

July 8, 2016

**VIA HAND DELIVERY & ETFS**

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

**Re: Petition of Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC to Reject or Suspend and Investigate AT&T Transmittal Nos. 539, 1847, and 3428**

Dear Ms. Dortch:

On behalf of Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC, please find enclosed an original and three copies of a Petition to Reject or Suspend and Investigate the above-referenced transmittals filed by AT&T, Inc. (“AT&T”) on July 1, 2016.

Pursuant to the procedures outlined in Section 1.773(a)(4) of the Commission’s Rules,<sup>1</sup> one copy of the filing is being delivered to each of the following parties: Matthew DelNero, Chief of the Wireline Competition Bureau; Pamela Arluk, Chief of the Pricing Policy Division of the Wireline Competition Bureau; and Best Copy & Printing, Inc., the Commission’s copy contractor. Furthermore, one copy of the filing is being served upon AT&T via facsimile and first class mail. Finally, an electronic copy of the filing is being submitted via ETFS.

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<sup>1</sup> 47 C.F.R. § 1.773(a)(4).

Marlene H. Dortch  
July 8, 2016  
Page 2

Please contact me with any questions regarding this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Jones", is written over the typed name and address.

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Enclosures

cc: Matthew DelNero  
Pamela Arluk  
Best Copy & Printing, Inc.

**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 BIRCH, EARTHLINK, INCOMPAS, LEVEL 3, SPRINT  
AND WINDSTREAM TO REJECT OR SUSPEND AND INVESTIGATE**

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July 8, 2016

TABLE OF CONTENTS

I. INTRODUCTION .....2

II. ARGUMENT.....3

    A. AT&T’s Tariff Transmittals Are Unlawful and Should Be Rejected.....3

    B. AT&T’s Proposed Tariff Revisions Raise Significant Questions of Lawfulness. ....6

III. CONCLUSION..... 14

**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 BIRCH, EARTHLINK, INCOMPAS, LEVEL 3, SPRINT,  
AND WINDSTREAM TO REJECT OR SUSPEND AND INVESTIGATE**

Pursuant to Section 1.773(a) of the Commission’s rules,<sup>1</sup> Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC hereby petition the Wireline Competition Bureau (“Bureau”) to reject, or in the alternative, suspend and investigate the above-referenced transmittals filed by AT&T, Inc. (“AT&T”) on July 1, 2016 in which AT&T proposes 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 (“PacBell”) and Southwestern Bell (“SWBT”) 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.

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<sup>1</sup> 47 C.F.R. § 1.773(a).

## I. INTRODUCTION

AT&T's proposed tariff revisions once again confirm that AT&T has substantial and persisting market power in the provision of business data services. Only a firm with market power would have the incentive or the ability to refuse to offer circuit portability, which is a critical input on which its wholesale customers depend, and to impose shortfall and early termination penalties that exceed expectation damages.

Moreover, in proposing these tariff revisions, AT&T has ignored the terms of the *Tariff Investigation Order*,<sup>2</sup> the Commission's price cap rules, and the requirements of the Communications Act. The Bureau should reject the transmittals because AT&T's revised methodology for determining shortfall and early termination penalties and its proposal for addressing the requirement that it eliminate all-or-nothing provisions from the tariffs violate the Commission's directives in the *Tariff Investigation Order*. Even if the Bureau does not reject the transmittals, it should suspend and investigate them because there are significant questions as to whether (1) AT&T has sought to evade application of the price cap rules by failing to comply with the tariff-filing requirements for transmittals proposing restructured services, and (2) AT&T's grandfathering of critically important circuit portability plans without offering an adequate substitute for those plans is an unreasonable practice and/or results in an unreasonable rate structure under Section 201(b) of the Communications Act.<sup>3</sup>

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<sup>2</sup> *Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Tariff Investigation Order and Further Notice of Proposed Rulemaking* 31 FCC Rcd. 4723 (2015) ("*Tariff Investigation Order*" or "*Business Data Services FNPRM*").

<sup>3</sup> 47 U.S.C. § 201(b).

## II. ARGUMENT

As explained below, the Bureau should reject AT&T's proposed tariff revisions, or, in the alternative, suspend and investigate the proposed tariff revisions.

