perform mid-term recalculations of AT&T's APIs and SBIs. This argument is meritless, because the restructuring rule does not apply here.

A "restructured" rate under Rule 61.49(e) is a *new* offering that redefines an existing service. As the Commission has explained, a restructured service "*replaces*" an existing service, which distinguishes a restructured service from a new service, which is a "service[] that *add[s]* to the range of options already available to customers" without taking away existing options.[24]

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[24] Second Further Notice Of Proposed Rulemaking In CC Docket No. 94-1, Further Notice Of Proposed Rulemaking In CC Docket No. 93-124, And Second Further Notice Of Proposed Rulemaking In CC Docket No. 93-197, *Price Cap Performance Review for Local Exchange Carriers, et al.*, 11 FCC Rcd 858, ¶ 40 (rel. Sept. 20, 1995) ("*Price Cap Review Notice*") (emphasis added) ("[N]ew services are currently defined as services that add to the range of options already available to customers. Under the existing rules, a new service may include, but need not, a new technology or functional capability; the test is simply whether the service adds to the existing array of services. New services are distinguished from 'restructured' services, which replace existing services and consequently do not expand the range of services available," citing Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, ¶ 314 (rel. Oct. 4, 1990) ("*LEC Price Cap Order*")); *see also LEC Price Cap Order* ¶ 314 ("restructured services, on the other hand, involve the rearrangement of existing services . . .

Since AT&T's tariff filing does not replace any existing service or option, there is no restructuring. The history of the affected tariff provisions further confirms that AT&T has not restructured an existing service. The longer-term plans at issue were originally filed as *new* services that did not change or affect other services or rate plans. For the same reasons, the simple sunset of those "new" services does not affect or replace any other option and thus does not restructure any existing service or rates. Rule 61.49(e) does not apply.

Notably, Petitioners provide scant support for their claim that the elimination of a term plan discount constitutes a restructure. Indeed, Cbeyond's entire argument consists of a single sentence that misconstrues the FCC's 1990 *LEC Price Cap Order.* Specifically, Cbeyond argues (at 13) that "[t]he Commission [in the *LEC Price Cap Order*] has explained that 'eliminating' prices for a component of a tariff offering, such as rate elements, qualifies as a restructured service." But the *LEC Price Cap Order* merely states that a restructure may occur by, among other things, "eliminating rate elements."[25] That, of course, is not disputed. If a carrier changes the way it charges for a service – by, for example, switching from a combination of fixed and usage-sensitive charges to fixed charges – that restructure would entail the elimination of rate elements setting forth usage-sensitive charges. The mere elimination of a particular term discount, however, is not a restructure when the underlying rate elements (and the remaining pricing plans) are unaffected.[26] Here, AT&T has not eliminated any rate elements or otherwise

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When a service has been restructured, the previous version of that service no longer exists"); Supplemental Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates For Dominant Carriers,* 5 FCC Rcd. 2176, ¶ 12 (rel. Mar. 12, 1990) (restructuring rule designed to apply "to modification of rates when existing *services* are restructured" (emphasis added)).

[25] *LEC Price Cap Order* ¶ 314

[26] *See, e.g.*, Order on Review, *AT&T Corp. MCI Telecommunications Corp.; Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched*

changed or redefined any service; it has merely sunset certain term plan discounts. That is not a restructure under the Commission's rules. Indeed, under Cbeyond's boundless theory, any change in price would effectively "eliminate" the previous price and would thus qualify as a "restructuring," The Commission has specifically refuted any such interpretation of the rules: "[n]ew services and restructures are both distinguished from a mere change in the rate for an existing service."[27]

That is not to say that the elimination of a particular discount is ignored by the Commission's price cap rules. While the elimination of a discount does not trigger any required mid-term recalculations of price cap indices,[28] any shift in demand that may occur will be accounted for in subsequent annual tariff filings. And because AT&T is merely grandfathering rather than immediately eliminating the longer-term plans, the effects of these tariff changes will be felt gradually as existing plans expire or as providers terminate those circuits early. Indeed, a broad-scale shift in demand to other AT&T TDM-based plans may never occur, given the industry-wide shift toward IP-based services and the intense competition for special access services where demand is most concentrated. But if such a shift in demand did occur – and if demand for the three-year plan increased to the point where an AT&T annual filing would

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Voice Service with Various Countries; Re: Applications for Review, 13 FCC Rcd. 23924, ¶ 17 n.39 (distinguishing term and volume discounts from rate elements).

