



September 5, 2017

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 Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 1861 & 1862; BellSouth Telecommunications, LLC Tariff F.C.C. No. 1, Transmittal No. 131; Nevada Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 302; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 554; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 3445

Dear Ms. Dortch:

In accordance with the standard protective order issued by the Commission¹ for use in review of tariff filings submitted pursuant to Section 204(a)(3) of the Communications Act of 1934, Windstream Services, LLC (“Windstream”) hereby submits a redacted version of its Petition to Reject or Suspend and Investigate regarding Ameritech Operating Companies Tariff F.C.C. No. 2, BellSouth Telecommunications, LLC Tariff F.C.C. No. 1, Nevada Bell Telephone Company Tariff F.C.C. No. 1, 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 has designated for confidential treatment the marked portions of the attached document pursuant to the standard protective order issued in the *Tariff Streamlining Order*.² The marked portions in the attached document designated as “Confidential Information” contains confidential, business sensitive information contained, 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.

¹ See *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 2170, 2210-2216 ¶¶ 87-95 (1997) (“*Tariff Streamlining Order*”).

² See *id.* Appx. B § 3.

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,” 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.

Pursuant to *Tariff Streamlining Order* and 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 Nos. 1861 & 1862, BellSouth Telecommunications, LLC Transmittal No. 131, Nevada Bell Telephone Company Transmittal No. 302, Pacific Bell Telephone Company Transmittal No. 554, and Southwestern Bell Telephone Company Transmittal No. 3445.

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 it 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.

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**Subject to Request for Confidential Treatment
Pursuant to *Tariff Streamlining Order***

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.

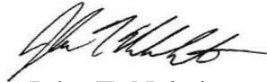
6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6))

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

cc:

Kris Monteith (by hand delivery and email)
Pamela Arluk (by hand delivery and email)
Scott Murray (by facsimile and email)
Best Copy and Printing, Inc. (by email)

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

In the Matter of)	
)	
Ameritech Operating Companies)	Transmittal Nos. 1861 & 1862
Tariff F.C.C. No. 2)	
)	
BellSouth Telecommunications, LLC)	Transmittal No. 131
Tariff F.C.C. No. 1)	
)	
Nevada Bell Telephone Company)	Transmittal No. 302
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Pacific Bell Telephone Company)	Transmittal No. 554
Tariff F.C.C. No. 1)	
)	
Southwestern Bell Telephone Company)	Transmittal No. 3445
Tariff F.C.C. No. 73)	

**PETITION OF WINDSTREAM SERVICES, LLC TO REJECT OR
SUSPEND AND INVESTIGATE**

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September 5, 2017

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

In the Matter of)	
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Ameritech Operating Companies)	Transmittal Nos. 1861 & 1862
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Southwestern Bell Telephone Company)	Transmittal No. 3445
Tariff F.C.C. No. 73)	

**PETITION OF WINDSTREAM SERVICES, LLC TO REJECT
OR SUSPEND AND INVESTIGATE**

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 August 29, 2017, to take effect on fifteen days’ notice on September 13, 2017.¹ AT&T has proposed to revise its tariffs to (1) “grandfather” certain term plans for various TDM-based services, and (2) eliminate the option for customers to

¹ AT&T filed Transmittal No. 1861 for Ameritech Operating Companies on August 29, 2017, but subsequently replaced that filing with Transmittal No. 1862 on the same day, due to the inability of the Electronic Tariff Filing System to process the payment for Transmittal No. 1861. See Letter from Kristen E. Shore, AT&T, Inc., to Marlene H. Dortch, Secretary, FCC, accompanying Transmittal No. 1862, at 1 (Aug. 30, 2017).

purchase DS1 and DS3 services at reduced rates for term plans longer than 3 years, for both new and existing circuits. By eliminating existing long-term discounts, the proposed revisions effectively raise rates for tariffed services in violation of the Commission’s Order in the *Business Data Services* proceeding,² and constitute an unjust and unreasonable practice under Section 201 of the Act.³

INTRODUCTION

Windstream urges the Bureau to prevent AT&T from using the proposed tariff revisions to sidestep transition provisions clearly set out in the Commission’s *BDS Order*, thereby jumpstarting price increases mere weeks after the *BDS Order* became effective. The *BDS Order* introduced a novel, sweeping deregulatory framework for business data services. Under these new rules, DS1 and DS3 special access services offered by incumbent local exchange carriers (“ILECs”) would no longer be subject to any *ex ante* rate regulation in the vast majority of the country, encompassing 1,879 counties that collectively include more than 90 percent of customer locations with business data services demand.⁴ Businesses large and small, government entities, and non-profit organizations around the country rely everyday on the services in the \$45 billion-plus market for business data services. AT&T’s proposed tariff changes will have a profound impact on the prices that customers pay, increasing the effective per-circuit rates for many DS1 and DS3 circuits and harming the availability of competitive choice in the markets for business data services and the integrated communications solutions that those services enable.

