

July 8, 2016

**BY HAND DELIVERY AND ETFS**

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

**Re: Petition of Windstream Services, LLC to Reject or Suspend and Investigate, and Request for Confidential Treatment Pursuant to 47 C.F.R. §§ 0.457 and 0.459; Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 1847; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 539; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 3428**

Dear Ms. Dortch:

Windstream Services, LLC (“Windstream”) hereby submits its Petition to Reject or Suspend and Investigate regarding Ameritech Operating Companies Tariff F.C.C. No. 2, Pacific Bell Telephone Company Tariff F.C.C. No. 1, and Southwestern Bell Telephone Company Tariff F.C.C. No. 73. Windstream is filing an original and three copies with the Secretary’s Office as well as one copy directly to the Commission’s copy contractor. Windstream will also be serving copies upon the Chief of the Wireline Competition Bureau and the Chief of the Pricing Policy Division. Windstream will serve the filing carriers via facsimile transmission and first-class mail. Windstream is also filing an electronic copy of the redacted version via ETFS.

Windstream requests pursuant to Sections 0.457 and 0.459 of the Commission’s rules, 47 C.F.R. §§ 0.457, 0.459, that the Commission withhold from any future public inspection and accord confidential treatment to the highly confidential, business sensitive information contained in the Petition, including Windstream’s costs for DS1 circuits (the “Confidential Information”). All of the Confidential Information has been redacted from the version of the Petition filed electronically.

The Confidential Information constitutes highly sensitive commercial information that falls within Exemption 4 of the Freedom of Information Act (“FOIA”). Exemption 4 of FOIA provides that the public disclosure requirement of the statute “does not apply to matters that are ... (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Because Windstream is providing commercial information “of a kind that would not customarily be released to the public” in accordance with the application requirements in Section 64.606 of the Commission’s rules, this information is “confidential” under Exemption 4 of FOIA. *See Critical Mass Energy Project v. NRC*, 975 F.2d

871, 879 (D.C. Cir. 1992). Because this is a voluntary filing, if the Commission denies this request for confidential treatment, Windstream requests for its Confidential Information to be returned.

In support of this request and pursuant to Section 0.459(b) of the Commission's rules, Windstream hereby states as follows:

**1. Identification of the Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))**

Windstream seeks confidential treatment with respect to the Confidential Information—all of which has been redacted from the version of the Petition filed electronically on the Electronic Tariff Filing System.

**2. Description of the Circumstances Giving Rise to the Submission (Section 0.459(b)(2))**

Windstream is submitting a Petition to reject, or in the alternative, suspend and investigate, Ameritech Operating Companies Transmittal No. 1847, Pacific Bell Telephone Company Transmittal No. 539, and Southwestern Bell Telephone Company Transmittal No. 3428.

**3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))**

The information described above is protected from disclosure because the Confidential Information constitutes highly sensitive information about Windstream's costs and the impact of proposed tariff changes on Windstream's future costs. This information constitutes highly sensitive commercial information "which would customarily be guarded from competitors." 47 C.F.R. § 0.457.

**4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))**

Communications solutions for business, governmental and not-for-profit is highly competitive, and the Confidential Information concerns costs of a key input—business data services used for last-mile transmission—to those communications solutions.

**5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))**

Disclosure of the Confidential Information would provide Windstream's competitors with sensitive insights related to Windstream's costs and potential future—which would work to Windstream's severe competitive disadvantage.

**6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section**

**REDACTED - FOR PUBLIC INSPECTION**

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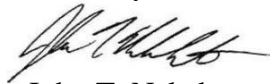
**0.459(b)(6))**

Windstream does not make the Confidential Information publicly available. This information would not be disclosed without a non-disclosure agreement or equivalent confidentiality obligation.

**7. Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))**

Windstream has not made the Confidential Information publicly available.