[27] *Price Cap Review Notice* ¶ 40 n.54.

[28] Rule 61.49(b) does not apply because AT&T's filing does not "propose rates." 47 C.F.R. § 61.49(b).

exceed the price cap – AT&T would be required to make appropriate adjustments in its annual tariff filing to keep its rates under the cap.[29]

III. PETITIONERS' TARIFF-SPECIFIC CONCERNS ARE MISPLACED.

Two Petitioners – Consolidated and Windstream – oppose AT&T's tariff filing because they have concerns that the filings may adversely affect specific contract tariffs and optional pricing plans. AT&T understands that customers may seek concrete assurances regarding the operation of their contract tariffs, but, as discussed below, the concerns voiced by Consolidated and Windstream are misplaced: the elimination of longer-term plans will not affect the operation of the contract tariffs and other arrangements they identify.

For example, Windstream raises concerns about the operation of the Discount Commitment Plan ("DCP") offered in AT&T's Ameritech general tariff. The DCP allows customers to purchase circuits for either a three-year or five-year term. Both terms require a volume commitment, and both include circuit portability, *i.e.*, the ability to remove and add circuits without incurring termination penalties as long as the agreed-to commitment level is maintained. The rates for the DCP are set forth in a table in the tariff, which includes two columns, one for three-year plans and one for five-year plans. Windstream argues that customers who have committed to purchase under the five-year plan will no longer be able to receive the five-year rates set forth in the tariff as they add new circuits (as permitted by the portability provisions). Windstream's interpretation of this tariff is incorrect. The DCP expressly sets forth the specific rates applicable for the three- and five-year plans. Accordingly, customers who

[29] Notably, however, the price cap rules give AT&T considerable flexibility to decide how to adjust its rates in such circumstances. Nothing in the Act (or the Commission's rules) would require AT&T to do so by maintaining any particular discount.

currently subscribe to the five-year DCP plan will continue to receive the agreed-upon five-year rates when they add circuits under that plan.[30]

Consolidated expresses concern that the modifications to AT&T's tariff will effectively abrogate a contract tariff (SWBT FCC Tariff No. 73, Section 41.183) that offers discounts equivalent to the five-year term rates. In fact, that contract tariff expressly requires AT&T continue to make such rates available. The contract tariff states that during the term of the contract tariff, "[e]ach Subject Service shall be subject to a sixty (60) month service term commitment Term Payment Plan (TPP) Section 7.2.19" and that "[u]pon expiration of the Term Period of this Contract Offer, each Subject Service shall be provided for the remainder of the applicable Service Term, if any, according to the rates, terms and conditions applicable to a sixty (60) month term commitment." Sw. Bell Tel. Co., FCC Tariff No. 73, § 41.183.5(B), Original Page 41-1672. Further, the contract tariff states that "tariff modifications will not change the terms and conditions of this Contract Offer." *Id.* § 41.183.5(C)(1), Original Page 41-1673. Accordingly, pursuant to the terms of the contract tariff, customers will continue to be able to purchase the five-year term plans available under that contract tariff until the contract tariff expires or is re-negotiated.

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[30] Windstream cites to a number of other tariffs that it claims contain volume commitments that will be more expensive for customers to maintain without the five-year plans. In fact, however, none of these other tariffs include volume or revenue commitments. *See* Pac. Bell Tel. Co., Tariff F.C.C. No. 1, § 7.4.18, 2nd Revised Page 7-140.1 ("The DS1 Term Payment Plan (DS1 TPP) is a term plan"); BellSouth Telecommunications, Tariff F.C.C. No. 1, § 2.4.8, Original Page 2-78 to 1st Revised Page 2-155 (offering term discounts with no volume commitments); Sw. Bell Tel. Co., Tariff F.C.C. No. 73, § 7.2.22, 10th Revised Page 2-23 to 8th Revised Page 2-23.4 ("The DS1 Term Payment Plan (DS1 TPP) is a term plan"). Windstream also cites to the SNET OPP tariff. *See* S. New Eng. Tel. Co., Tariff F.C.C. No. 39, § 2.11.1.1, 19th Revised Page 2-23 to 8th Revised Page 2-23.4. This tariff offers customers the option to commit to maintaining a certain level of purchases for a period of time in return for receiving circuit portability (*i.e.*, the option to churn circuits without incurring termination penalties). This portability plans does not guarantee the availability of any particular term discount.