² See *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459 (Apr. 28, 2017) (“*BDS Order*”).

³ 47 U.S.C. § 201(b).

⁴ *BDS Order* ¶¶ 141-42; see also Public Notice, WC Docket Nos. 16-143, 05-25; RM-10593, DA 17-463 (rel. May 15, 2017) (“*BDS County List*”) (announcing list of counties deemed competitive, non-competitive, and grandfathered under the competitive market test).

In an effort to reduce the potential for near-term disruption as the deregulatory changes in the *BDS Order* moved forward, the Commission imposed near term price freezes on tariffed ILEC DS1 and DS3 special access services, and mandated that existing contract tariffs be honored through the ends of their respective terms without revision. The Commission also allowed a three-year period for carriers to complete detariffing (while permitting carriers to detariff at any time), and encouraged carriers to engage in good faith negotiations to revise contract tariff provisions that are impacted by detariffing. Although Windstream believes greater transition protections were warranted, these minimal measures are essential to preventing price shocks and ensuring that bargained-for exchanges in contract tariffs are honored.

Instead of following this transition mechanism, AT&T abruptly proposes to revise its tariffs to significantly increase the prices that Windstream and others pay for DS1 and DS3 circuits under *existing* contract tariffs by eliminating the longest-term, lowest-priced options. By so doing, AT&T would force all circuit renewals or new purchases under an existing contract tariff that previously were subject to longer-term rates to be purchased at the higher three-year contract rates. This move flagrantly disregards the provisions directing that existing contract tariffs not be revised, as well as the rate freezes set out in the *BDS Order* and codified in the Commission's rules. By raising immediately tariffed DS1 and DS3 channel termination prices in the near term, AT&T drives up the costs of competitive carriers that are offering an alternative choice of provider to customers in locations where AT&T currently owns the only last-mile connections capable of providing business data services.

Higher prices not only yield AT&T windfall profits from its carrier customers, but will also enable AT&T to further squeeze its enterprise business competitors and thereby to lock up retail customers in long-term contracts and erect even more barriers against potential facilities-

based entry. These impacts will harm Windstream irreparably, because once an enterprise is signed to a long-term contract, its business is not available for bid for the term of the contract. AT&T's proposed changes reflect a cynical attempt by AT&T to exploit its near-term ability to increase prices in light of the *BDS Order*'s prediction that facilities-based competitors will emerge only over the "medium term" of three to five years in the newly deregulated markets.⁵ This is a redux of AT&T's attempt in 2013 to raise prices by eliminating 5-year and 7-year rates through tariff revisions, even though Commission was in the midst of its special access rulemaking. The Bureau suspended those proposed revisions, and it should again reject AT&T's unlawful attempt to engage in an end-run around the *BDS Order*'s transitional protections for business data services purchasers. Accordingly, the Bureau should reject or in the alternative suspend and investigate AT&T's transmittals.

ARGUMENT

Section 204 of the Act, 47 U.S.C. § 204, grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness.⁶ As the Commission has recognized, suspension and investigation of tariffs is a particularly essential element of fulfilling the core mandate to ensure just and reasonable rates where, as here, tariffs that raise substantial questions of lawfulness are filed on a streamlined basis.⁷

⁵ See *BDS Order* ¶ 13.

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

⁷ See, e.g., *July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, WC Docket No. 04-372, FCC 04-277, 19 FCC Rcd 23877, ¶ 7 (rel. Nov. 30, 2004) ("When tariffs . . . are filed pursuant to the 'deemed lawful' provisions of the statute . . . it is

Section 1.773 of the Commission's rules also provides grounds for suspending the transmittals (although the Commission need not rely on its rules if it otherwise finds that suspension is appropriate under Section 204 of the Act).⁸ The rule provides that a tariff may be suspended if: (1) "there is a high probability the tariff would be found unlawful after investigation"; (2) "the suspension would not substantially harm other interested parties"; (3) "irreparable injury will result if the tariff filing is not suspended"; and (4) "the suspension would not otherwise be contrary to the public interest."⁹ These elements are satisfied here because, for the reasons set forth below, there is a high probability that the tariff will be found unlawful; there would be no substantial harm to any other interested party, including AT&T; irreparable injury will result if anticompetitive rates are "deemed lawful"; and by preventing harm to competition, suspension is consistent with, rather than contrary to, the public interest.