### A. AT&T's Tariff Transmittals Are Unlawful and Should Be Rejected.

The Bureau should reject the instant tariff transmittals because they violate the Commission's directives in the *Tariff Investigation Order* that AT&T (1) may not impose shortfall and early termination penalties under the TPP Portability Plans that exceed the amount the customer would have paid had it met its volume commitment under its purchase plan, i.e., so-called expectation damages,<sup>4</sup> and (2) must revise the three tariffs at issue to remove the unjust and unreasonable all-or-nothing provisions therein.<sup>5</sup>

*First*, AT&T proposes to set both the TPP shortfall and early termination penalties equal to the Two-Year Zone 1 DS1 TPP rate, which is currently \$126.00 for PacBell and \$145.00 for SWBT. AT&T maintains that its proposed revisions to the shortfall and early termination penalties applicable to current customers under the TPP Portability Plans comply with the *Tariff Investigation Order* because they are based on rates that are lower than AT&T's average revenue per circuit and will "on average . . . result in charges and liabilities that are *below* what customers would have paid absent the shortfall or early termination."<sup>6</sup> But this methodology would require

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<sup>4</sup> *Tariff Investigation Order* ¶¶ 132, 140, 158.

<sup>5</sup> *Id.* ¶¶ 140, 158.

<sup>6</sup> Pacific Bell Telephone Company (PBTC) Description and Justification, Transmittal No. 539, at 5 (July 1, 2016) (emphasis in original); Southwestern Bell Telephone Company (SWBT) Description and Justification, at 5 (July 1, 2015) (emphasis in original).

that customers pay penalties that in many cases – and possibly all cases – would exceed expectation damages in violation of the *Tariff Investigation Order*.<sup>7</sup>

A simple example illustrates the manner in which a shortfall or early termination penalty based on the Two-Year Zone 1 DS1 TPP rate would produce penalties that violate this requirement. Consider a customer in the SWBT territory that purchases DS1 business data services at the current Seven-Year Zone 1 TPP rate. That customer currently pays \$90.00 per circuit.<sup>8</sup> Under AT&T's proposed shortfall calculation methodology, if the customer were to fall short of its volume commitment by 10 circuits, the customer would be required to pay AT&T \$1450.00 per month, which is \$550.00 per month more than the customer would have paid had it met its volume commitment. This is a clear violation of the *Tariff Investigation Order*.

This is an entirely realistic scenario. Most customers, perhaps even all customers, that subscribe to AT&T's portability plans, purchase circuits for terms longer than three years because those terms provide the discounts that wholesale customer need in order to compete for downstream retail customers.<sup>9</sup> Again, under AT&T's proposed calculation methodology *all* such

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<sup>7</sup> See *Tariff Investigation Order* ¶¶ 132, 155. While the shortfall and early termination fees proposed by AT&T violate the *Tariff Investigation Order*'s expectation damages standard, Birch, EarthLink, and Level 3 have argued that this standard does not go far enough to protect customers from incumbent LECs' unreasonable lock-up practices and likely overcompensates incumbent LECs. See Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 90-95 (filed June 28, 2016) (proposing a presumption that an incumbent LEC may not set shortfall and early termination fees higher than 50 percent of expectation damages).

<sup>8</sup> DS1 Term Payment Plan of the Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.3.10(F)(10.4)(1) ("SWBT DS1 TPP").

<sup>9</sup> See Petition of Cbeyond Communications, LLC, Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc. to Suspend and Investigate AT&T Transmittal Nos. 1803, 21, 254, 498, 1061, and 3383, at 7 (filed Dec. 2, 2013) ("[P]urchasing these services pursuant to term plans longer than three years is the most viable means of providing competitive services to business customer locations in AT&T's incumbent LEC territory. In fact, Level 3

customers that fall short of their volume commitments and/or disconnect circuits before the end of a term would be liable for shortfall and early termination penalties that exceed expectation damages.

Nor does AT&T's apparent preference for relying on a single rate for shortfall and early termination penalties preclude it from complying with the expectation damages standard. It could do so, for example, by setting shortfall and early termination penalties based on the lowest DS1 channel termination rate available to any customer, in any zone, for any term.<sup>10</sup> Its failure to do so is a clear violation of the *Tariff Investigation Order*.