IV. PETITIONERS CANNOT ESTABLISH THAT THE RULE 1.773(a)(1)(iv) FACTORS ARE SATISFIED.

Some Petitioners argue that Rule 1.773(a)(1)(iv) is applicable to this case and assert that suspension is warranted here under the relevant factors. Cbeyond argues that the standard of review set forth in Rule 1.773(a)(1)(iv) is inapplicable here, but that even if it were applicable, suspension would be warranted under the relevant factors.[31] Regardless of whether Rule 1.773(a)(1)(iv) is applicable here, it is quite clear that the factors set forth in that rule are not satisfied here.

To begin with, there is no merit to claims that "there is a high probability the tariff would be found unlawful after investigation." *Id.* For the reasons stated above, Petitioners have not identified *any* legitimate basis on which AT&T's tariff filings could conceivably be found unlawful, let alone a "high probability" that it would be found unlawful. Rather, as demonstrated above, AT&T is merely ceasing to offer certain term discounts, and the remaining tariff is comprised of rates and terms that have been in place for years and that are deemed or presumed lawful.

Nor is there any merit to Petitioner's claims that the balance of harms favors suspension of AT&T's tariffs.[32] Petitioners cannot and do not demonstrate that material "irreparable injury will result if the tariff filing is not suspended." *Id.* At the outset, any estimate as to the potential financial impact of AT&T's tariff submissions is, by its nature, highly speculative. It depends on

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[31] Cbeyond at 10-11.

[32] In that regard, AT&T requests that the Commission strike Level 3's confidential information from the record. Despite repeated requests since Tuesday morning, Level 3 did not produce this information to AT&T until Thursday night. Given the extraordinarily compressed timetables for these pleadings, it is unacceptable for a party to seek suspension of a tariff on the basis of confidential information that it withholds from production until the very eve of the due date for the reply.

multiple factors including, for example, when the circuits expire, the type of service that will replace the TDM circuit (*e.g.,* Ethernet or another TDM circuit under a shorter term plan), and the customer's choice of provider for the replacement service (*e.g.,* AT&T or one of the myriad alternative providers of alternative special access services).

It is clear, however, that the tariff change will have only a modest impact. As detailed in the attached Confidential Declaration of Scot Nyman, the vast majority of the circuits purchased under term plans longer than 36 months will not expire for several years.[33] Moreover, it is far from clear that customers will actually replace substantial numbers of TDM-based circuits currently purchased from AT&T under longer-term plans with the same TDM-based circuits under three-year (or shorter) terms (or provision entirely new circuits with TDM special access arrangements). Indeed, the number of TDM-based DSn circuits purchased by Petitioners (combined) has continued to decline dramatically over the past year, as they migrate to Ethernet or services provided by AT&T's competitors.

In this regard, Petitioners greatly exaggerate the amount by which their costs might increase as a result of AT&T's revised tariffs. For example, the estimates provided by Level 3 and XO erroneously assume that *all* existing circuits purchased under terms greater than three years will *immediately* be migrated to an AT&T three-year plan, thus ignoring that the vast majority of these circuits will remain under the grandfathered long-term plans for two or more years.[34] And none of the estimates provided account for the fact that the Petitioners, like all customers, will have many options for how they will migrate the grandfathered circuits, including to AT&T's Ethernet services or a competitor's services rather than AT&T's three-year

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[33] *See* Declaration of Scot Nyman of Behalf of AT&T (attached as Exhibit A).

[34] *See, e.g.*, Cbeyond, Black Declaration, at 4; XO Petition at 4.