I. THERE IS A HIGH PROBABILITY THAT THE TRANSMITTALS WILL BE FOUND UNLAWFUL AFTER INVESTIGATION.

A. The Proposed Tariff Revisions in the Transmittals Violate the Commission's BDS Order and 47 C.F.R. § 1.776 by Unilaterally Revising the Terms of Grandfathered Contract Tariffs.

The transmittals, if allowed to become effective, would fundamentally change the economic terms of a suite of interlocking contract tariffs,¹⁰ forcing Windstream to pay

incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates").

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

⁹ 47 C.F.R. § 1.773(iv).

¹⁰ The contract tariffs are: Nevada Bell Telephone Company Tariff FCC No. 1, Contract Offer No. 37; Pacific Bell Telephone Company Tariff FCC No. 1, Contract Offer No. 173;

significantly higher rates and yielding a windfall for AT&T. The Commission’s clear directive in the *BDS Order*, codified in section 1.776 of the Commission’s rules, states that “contract-based tariffs in effect on or before the effective date of [the *BDS Order*] are grandfathered” and “*may not be . . . revised,*” except by mutual consent of the contracting parties.¹¹ The Commission included this provision so that the actions taken in the *BDS Order* do not “disturb existing contractual or other long-term arrangements,” including “contract tariffs, term and volume discount plans, and individual circuit plans.”¹² Grandfathering existing contract tariffs was necessary “in light of the need for an adequate transition” given the “new regulatory conditions” imposed by the *BDS Order*. The proposed tariff revisions violate both the letter and spirit of *BDS Order* by unilaterally changing price terms that are incorporated into contract tariffs by reference and raising costs for competitive provider and ultimately end-user customers, all within weeks after the *BDS Order* went into effect. The Bureau should reject the proposed tariff revisions as “demonstrably unlawful on its face” because they “conflict[] with a[n] . . . agency regulation or order.”¹³ At a minimum, the Bureau should suspend the proposed tariff revisions pending investigation.

Southwestern Bell Telephone Tariff FCC No. 73, Contract Offer No. 193; Ameritech Tariff FCC No. 2, Contract Offer No. 223; and BellSouth Tariff FCC No. 1, Contract Offer No. 88.

¹¹ 47 C.F.R. § 1.776. Although Section 1.776 has not yet taken effect pending OMB review, it is likely that it will be effective prior to the end of the investigation period. Moreover, it makes no sense to allow AT&T to undertake actions now that would violate Section 1.776 once it is approved, as that would frustrate the purpose of the transitional protections and be contrary to the public interest.

¹² *BDS Order* ¶ 170.

¹³ *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971); *see also Ameritech Operating Companies Tariff FCC No. 2*, Order, 31 FCC Rcd. 7673, 7675 ¶ 5 (Wireline Comp. Bureau July 15, 2016) (“*2016 AT&T Rejection Order*”) (rejecting proposed tariff revisions as conflicting with Commission rules).

Windstream had entered into, or “subscribed,” to a set of contract tariffs with each of the operating companies covered by AT&T’s transmittals prior to the effect date of the *BDS Order*. The structure of each contract tariff, and its incorporation of the underlying generally available tariff that AT&T now proposes to change, works substantively in the same manner. Using Southwestern Bell as an illustrative example, Windstream’s contract tariff with Southwestern Bell (the “Price Flex Contract Tariff”) is in effect until June 20, 2018, having been renewed in June 2017.¹⁴ Under the Price Flex Contract Tariff, Windstream commits to purchase a minimum volume and percentage of DS1 circuits that meet specified conditions, in exchange for credits provided by the ILEC that lower the net price of the circuits.¹⁵ In addition, Windstream is required by the Price Flex Contract Tariff to subscribe to the terms of a “Portability Commitment” set out in Southwestern Bell’s general access tariff, FCC No. 73. These tariff provisions, which are incorporated by reference into the Price Flex Contract Tariff, would be altered by the proposed revisions in Transmittal No. 3445 (or, for other AT&T operating companies, their respective tariff transmittals).

The Price Flex Contract Tariff provides that to be eligible for credits against the charges for the DS1 circuits, Windstream “must subscribe to the DS1 High Capacity Service Portability Commitment . . . described in Sections 7.2.22(E) of SWBT FCC Tariff No. 73.”¹⁶ Section

¹⁴ Each of the tariff contracts requires Windstream to subscribe to the analogous contract tariffs of the other operating companies. *See, e.g.*, Southwestern Bell Telephone Tariff FCC No. 73, § 41.193.4(G) (stating that “[t]he Customer must concurrently subscribe to the following Contract Offers”: NBTC Tariff F.C.C. No. 1, Contract Offer No. 37; PBTC Tariff F.C.C. No. 1, Contract Offer No. 173; SWBT Tariff F.C.C. No. 73, Contract Offer No. 193; Ameritech Tariff F.C.C. No. 2, Contract Offer No. 223; and BellSouth Tariff F.C.C. No. 1, Contract Offer No. 88).