*Second*, AT&T has refused to revise its tariffs by removing from the DCP and the TPP Portability Plans "language requiring customers to aggregate all their purchases under a single plan."<sup>11</sup> It has instead proposed to *grandfather* the DCP and the TPP Portability Plans. This is inconsistent with the plain language of the *Tariff Investigation Order*, and it is therefore unlawful on its face.<sup>12</sup>

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and tw telecom currently purchase the vast majority of their DS1 and DS3 special access services from AT&T under such plans").

<sup>10</sup> Under the current TPPs, that rate appears to be the Seven-Year Zone 1 rate, which is \$110.00 per circuit in the PacBell territory, and, as mentioned \$90.00 per circuit in the SWBT territory. DS1 Term Payment Plan of the Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.5.9(I)(1); SWBT DS1 TPP § 7.3.10(F)(10.4)(1).

<sup>11</sup> *Tariff Investigation Order* ¶ 110.

<sup>12</sup> There does not appear to be any reason inherent in AT&T's portability plans that would prevent AT&T from eliminating the all-or-nothing language in question. Frontier, for example, has complied with the *Tariff Investigation Order* by eliminating the all-or-nothing provision in the Portability Commitment of its Optional Payment Plan, which is substantially similar to the TPP Portability Plans. See Frontier Description and Justification, Transmittal No. 67, at 7-8 (July 1, 2016).

**B. AT&T's Proposed Tariff Revisions Raise Significant Questions of Lawfulness.**

Even if the Bureau does not find that the instant AT&T transmittals should be rejected, the revisions that AT&T proposes raise significant issues or questions concerning the lawfulness of the tariffs and therefore warrant suspension and investigation.<sup>13</sup>

*First*, the Bureau should find that there is a substantial question as to whether AT&T's elimination of the portability plans and modification of the shortfall and early termination penalty calculations in the instant transmittals constitute a restructuring under the Commission's rules and that AT&T's failure to comply with the requirements for restructured services violates the Commission's rules. Accordingly, the Bureau should suspend and investigate the instant transmittals.<sup>14</sup>

A restructured service is defined under Section 61.3 of the Commission's rules as "[a]n offering which represents the modification of [a price cap] 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>15</sup> The Commission has explained that "eliminating" prices for components of a tariffed offering, such as rate elements, qualifies as a restructured service.<sup>16</sup> Here, AT&T is proposing to modify its service offerings by eliminating circuit portability for new and renewing customers and by altering the manner in which it calculates shortfall and early termination

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<sup>13</sup> See *Bell Atlantic Telephone Companies Transmittal Nos. 741, 786, Revisions to Tariff F.C.C. No. 10, Rates, Terms, and Regulations*, Order, 10 FCC Rcd. 10831, ¶ 3 (1995). The Bureau suspends and investigates tariff filings "when it finds, after initial review, that a more complete record is needed to resolve whether all or certain parts of the tariff filings are lawful." *Id.*

<sup>14</sup> In fact, AT&T's refusal even to attempt to comply with the rules governing restructured services constitutes an independent basis for the Bureau to reject the transmittals.

<sup>15</sup> 47 C.F.R. § 61.3(mm).

<sup>16</sup> See *Policy & Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, ¶ 314 (1990).

penalties under the TPPs. These changes represent a “new method of charging” for price cap services. And, the introduction of this new method will not result in a net increase in the options available to customers because the tariff provisions at issue will merely offer DS1 business data services (1) pursuant to more restrictive terms (in the case of the proposed grandfathering) and (2) subject to a revised penalty calculation methodology (in the case of the proposed changes to the TPP shortfall and early termination provisions). There can therefore be no doubt that, in the aggregate, AT&T’s transmittals propose restructured services.