Sincerely,



John T. Nakahata

*Counsel to Windstream Services, LLC*

Attachments

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

In the Matter of	)	
	)	
Ameritech Operating Companies	)	Transmittal No. 1847
Tariff F.C.C. No. 2	)	
	)	
Pacific Bell Telephone Company	)	Transmittal No. 539
Tariff F.C.C. No. 1	)	
	)	
Southwestern Bell Telephone Company	)	Transmittal No. 3428
Tariff F.C.C. No. 73	)	

**PETITION OF WINDSTREAM SERVICES, LLC TO REJECT OR SUSPEND AND  
INVESTIGATE AMERITECH OPERATING COMPANIES TARIFF F.C.C. NO. 2,  
TRANSMITTAL NO. 1847; PACIFIC BELL TELEPHONE COMPANY TARIFF F.C.C.  
NO. 1, TRANSMITTAL NO. 539; SOUTHWESTERN BELL TELEPHONE COMPANY  
TARIFF F.C.C. NO. 73, TRANSMITTAL NO. 3428**

Pursuant to Section 204(a)(1) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 204(a)(1), and Section 1.773 of the Commission’s Rules, 47 C.F.R. § 1.773, Windstream Services, LLC (“Windstream”), respectfully requests that the Wireline Competition Bureau (“Bureau”) reject, or in the alternative, suspend and investigate the above-referenced transmittals filed by AT&T, Inc. (“AT&T”) on July 1, 2016. AT&T has proposed to revise its tariffs to (1) grandfather the Discount Commitment Program (“DCP”) in the legacy Ameritech incumbent LEC territory and the DS1 High Capacity Service Portability Commitment Plan of the Term Payment Plans in the Pacific Bell and Southwestern Bell incumbent LEC territories (together, the “TPP Portability Plans”), and (2) change the method of calculating shortfall and early termination penalties under the TPP Portability Plans. Windstream fully supports the petition filed by Birch Communications, Inc., Broadview, BT Americas Inc., EarthLink,

INCOMPAS, and Level 3 Communications, LLC, and files this petition to provide additional information to support rejection of these transmittals.

If allowed to take effect AT&T would, *de facto*, force a huge price increase on wholesale purchasers, and, in turn, on retail customers. By discontinuing renewals of the DCP and TPP Portability Plans, as well as new subscriptions, AT&T is using the threat of enormous early termination liabilities to conscript wholesale customers into purchasing only on higher priced two- or three-year terms consistent with a wholesale customer's retail contracts, rather than the five- to seven-year terms utilized with portability. If AT&T is allowed to discontinue portability, it will reap a substantial windfall, because this shift in demand would not be reflected in historical base period demand. As such, these transmittals should be rejected because they do not comply with the rules governing support for restructures, 47 C.F.R. §§ 61.49(b), (e), and thus cannot be *prima facie* lawful pursuant to 47 C.F.R. § 1.773(a)(1)(iv).

The transmittals must also be rejected because, by discontinuing portability, they *de facto* seek to terminate five- and seven-year term offerings, as they attempted to do in 2013, and because they constitute an attempt to evade both the letter and spirit of the Commission's interim wholesale migration protections adopted in the *Emerging Wireline Order*.<sup>1</sup>

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<sup>1</sup> *Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, 30 FCC Rcd. 9372 (2015) ("*Emerging Wireline Order*").

## ARGUMENT

### I. **AT&T *DE FACTO* PROPOSES A HUGE, UNSUPPORTED RATE INCREASE.**

The Commission and Bureau should not be misled. By discontinuing portability plans, AT&T will perpetrate an enormous rate increase outside of price cap protections. It must not be permitted to do so.

Retail customers frequently enter into service agreements with two- to three-year terms. A wholesale carrier today can purchase these circuits under a five- or seven-year term plan with portability, which means that the wholesale carrier does not incur early termination liability for that particular circuit as long as, in aggregate, it is replaced by other circuits, even at different locations. This has benefitted both the ILEC and the wholesale-purchasing CLEC by giving the ILEC a longer term revenue assurance, and by providing the CLEC with flexibility to de-link wholesale purchases from their retail terms.

Discontinuing portability, however, means that CLECs would now incur early termination liability to AT&T every time a retail customer discontinued service before the end of the term of the underlying wholesale circuit order. These early termination fees are substantial – 40 percent of the revenue that would have been due in the remaining term. Faced with such large early termination liabilities, a wholesale purchaser will have little choice other than to cease purchasing long-term commitments, and to purchase terms that more closely align to the two- to three-year average length of a retail customer agreement.

Moving from five- or seven-year terms to two- or three-year terms results in a significant price increase. For example, the Southwestern Bell Zone 1 Channel Termination TPP rate for a DS1 with a seven-year term is \$90.00 per month, but the corresponding two-year term Channel Termination Zone 1 TPP rate is \$145.00 per month, an increase of 61.11 percent. Because of the large numbers of DS1 circuits it purchases, if Windstream were to shift its current five- or seven-

year term circuits to two-year term circuits, its total cost for these circuits would increase by

**\*\*BEGIN CONFIDENTIAL\*\*** [REDACTED] **\*\*END**

**CONFIDENTIAL\*\***. While AT&T's changes would not be implemented in a flash-cut, there would be a substantial shift in demand from longer term, lower-priced circuits to shorter-term, higher-priced circuits, yielding a windfall to AT&T.