¹⁵ *See, e.g., id.* § 41.19.5(C) (setting out DS1 and DS3 volume commitments); *id.* § 41.193.6(A) (providing a monthly credit of 4% of eligible spend).

¹⁶ *Id.* § 41.193.6(B).

7.2.22(E), in turn, provides that “[f]or a Portability Commitment under Section 7.2.22(E)(1), Customers may purchase DS1 service under DS1 [Term Payment Plan] terms of 2, 3, 5, or 7 years.”¹⁷ The availability of 5-year and 7-year terms for Windstream to purchase, and the corresponding lower rates for those terms, are thus incorporated into the Price Flex Contract Tariff. The proposed revisions for Southwestern Bell’s tariff would eliminate the option to purchase 5-year and 7-year terms, starting on September 13, 2017.¹⁸ In its description and justification for the revision, AT&T states that “[u]pon the effective date of the tariff filing, SWBT customers will no longer be able to purchase *new* term plans longer than 3 years for DS-1 and DS-3 services,” and “a customer may not establish new grandfathered term plans for either new or existing circuits.”¹⁹

Because the 5-year and 7-year (depending on the specific tariff) term circuits provide the lowest prices, they are by far the most common circuits purchased by Windstream under the Price Flex Contract Tariff, as well as the corresponding contract tariffs for the other AT&T operating companies. The proposed tariff revisions, if allowed to go into effect, would raise the price that Windstream pays to the price of a circuit purchased under a 3-year term, and this higher price would apply to all circuits ordered by Windstream for the remainder of the Price Flex Contract Tariff. Table 1 on the following page shows the sections of contract tariffs that would be revised by the transmittals, as well as the price increases that would result if these revisions go into effect.

¹⁷ *Id.* § 7.2.22(E)

¹⁸ *See* Southwestern Bell Revised Tariff FCC No. 73, at 10 n.1 (“Effective on September 13, 2017, DS1 TPP 5- and 7-year Payment Plans are no longer available, including for any otherwise available conversions.”).

¹⁹ Southwestern Bell Telephone Company Description and Justification, Transmittal No. 3445, at 2.

TABLE 1

AT&T Access Tariff / Transmittal No.	Contract Tariff No.	Contract Tariff Section Incorporating General Tariff	General Tariff Sections Subject to Proposed Tariff Revisions	Monthly Charge for DS1 Channel Termination Under Applicable General Tariff Plan		
				Current Lowest Rate	Proposed Lowest Rate	Change
Ameritech FCC No. 2 / Transmittal Nos. 1861 and 1862	223	22.223.6(B) (incorporating by reference § 7.4.13)	7.4.10(A), 7.4.13(A)-(B) , 7.5.3, 7.5.9, 21.5.2	\$126.00	\$144.00	+14.3% ²⁰
BellSouth FCC No. 1 / Transmittal No. 131	88	25.91.6(B) (incorporating by reference §§ 2.4.8 and 7.4.15)	2.4.8 , 7.5.1, 25.5.2.1	\$123.00	\$126.00	+2.4% ²¹
Pacific Bell FCC No. 73 / Transmittal No. 554	193	§ 33.173.6(B) (incorporating by reference § 7.4.18(E))	7.4.11(A), 7.4.11(C)-(E), 7.4.18(A), 7.4.18(C)-(E) , 7.5.9, 31.5.2	\$118.75	\$133.50	+12.4% ²²
Southwestern Bell FCC No. 1 / Transmittal No. 3445	173	§ 41.193.6(B) (incorporating by reference § 7.2.22(E))	7.2.19(B), 7.2.22(A), 7.2.22(E)	\$90.00	\$112.00	+24.4% ²³

²⁰ See Ameritech Operating Companies Tariff FCC No. 2 § 7.5.9(B)(1) (comparing Illinois Zone 5 DS1 channel termination 5-year rate against Illinois Zone 5 DS1 channel termination 3-year rate).

²¹ See BellSouth Telecommunications Tariff FCC No. 1 § 7.5.9(A)(1) (comparing Zone 2 DS1 channel termination 49-72 month rate against Zone 2 DS1 channel termination 24-48 month rate).

²² See Pacific Bell Telephone Company Tariff FCC No. 1 § 7.5.9(I) (comparing TMECS ZN3 DS1 channel termination 7-year rate against TMECS ZN3 DS1 channel termination 3-year rate).