Under the Commission’s rules,<sup>17</sup> a carrier that proposes a restructuring must recalculate its average prices to account for the restructuring and demonstrate that its proposed rate structure would not yield actual price indices (“APIs”) that exceed the applicable price cap indices (“PCIs”) (i.e., that the restructuring would yield rates that are within-cap) and would not yield service band indices (“SBIs”) that exceed the applicable pricing bands (i.e., that the restructuring would yield rates that are within-band). This showing requires “the conversion of existing rates into rates of equivalent value under the proposed structure, and then the comparison of the existing rates that have been converted to reflect restructuring to the proposed restructured rates.”<sup>18</sup> This “may require the use of carrier data and estimation techniques to assign customers of the preexisting service to those services (including the new restructured service) that will remain or become available after the restructuring.”<sup>19</sup>

To comply with these requirements, AT&T must estimate the extent to which (1) customers that have purchased business data services pursuant to its portability plans would

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<sup>17</sup> See 47 C.F.R. §§ 61.46(c), 61.47(d), 61.49(e).

<sup>18</sup> *Id.* § 61.46(c); see also *id.* § 61.47(d).

<sup>19</sup> *Id.* § 61.46(c); see also *id.* § 61.47(d).

incur a larger number of circuit-specific early termination penalties once their portability plans expire, and (2) customers would be required to purchase business data services at higher monthly rates either because they must purchase business data services under shorter, and higher-priced, circuit-specific term plans than has been the case in the past and/or at extremely high month-to-month rates. AT&T must then demonstrate that its revised APIs would not exceed the PCIs for the business data services basket and that its revised SBIs for DS1 business data services would not exceed the applicable pricing bands. AT&T has the data it needs to perform these estimates and recalculate its API because it possesses information about the expiration of its customers' portability plans, and, in the case of the TPP Portability Plans, information about the expiration of the underlying circuit-specific term plans. In addition, AT&T possesses information about when it performs circuit portability.

AT&T has not made such a showing, nor has it provided any materials with its transmittals that would assist the Bureau in performing the analysis required by the rules. Rather, AT&T claims, erroneously, that the portability plans and any revenues associated with those plans are not part of AT&T's price caps services and, therefore, are not included in the Tariff Review Plan that accompanies the transmittal.<sup>20</sup> This is flatly inconsistent with the Commission's observations in the *Tariff Investigation Order* that "incumbent LECs do reflect shortfall fees in the price cap indices,"<sup>21</sup> and that "early termination fees are reflected in the price cap indices."<sup>22</sup>

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<sup>20</sup> Verizon, on the other hand, *did* file revisions to its shortfall and early termination penalties "as a price cap restructure under Section 61.3(mm) of the Commission's rules." Verizon Description and Justification, Transmittal No. 1335, at 1 (July 1, 2016).

<sup>21</sup> *Tariff Investigation Order* ¶ 137.

<sup>22</sup> *Id.* ¶ 156.

Finally, it is critical that the Bureau enforce this requirement here. AT&T already has “almost zero headroom under the price caps.”<sup>23</sup> By eliminating circuit portability, it will almost certainly force customers that have relied on portability plans to incur circuit-specific early termination penalties more frequently than has been the case in the past and/or to pay higher monthly rates. Either way, AT&T is likely to receive more revenue from business data services than has been the case in the past. The Bureau must ensure that this increase in revenue does not enable AT&T to evade the revenue limits established under the price cap rules.

*Second*, the Bureau should find that there is a significant question as to whether AT&T’s proposed grandfathering of critically important portability plans constitutes an unjust and unreasonable practice under Section 201(b)<sup>24</sup> because it would deny competitors access to a necessary wholesale input and would yield rate structures that would cause substantial harm to competition and consumer welfare.<sup>25</sup>

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<sup>23</sup> *Business Data Services FNPRM* ¶ 241.

<sup>24</sup> See 47 U.S.C. § 201(b) (“All charges, *practices*, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, *practice*, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]”) (emphasis added).