TDM-based plans (and even then, not necessarily at AT&T's currently tariffed three-year term rates rather than rates negotiated, for example, in a contract tariff).[35]

In all events, to the extent Petitioners actually believe that AT&T's revised tariff contains rates that are unjust and unreasonable, the proper remedy is to file a Section 208 complaint challenging AT&T's rates. There is no merit to Petitioner's claims that a Section 208 complaint would be inadequate because the deemed lawful status of AT&T's tariffs would deny their ability to recover amounts they paid during the pendency of the Complaint proceeding, because any such amounts would be *de minimis*. Any such complaint related to AT&T's rates likely would be resolved within five months, pursuant to Section 208(b)(1) of the Act, and would thus be completed long-before the vast majority of the grandfathered term plans for the long-term circuits currently purchased by Petitioners expire.

Finally, a suspension would be "contrary to the public interest" and "substantially harm other interested parties." 47 C.F.R. § 1.773(A)(1)(iv). As discussed above, suspension of AT&T's tariff filings would harm AT&T and other parties that would otherwise benefit from an efficient and timely transition from TDM-based services to IP-based services. Forcing AT&T to continue to offer TDM-based plans for terms longer than three years could only delay AT&T's ability to make that transition in an efficient and timely manner, because AT&T would be forced to maintain outdated legacy services for customers that will remain on those plans. It would also provide perverse incentives for customers to continue purchasing TDM-based services rather than migrating to next-generation IP-based services.

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[35] *See, e.g.*, Cbeyond, Black Declaration, ¶¶ 6, 7-9; Cbeyond, Rouleau Declaration, ¶ 8; XO at 4; Sprint at 11.

CONCLUSION

For the foregoing reasons, the Commission should reject the Petitions to suspend or reject AT&T's tariff filings.

Respectfully Submitted,

/s/ Robert C. Barber

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Dated: December 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2013, I caused true and correct copies of the foregoing Reply of AT&T Corp. to Petitions to Suspend and Investigate to be served on all parties as shown on the attached Service List.

Dated: December 6, 2013
Washington, D.C.

/s/ Rishi P. Chhatwal

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EXHIBIT A

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Ameritech Operating Companies Tariff F.C.C. No. 2	)	Transmittal No. 1803
BellSouth Telecommunications, LLC Tariff F.C.C. No. 1	)	Transmittal No. 71
Nevada Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 254
Pacific Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 498
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	)	Transmittal No. 3383
The Southern New England Telephone Company Tariff F.C.C. No. 39	)	Transmittal No. 1061

DECLARATION OF SCOT A. NYMAN
ON BEHALF OF AT&T

1. My name is Scot A. Nyman. I am Lead Product Marketing Manager – Enterprise Networking for AT&T. In this position I assist with special access projects, among other responsibilities. Until February 2013, I had Product Management responsibility for interstate special access DS1 and DS3 services.

2. The purpose of this declaration is to explain how Petitioners who are asking the Commission to suspend AT&T's tariffs transmittals overstate the impact of those tariff revisions.

3. When estimating the potential impact of the tariff revisions, some of the Petitioners erroneously assume that AT&T's revised tariffs require customers who purchase DS1

and DS3 circuits under plans with terms greater than 36 months immediately to migrate those circuits to higher-priced AT&T plans with terms of 36 months or less. In fact, AT&T's revised tariffs include a grandfathering component that permits customers who currently purchase DS1 and DS3 circuits under plans with terms greater than 36 months to keep those circuits on those plans until those plans expire. As shown in Table 1 below, the vast majority of circuits currently purchased under these grandfathered plans do not expire until 2016 or beyond.[1]

[1] Moreover, in some cases customers will be able to continue purchasing additional circuits at rates equivalent to (or even lower than) existing 5-year and 7-year plan rates. For example, some of the Petitioners rely extensively on AT&T Discount Commitment Plan ("DCP") and Area Commitment Plan ("ACP") arrangements that provide specified rates or discounts over the full term periods of those arrangements, and customers with such arrangements will continue to be able to purchase new circuits at rates and discounts equivalent to existing 5-year term rates for the remaining terms of their DCP and ACP plans. Likewise, customers of certain contract tariffs will continue, for the duration of their contracts, to be able to purchase circuits at the rates and terms provided in those contracts whether or not those rates are equivalent to (or lower than) the existing 5-year and 7-year term plan rates.

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

/s/ Scot A. Nyman Dated: December 6, 2013
Scot A. Nyman