²³ See Southwestern Bell Telephone Company Tariff FCC No. 73 § 7.3.10(F)(10.4)(1) (comparing TMECS Zone 1 DS1 channel termination 7-year rate against TMECS Zone 1 DS1 channel termination 3-year rate).

The proposed Southwestern Bell tariff revisions “revise[]” the terms of the Price Flex Contract Tariff, and thus violate the plain language and meaning of section 1.776 of the Commission’s rules.²⁴ The proposed revisions to the Southwestern Bell tariff, like those for the other AT&T operating companies, purport to “grandfather certain term plans for legacy TDM-based services.”²⁵ But this merely means that the transmittals will not invalidate the terms or rates for circuits already purchased on 5- or 7-year terms. However, AT&T has made clear that the 5- and 7-year terms and rates will no longer be available as of September 13, 2017, for renewals or new purchases under the Price Flex Contract Tariff, even though the Price Flex Contract Tariff is in effect until June 20, 2018. In other words, the proposed tariff revisions only grandfather the existing terms of individual *circuit*, and not of the *contract tariff* itself as required by the *BDS Order* and section 1.776.

The Bureau should reject any claim by AT&T that the terms of the contract tariffs already permit changes to the Portability Commitment and tariffed rates, and thus they are not “revised” by the transmittals. Although the contract tariff may permit changes to the underlying tariff terms governing the services, including price, the *BDS Order* and section 1.776 of the Commission’s rules prohibit these revisions. For example, in Southwestern Bell’s Price Flex Contract Tariff, section 41.193.9 provides that “[n]othing in this Contract Offer No. 193 shall prevent” AT&T “from terminating the provision of Subject Services or Non-Subject Services, in part, or in their entirety, prior to the end of the Term Period, *to the extent permitted by applicable law*.”²⁶ Here, the prohibition on revising the underlying tariff rates incorporated into the Price

²⁴ 47 C.F.R. § 1.776.

²⁵ Southwestern Bell Revised Tariff FCC No. 73, at 1.

²⁶ Southwestern Bell Telephone Tariff FCC No. 73, § 41.193.9 (emphasis added).

Flex Contract Tariff comes not from the contract tariff itself but rather from the Commission's order and rules. Put another way, the proposed revisions, even if otherwise would have been permissible under the Price Flex Contract Tariff are not "permitted by applicable law" in this case.²⁷

The transmittals not only violate the plain language of section 1.776, they also undermine the transition framework set out in the *BDS Order*. The Commission specifically contemplated the scenario in which an ILEC eliminates an underlying tariffed rate that is referenced in a contract tariff that still in effect. The *BDS Order* made clear in that even when this results from detariffing, which the *BDS Order* requires, the Commission expects the ILEC to "continue to ensure the terms of the contract are upheld and rates continue to be just and reasonable" through good faith negotiations with its customers, not unilateral action.²⁸ AT&T here proposes unilateral tariff revisions rather than detariffing, with the result that the terms of the Price Flex Contract Tariff would not be upheld.

Instead, the proposed revisions in the transmittal would circumvent an already minimal transition period, giving a windfall to AT&T and driving up costs for Windstream, which will ultimately harm Windstream's own customers. Indeed, the Commission expressly relied on fidelity to "long-term contract[s] that could ameliorate any uncertainty about rates once the price

²⁷ The analogous provisions in the contract tariffs for Nevada Bell, Pacific Bell, and Ameritech are identical to the provision in the Price Flex Contract Tariff, other than cross-referenced numbers. See Nevada Bell Tariff F.C.C. No. 1, § 22.37.9; Pacific Bell Tariff F.C.C. No. 1, § 33.173.9; Ameritech Tariff F.C.C. No. 2, § 22.223.9. The analogous provision in the BellSouth contract tariff states that "terms and conditions [for the special access services] may be modified through the filing of tariff changes at any time during the Contract Term. However, such tariff modifications will not change the Terms and Conditions described in this Contract Offer No. 88." BellSouth Tariff F.C.C. No. 1, § 22.91.5(I). The substance of the provision is the same: the contract tariff by its own terms does not prohibit BellSouth from changing the underlying tariff, but the *BDS Order* and 47 C.F.R. § 1.776 do.

²⁸ *BDS Order* ¶ 170 n.450.

freeze ends” as a justification for not ordering a longer rate-freeze transitional period as Windstream and others have advocated.²⁹ The Bureau should reject AT&T’s attempt to unilaterally revise the terms and rates set out in the Price Flex Contract Tariff and in the contract tariffs for the other operating companies.

B. The Proposed Revisions in the Transmittals Are Unlawful Because They Violate the Rate Freeze Provisions in the *BDS Order* and 47 C.F.R. § 69.807(c).