This shift in demand and attendant increase in revenue is nowhere reflected in AT&T's transmittals and supporting documents. AT&T has taken the position that this is not a restructure, but that is wrong. The FCC's rules define a "restructured service" as "an offering which represents the modification of a method of charging or provisioning a service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to customers."<sup>2</sup> Plainly, there is no net increase in options available to customers. And by withdrawing portability, AT&T is altering its method of charging for a service – to one that imposes early termination liability where none previously existed.

Had AT&T complied with the rules regarding restructures of existing rates, AT&T would have had to file "supporting materials sufficient to make the adjustments to each affected API and SBI,"<sup>3</sup> including estimating changes in demand quantities resulting from the restructure.<sup>4</sup> By not doing so, AT&T attempts effectively to increase its total charges outside of price cap constraints, and thus to reap a windfall. It must not be permitted to do so.

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<sup>2</sup> 47 C.F.R. § 61.3(mm).

<sup>3</sup> 47 C.F.R. § 61.49(e).

<sup>4</sup> 47 C.F.R. §§ 61.46(c) and 61.47(d).

For this reason alone, AT&T's transmittals are unlawful and should be rejected. If this tariff is allowed to take effect without at least suspension and investigation, customers will be irreparably harmed because AT&T's tariffs will be deemed lawful.<sup>5</sup>

**II. AT&T IS SEEKING *DE FACTO* TO END FIVE- AND SEVEN-YEAR TERMS, WHICH IT PREVIOUSLY FAILED TO ACCOMPLISH**

The Bureau should also reject, or suspend and investigate, these transmittals for the same reasons that it suspended for investigation AT&T's transmittals in WC Docket No. 13-299.<sup>6</sup> In those transmittals, AT&T had sought to discontinue all term plans longer than three years. Various wholesale customers, including Windstream, filed petitions to reject, or suspend and investigate, AT&T's proposed elimination of these longer term plans on the grounds that they would significantly increase charges, were anticompetitive and otherwise violated the Communications Act.<sup>7</sup> The Bureau found that there were substantial questions of lawfulness, and thus suspended AT&T's transmittals and set them for investigation.<sup>8</sup>

Here, AT&T seeks to utilize the withdrawal of portability plans as the means to the same ends. As discussed above, without portability, wholesale customers are exposed to significant early termination liability. This effectively will mean that wholesale customers will have to

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<sup>5</sup> 47 C.F.R § 204(a)(3).

<sup>6</sup> See *Suspension and Investigation of AT&T Special Access Tariffs et al.*, Order, DA 13-2349, WC Docket No. 13-299 (Wireline Comp. Bur. 2013) ("*AT&T Suspension Order*").

<sup>7</sup> Petition of Windstream Corporation to Suspend and Investigate Ameritech Operating Cos. Transmittal No. 1803 (Dec. 2, 2013); Petition of Windstream Corporation to Suspend and Investigate BellSouth Telecommunications, LLC Transmittal No. 1803 (Dec. 2, 2013); Petition of Windstream Corporation to Suspend and Investigate Pacific Bell Telephone Co. Transmittal No. 498 (Dec. 2, 2013); Petition of Windstream Corporation to Suspend and Investigate the Southern New England Telephone Company Transmittal No. 1061 (Dec. 2, 2013); Petition of Windstream Corporation to Suspend and Investigate Southwestern Bell Telephone Co. Transmittal No. 3383 (Dec. 2, 2013).

<sup>8</sup> See *AT&T Suspension Order* ¶ 8.



cease purchasing under these longer term commitments. The same anticompetitive harms that would have flowed from elimination of terms longer three years will also result here.