<sup>25</sup> The Bureau routinely suspends and investigates tariff filings that raise significant questions of lawfulness regarding the reasonableness of incumbent LECs’ business data services rate structures and terms and conditions. See, e.g., *Southwestern Bell Telephone Company Tariff F.C.C. No. 73*, Suspension Order, 12 FCC Rcd. 4201, ¶ 2 (1997) (“[W]e find that Transmittal 2622 [regarding SWBT’s High Capacity Term Pricing Plan] raises significant issues of lawfulness regarding the rate levels, rate structures, and terms and conditions of SWBT’s access service. We therefore suspend Transmittal No. 2622 for five months and initiate an investigation into the lawfulness of its provisions.”); *Ameritech Operating Companies Revisions to Tariff FCC No. 2 et al.*, Order, 8 FCC Rcd. 4589, ¶ 7 (1993) (“[W]e find the LECs’ expanded interconnection tariffs raise significant questions of lawfulness regarding cost allocations, resulting rate levels, rate structures, and terms and conditions of service that warrant suspension for one day, investigation, and imposition of an accounting order.”).

The Commission has held in numerous instances that the prohibition against unjust and unreasonable practices encompasses a wide range of carrier conduct.<sup>26</sup> In each of these instances, the prohibition against unjust and unreasonable practices served as a vital, flexible grant of authority for the Commission to combat carrier practices that directly or indirectly cause significant harm to end users. In addition, harm caused by carrier conduct can justify a finding that a practice is unjust and unreasonable even if the carrier charges prices that have been classified as lawful.<sup>27</sup> Thus, even if the Bureau could find that AT&T's proposed tariff revisions would otherwise comply with price cap regulations and other tariffing rules, it may still find that grandfathering the DCP and the TPP Portability Plans constitutes an unjust and unreasonable practice under Section 201(b).

AT&T has explained that it initially made circuit portability available “at the request of certain CLEC customers who sought more flexibility to move circuits around without incurring [early termination liability].”<sup>28</sup> In the time since AT&T first introduced the DCP and the TPP Portability Plans, those customers, which rely on incumbent LEC facilities to reach most of their

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<sup>26</sup> For example, the Commission has found that unjust and unreasonable practices include: access stimulation schemes, unauthorized charges placed on customers' telephone bills, and rural call routing practices that lead to call termination and quality problems. *See In re AT&T Corp., Complainant, v. All American Telephone Co., E-Pinnacle Communications, Inc., ChaseCom, Defendants*, Memorandum Opinion & Order, 28 FCC Rcd. 3477 (2013) (“AT&T Corp.”) (access stimulation schemes); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 4436 (2012) (cramming); *Developing an Unified Inter-carrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling, 27 FCC Rcd. 1351 (2012) (call termination and quality).

<sup>27</sup> For example, the Commission has found that access stimulation schemes are unlawful even where the schemes consist of generating traffic for lawfully-tariffed access services. *See, e.g., AT&T Corp.* ¶ 31 (“Defendants’ assertion that their billings to AT&T were lawful because they benchmarked their rates in compliance with . . . the Commission’s rules is irrelevant.”).

<sup>28</sup> AT&T Direct Case, WC Docket No 15-247, at 4 (filed Jan. 8, 2016) (emphasis omitted).

customers' locations, have built businesses that depend on circuit portability as a critical wholesale input to the competitive retail business data services they offer.<sup>29</sup> Indeed, as the Commission has acknowledged “[g]iven the importance of circuit portability to competitive LECs, . . . most, if not all of them elect that option when purchasing [business data services] from incumbent LECs.”<sup>30</sup>

Circuit portability is a critical wholesale input to competitive retail business data services because competitive LECs often must cancel a circuit purchase before the expiration of the applicable term, usually when the retail customer ceases purchasing the service to which the circuit is an input.<sup>31</sup> Therefore, AT&T’s proposal to grandfather the DCP and the TPP Portability Plans would eliminate a “crucial non-rate benefit for competitive LECs serving retail customers whose terms of service rarely coincide with the competitive LECs’ underlying pricing plan term commitments with incumbent LECs.”<sup>32</sup> As a result of the elimination of circuit

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<sup>29</sup> See Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3, WC Docket. No. 15-247, at 17-18 (filed Feb. 5, 2016) (“Joint CLEC Opp.”) (“[C]ompetitive carriers must rely on incumbent LEC dedicated services to reach most customer locations, and the early termination penalties are high enough and incurred frequently enough that the resulting costs make it difficult to compete with the incumbent LECs in the provision of downstream retail services. Competitive LECs therefore almost invariably see no alternative but to sign up for circuit portability and the volume commitments that come with it.”).