The proposed revisions in AT&T’s transmittals, if allowed to take effect, will raise the prices that Windstream pays under its existing contract tariffs. These price increases would violate the clear transition provisions of the *BDS Order* freezing certain ILEC rates, which the Commission implemented to reduce harmful disruption in the marketplace. Now, barely six weeks following the effective date of the *BDS Order*, AT&T seeks to increase DS1 end-user channel termination rates by up to 24 percent. The Bureau should reject the proposed tariff revisions because they conflict with the *BDS Order*, or at a minimum should suspend the proposed revisions pending investigation.

First, the price increases in the transmittals violate the Commission’s order that, “for six (6) months after the effective date of this Order,” price cap ILECs must “freeze the tariffed rates for end-user channel terminations in newly deregulated counties, as long as those services remain tariffed.”³⁰ The “newly deregulated counties” are the 1,555 counties that were deemed to be “competitive” under the Commission’s new “competitive market test,”³¹ but that are in areas that had previously been subject to price cap regulation. They represent the vast majority of the total number of counties deemed “competitive.” The *BDS Order* became effective on August 1, 2017.

²⁹ *BDS Order* ¶ 167 n.446.

³⁰ *BDS Order* ¶ 167.

³¹ *See BDS County List*.

Thus, in these newly deregulated counties, ILECs are barred from increasing rates for tariffed end-user channel terminations until February 1, 2018.

The unmistakable effect of the proposed revisions is to raise the prices that Windstream pays under the Price Flex Contract Tariff. AT&T's transmittals make clear that upon their effective date, September 13, 2017, the revised tariffs would eliminate the lower rates of 5-year and 7-year terms plans for both newly ordered and existing circuits. For example, AT&T explains that, under the proposed tariff revision for BellSouth, "[u]pon the effective date of the tariff filing, SWBT customers will no longer be able to purchase *new* term plans longer than 3years for DS-1 and DS-3 services," and that "a customer may not establish new grandfathered term plans for either new or existing circuits."³² This means that, unless the Bureau suspends or rejects the transmittals, then beginning September 13, 2017, the lowest price for a DS1 channel termination available from Southwestern Bell Telephone Company will increase from \$90 to \$112, or a 24.4 percent increase.³³ This sudden and dramatic increase in price, within weeks after the *BDS Order* became effective, is precisely the kind of marketplace disruption that the rate freeze was intended to prevent.

Second, the proposed rate increases also violate the freeze on tariffed rates in "grandfathered" counties imposed by the *BDS Order*. These counties are deemed non-competitive under the competitive market test and are located in areas for which the Commission had previously granted Phase II pricing flexibility to the ILEC.³⁴ Codified in section 68.807(c)

³² Southwestern Bell Telephone Company, Transmittal No. 331, Description and Justification at 2.

³³ See Southwestern Bell Telephone Company Tariff FCC No. 73 § 7.3.10(F)(10.4)(1) (comparing TMECS Zone 1 DS1 channel termination 7-year rate against TMECS Zone 1 DS1 channel termination 3-year rate).

³⁴ *BDS Order* ¶ 186.

of the Commission’s rules, this rate freeze price provides that price cap LECs in grandfathered counties “must retain its business data services rates at levels no higher than those in effect as of the adoption date of” the *BDS Order*, until those services are detariffed during the transition period.³⁵ By increasing the price of DS1 and DS3 services while maintaining their tariffs throughout its service area, AT&T’s proposed revisions violate this provision of the *BDS Order* insofar as the price increase applies to a “grandfathered” county.

C. The Price Increases Are Unreasonable Practices that Further Stifle Competition, Including in Counties Deemed Non-Competitive in the *BDS Order*, in Violation of Section 201(b) of the Act.

AT&T’s proposed price increases are yet another attempt to use its market power over low-bandwidth business data services to engage in unreasonable practices that will increase input costs for competitors, foreclosing competition and ultimately harming the end-user customers, including small businesses, nonprofits, and government entities. The Commission reiterated in the *BDS Order* that enforcement of Section 201(b) of the Act ensures that “customers are protected in the near term from the harm that would result from” unjust practices and rate increases.³⁶ Scrutiny of rate increases is especially important in the counties deemed to be non-competitive. The Bureau should suspend the transmittals and investigate the lawfulness of these proposed revisions’ price increases.

The effects of the proposed revisions are familiar to the Commission. The Bureau suspended proposed tariff revisions by AT&T in 2013 that sought to eliminate 5-year and 7-year

³⁵ 47 C.F.R. § 69.807(c); *see also BDS Order* ¶ 186 (“[C]urrent Phase II price cap LECs in these non-competitive counties will be required to continue offering its current generally available rates for end user DS1 and DS3 channel terminations and for the other special access services as long as those services remain under tariff.”).