As Windstream observed in 2013, AT&T's decision effectively to eliminate its five-year and longer term commitment discounts on relatively short notice demonstrates the continued, substantial market power wielded by AT&T. AT&T remains the only facilities-based provider of DS1 and DS3 last-mile connections to most of the buildings in its operating territory. Small- to medium-sized businesses, and in particular those located in single-tenant buildings, still rely on AT&T's tariffed DS1 and DS3 services for their communications needs. The effective price increase that would result from the transmittals with their attendant withdrawal of portability would not only serve as a dramatic exercise of market power by AT&T capitalizing on this competitive vacuum, but would also, among other negative effects, lead to higher prices charged to many American small- to medium-sized business consumers.<sup>9</sup>

AT&T's transmittals would produce an undue windfall for AT&T. With little or no alternatives available for last-mile connections in most buildings, most business consumers currently addressed by CLECs and other purchasers of special access still will require access to an AT&T last-mile connection on an ongoing basis. This means that AT&T *still* will benefit from business consumers' ongoing use of its special access or other higher-priced connectivity, but AT&T now will be able to charge more for this continued connectivity. AT&T will realize this windfall in one of two ways: (1) by subjecting CLECs to higher wholesale rates (which at least will occur in the near term while CLECs maintain service to fulfill their contractual commitments to business consumers); (2) by increasing penalty charges; or (3) by charging

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<sup>9</sup> Petition of Windstream Corporation to Suspend and Investigate Southwestern Bell Telephone Co. Transmittal No. 3383, at 4-5 (Dec. 2, 2013).

business consumers retail rates that are no longer checked by meaningful marketplace competition (the likely result in the long run, given significantly higher wholesale costs will prevent CLECs from offering competitively- priced alternatives in the future). Marketplace conditions – which can be best assessed once the special access data collection is completed – suggest that AT&T’s windfall is likely to be significant. The presence of this windfall, to the ultimate detriment of business service consumers, is further evidence that the Transmittals would create an unreasonable rate structure.

Accordingly, the Bureau should reject, or alternatively suspend and investigate, these AT&T transmittals, as it did AT&T’s November 2013 transmittals. Again, AT&T’s wholesale customers will suffer irreparable harm unless the Bureau acts.

### **III. AT&T SEEKS TO EVADE THE *EMERGING WIRELINE ORDER*.**

AT&T’s proposed tariff changes also frustrate policies established in the *Emerging Wireline Order*. In that recent *Order*, the Commission adopted an interim requirement that “wholesale inputs continue to be offered on reasonably comparable rates, terms and conditions,” in response to its concern that “prices competitive [carriers] must pay for wholesale inputs could substantially increase, thereby substantially increasing the costs to their customers.”<sup>10</sup> The Commission, in particular, observed that “existing pricing arrangements” – especially five-year

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<sup>10</sup> *Emerging Wireline Order* ¶ 136. The Commission found that these concerns apply to competitive carriers’ existing customers as well as to prospective customers seeking to benefit from competition. *See also id.* (“To the extent the wholesale prices of replacement packet-based services are unreasonably high, competitive LECs may be unable to modify the terms of their long-term retail contracts to recover the increased cost of the wholesale inputs without losing customers or losing revenue and potentially exiting the market, to the detriment of its customers and the public they serve. Moreover, in offering new contracts to customers, competitive LECs could in these circumstances be forced to raise their prices, so a switch to packet-based services could weaken the constraint competitive LECs place on incumbent LEC market power. These results would delay the positive effects of the technology transitions on competition and the economy.”).

term and volume discount plans – are appropriately considered “as a default setting for rates for replacement services.”<sup>11</sup> AT&T, however, now is attempting to evade the Commission’s action to ensure reasonably comparable wholesale access in the near term. AT&T’s proposal effectively forces carriers to pay more for special access circuits (in the form of higher rates or more penalties) and thereby undermines the very “predictability, simplicity, and clarity” that the Commission sought to ensure in the IP Transition.<sup>12</sup>

#### IV. CONCLUSION

For these reasons, the Bureau should reject the instant transmittals. In the alternative, the Bureau should suspend and investigate the instant transmittals. AT&T’s wholesale customers will be irreparably harmed without Bureau action.

Respectfully submitted,



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<sup>11</sup> *Emerging Wireline Order* ¶ 165 n. 561 (observing that three- and five-year term and term-and-volume discount plans currently constitute “a significant share of special access purchases”).

<sup>12</sup> *Emerging Wireline Order* ¶ 165.

**CERTIFICATE OF SERVICE**

I, Alexandra Tate, do hereby certify that on this 8th day of July, 2016, I have caused the foregoing Petition Of Windstream Services, LLC to Reject or Suspend and Investigate Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 1847; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 539; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 3428 to be served on the following parties:

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/s/Alexandra Tate  
Alexandra Tate