<sup>30</sup> *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd. 11417 ¶ 34 (2015) (“*Designation Order*”).

<sup>31</sup> See, e.g., Joint CLEC Opp. at 32 (“Integra could not sustain its business while purchasing dedicated services without the benefits of circuit portability.”); Declaration of Mark Jeary on Behalf of EarthLink Holdings Corp., ¶ 4, attached as Appendix B to Joint CLEC Opp. (“EarthLink cannot offer competitive rates to its end-user business customers unless it can purchase dedicated services from the incumbent LECs at discounted rates and pursuant to circuit portability options that allow EarthLink to move circuits without incurring exorbitant circuit termination penalties.”).

<sup>32</sup> *Designation Order* ¶ 34.

portability, AT&T's wholesale customers would frequently be exposed to the onerous early termination penalties imposed under AT&T's circuit-specific term plans.

By increasing the frequency with which AT&T's new and renewing wholesale customers would incur early termination penalties, grandfathering the DCP and the TPP Portability Plans would establish an unjust and unreasonable rate structure that substantially increases the cost of essential business data services inputs. This would in turn diminish the competitive positions of AT&T's wholesale customers that provide business data services in its incumbent LEC territory. Among other things, those customers would experience reduced margins when serving customers via DS1 business data services purchased from AT&T and would be even more vulnerable to an AT&T price squeeze than is already the case. In response to increased costs of critical inputs, wholesale customers likely would have no choice but to increase the retail prices that they charge their customers in AT&T's incumbent LEC footprint. Moreover, if faced with increased costs from mounting early termination penalties, some wholesale customers may determine that they have no meaningful choice but to buy DS1 business data services at AT&T's exorbitant month-to-month rates or to forego purchase of those critical inputs entirely.

Finally, the D.C. Circuit's decision in *BellSouth v. FCC*<sup>33</sup> does not preclude the Bureau from ruling that AT&T's withdrawal of the DCP and the TPP Portability Plans is unlawful. *First*, the D.C. Circuit's holding in *BellSouth* does not limit the Bureau's ability to conclude AT&T's conduct here is unjust and unreasonable under Section 201(b) because that case only concerned whether the plan in question unlawfully discriminated against certain customers. *Second*, *BellSouth* did not concern the elimination an essential input for competition, whereas AT&T's proposal to grandfather the portability plans does. *Third*, to the extent that the court

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<sup>33</sup> *BellSouth Telecomms. Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

concluded that BellSouth's volume discount was tantamount to the voluntary offer of a benefit to its customers, that conclusion does not hold here. AT&T has the incentive to set "discounted" prices under the tariffs at issue to produce the maximum revenue permissible under price caps, and the Commission has found that AT&T has done exactly that.<sup>34</sup> Therefore, the prices under the tariffs at issue, including any reduction in early termination penalty revenue that results from circuit portability, do not represent the voluntary offer of a "discount" to wholesale buyers at all, but, rather, the exercise of AT&T's pricing power to the maximum extent permitted by regulation.

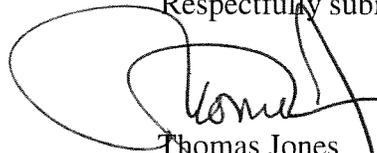
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<sup>34</sup> See *Business Data Services FNPRM* ¶ 241 & tbl. 6 (indicating that AT&T's API is more than 99 percent of its PCI).

**III. CONCLUSION**

For these reasons, the Bureau should reject the instant transmittals. In the alternative, the Bureau should suspend and investigate the instant transmittals, as doing so would give the Bureau time to develop a record sufficient to determine whether AT&T's proposed tariff revisions are lawful and to design appropriate remedies.

Respectfully submitted,



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July 8, 2016

## CERTIFICATE OF SERVICE

I, Stephanie Power, hereby certify that on this 8th day of July 2016, I caused to be served a true and correct copy of the foregoing Petition of Birch, EarthLink, INCOMPAS, Level 3, Sprint, and Windstream to Reject or Suspend and Investigate on the following parties in the following manner:

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