³⁶ *BDS Order* ¶ 102.

term rates for special access services,³⁷ and rejected proposed tariff revisions by AT&T just last summer that sought to remove circuit portability, which would also have resulted in higher costs (in the form of early termination penalties) for competitive providers.³⁸ In the *2013 AT&T Suspension Order*, the Bureau noted that the petitions raised “substantial questions regarding the lawfulness” of the proposed revisions, including whether the revisions would “result in unreasonable rates, rate structures and terms and conditions under section 201(b) of the Act.”³⁹ Now, as then, low bandwidth DS1 and DS3 special access circuits remain critical to competitive providers’ ability to provide competitively relevant alternatives to AT&T to businesses, nonprofits, and government customers that demand communications solutions delivered using high-performance connections.⁴⁰

Reasonable input rates are especially important to check ILEC market power in the non-competitive counties as determined by the *BDS Order*’s competitive market test.⁴¹

Notwithstanding the broadly deregulatory changes in *BDS Order*, the Commission recognized that ex ante price regulations “replicate[] some of the beneficial incentives of competition” where

³⁷ See *Suspension and Investigation of AT&T Special Access Tariffs*, Order, 28 FCC Rcd. 16525, 16526 ¶ 3 (Pricing Policy Div. Wireline Competition Bureau Dec. 9, 2013) (“*2013 AT&T Suspension Order*”).

³⁸ See 2016 AT&T Rejection Order, 31 FCC Rcd. at 7675 ¶ 5.

³⁹ *2013 AT&T Suspension Order* ¶¶ 3, 5.

⁴⁰ See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans Special Access for Price Cap Local Exchange Carriers*, Tariff Investigation Order, 31 FCC Rcd. 4723, 4763 ¶ 91 (2016) (“*Tariff Investigation Order*”) (noting that the Commission’s data “show that the vast majority of off-net services provided by competitive LECs is provided through either incumbent LEC leased facilities or incumbent LEC UNEs”).

⁴¹ In these counties, fewer than half of all customer locations with demand for business data services are located even within half-a-mile of a located served by a facilities-based competitive provider, and fewer than 75 percent of census blocks are have a reported cable operator providing broadband connectivity. See 47 C.F.R. § 69.803(b).

facilities-based competition does not exist.⁴² By purchasing circuits at lower rates for 5- or 7-year terms, competitive providers can offer their own finished communications solution to end-user customers, generally on terms of between one and three years. The proposed revisions would, in effect, increase the lowest rate for special access circuits to the rate for a 3-year term, which will raise competitors' input costs and squeeze them out of the market. The result is that end-user customers in these markets will have fewer choices of provider and will face higher prices as a direct result of AT&T's exercise of its market power. Consistent with its order in 2013, the Bureau should suspend the proposed tariff revisions and investigate the lawfulness of price increases in non-competitive counties.

II. SUSPENSION WOULD NOT SUBSTANTIALLY HARM OTHER INTERESTED PARTIES.

Suspension and investigation of AT&T's proposed tariff revisions would not harm other interested parties. Rather it would prevent—or at least delay—significant harm to wholesale purchasers and their own downstream end-user customers. Nor would suspension harm AT&T, which can continue to charge its current rates without losing revenue or increasing its costs.

The Bureau also should be skeptical of any claim by AT&T suspending the revisions would undermine its ability to “facilitate the transition to an all-Internet Protocol” network.⁴³ Were its aim to reduce the number long-term circuits it is required to provide, AT&T could simply have maintained the same *rate* for the longest-term plan offered through the tariff, but reduced the length of the term to the same maximum of three years as proposed in the transmittals – or added a provision to permit AT&T to terminate after three years if it was

⁴² See *BDS Order* ¶ 180.

⁴³ See *Southwestern Bell Telephone Company Description and Justification*, Transmittal No. 3445, at 1.

engaging in a network transition. Alternatively, AT&T could have negotiated with its customers regarding ways to amend the contract tariffs in light of the *BDS Order*, as was the Commission's expectation and directive in section 1.776 of the Commission's rules. The fact that AT&T pursued neither of these options shows that the proposed revisions are simply an attempt to side step the transition provisions of the *BDS Order* and jump-start its price increases.

III. WINDSTREAM WILL SUFFER IRREPARABLE INJURY IF THE TRANSMITTALS ARE NOT SUSPENDED.

Windstream will suffer irreparable injury if the anticompetitive practices in the transmittals are allowed to go into effect. Unless the proposed tariff revisions are suspended, they will be "deemed lawful," in which case even a successful complaint against AT&T will only provide prospective relief. Because Windstream would be prevented from recouping its losses even if the tariff revisions were later found to be unlawful, it would face substantial pressure in the near term to raise the quoted rates in its own offerings that rely on DS1 and DS3 inputs to offset these substantial costs. Windstream estimates that, based on its currently monthly spend on DS1 special access circuits supplied by AT&T, the tariff revisions would result in an average rate increase of *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL***** *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL***** over a 12-month period.

AT&T does not face the same cost increases as Windstream because it owns the underlying facilities, and can set its own retail rates to drive competitors out of the market. AT&T will then have a unique opportunity to win business customers by undercutting the very same retail prices that it drove up through these special access price increases. These are precisely the kind of circumstances in which the Commission has recognized that "a price

squeeze is evident, such as when a *monopolist's wholesale rates exceed retail rates.*"⁴⁴ AT&T can then sign these business customers to multiyear contracts, further extending the lost revenue to Windstream. Windstream has estimated that due to increased input costs across its special access suppliers, "it expects to ***BEGIN CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END CONFIDENTIAL***⁴⁵

IV. SUSPENSION OF THE TRANSMITTALS WOULD NOT OTHERWISE BE CONTRARY TO THE PUBLIC INTEREST

Suspending the proposed tariff revisions would benefit the public interest by preserving the transition period as required by the *BDS Order*, reducing market disruption and preventing sudden price increases in the business data services market, and delaying the harms to competition that would otherwise result. First, as the Commission recognized in the *BDS Order*, a predictable transition is necessary to ensure that business data services customers, including multilocation customers and small businesses and others that often rely on low-bandwidth services that are predominantly provided over DS1 and DS3 lines,⁴⁶ "will have adequate time to adjust to the new regulatory conditions."⁴⁷ The *BDS Order* implemented the transition using

⁴⁴ *INFONXX, Inc. v. New York Telephone Co.*, 13 FCC Rcd. 3589, 3598 ¶18 (1997) (emphasis added) (citing *City of Mishawaka, Ind. v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980)); see also *Verizon Tel. Co. Tariff FCC Nos. 1 & 11, Transmittal No. 232*, 17 FCC Rcd. 23598, 23599 ¶3 (2002); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd. 15756, 15849 ¶161 (1997).

⁴⁵ Declaration of Joseph Harding ¶ 27, appended as Attachment B to Motion for Stay Pending Judicial Review, WC Docket No. 16-143, 05-25, GN Docket No. 13-5, RM-10593 (filed June 23, 2017) ("*BDS Stay Motion*").

⁴⁶ See Letter from Major L. Clark III, Acting Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017); Declaration of David J. Malfara Sr. ¶¶ 13-14, 16, appended as Attachment C to *BDS Stay Motion* ("INCOMPAS Decl.").

⁴⁷ *BDS Order* ¶ 167.

both rate freezes and the grandfathering of existing contract tariffs. Suspending the proposed tariff revisions would protect both prongs in the *BDS Order*, and prevent the near-term price increases that will be harmful to carrier customers such as Windstream and, ultimately, to the end-user customers of their services.

Second, suspending the price increases will, at least temporarily, preserve special access services as an important “stepping stone” for subscribers and competitive carriers alike in reducing the risk of deployment when the demand for a new service or the viability of a new market cannot be quantified.⁴⁸ Markets with lower ILEC special access pricing are more attractive to competitive entrants because these carriers may be able to reach subscribers at a lower cost and, thereby, quickly capture enough market share to support their own network build-out.⁴⁹ The higher the special access costs in the market, the proportionately lower the likelihood of competitive build-out, and the more likely subscribers will suffer the harms of a lack of competition.⁵⁰

Finally, suspending the proposed tariff revisions will not harm the public interest through delaying the transition to IP-based services. As discussed above, AT&T can reduce the term of its legacy services without increasing prices, or could otherwise negotiate a separate agreement with its carrier customers instead of unilaterally revising contract tariffs in violation of the *BDS Order*.

⁴⁸ See INCOMPAS Decl. ¶ 4.

⁴⁹ See *id.* ¶¶ 8-9.

⁵⁰ See *id.* ¶ 13.

CONCLUSION

For these reasons, the Bureau should reject the instant transmittals. In the alternative, the Bureau should suspend and investigate the instant transmittals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Abigail Hylton, do hereby certify that on this 5th day of September, 2017, 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 Nos. 1861 & 1862; BellSouth Telecommunications, LLC Tariff F.C.C. No. 1, Transmittal No. 131; Nevada Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 302; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 554; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 3445 to be served on the following parties:

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