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Via ETFS

September 12, 2017

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

Re: *Windstream Petition 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:

Less than one month since the Commission's *BDS Order* became effective, and contrary to the Commission's prediction in its order denying a stay of that Order ("Stay Denial"), AT&T demonstrates that it can indeed implement and coordinate changes across multiple tariffs by multiple LEC operating companies and that it was not "administratively burdensome and challenging to accomplish during the pendency of [the] appeal."¹ Not surprisingly, the change is one that increases the rates purchasers of BDS services must pay. INCOMPAS² urges the Commission to enforce the transition it adopted in the *BDS Order*, as well as Section 201(b) of the Act, and grant Windstream's petition to reject or suspend and investigate AT&T's transmittal filed by AT&T on August 29, 2017 that (1) grandfather certain term plans for various TDM-

¹ *Business Data Services in an Internet Protocol Environment*, Order Denying Stay Motion, DA 17-663, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5 and RM-10593, at ¶ 43 (Jul. 10, 2017) ("Stay Denial").

² INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes.

based services, and (2) eliminate the option for customers to purchase DS1 and DS3 services at reduced rates for term plans longer than 3 years, for both new and existing circuits.³

In its *BDS Order* the Commission assured—and reemphasized in the *Stay Denial*—that incumbent LECs would be precluded from 1) unilaterally changing the terms of existing contracts and 2) raising BDS tariffed rates for a period of six months after the effective date of the *BDS Order*. In particular, the Commission “grandfathered existing BDS ‘contract tariffs, term and volume discount plans, and individual circuit plans’ to ensure that long term contracts not be disrupted and that *both* parties realize the benefits of the agreement they entered.”⁴ That rule permits parties to negotiate an alternative, but does not allow the tariff filer simply to act unilaterally to change terms.⁵ As a separate requirement applicable to all tariffed rates, not just contract tariffs, the Commission also specifically states that “any tariff filing made during that permissive period will be subject to challenge . . . and for a period of six months after the effective date of the *BDS Order*, the Commission required ‘price cap incumbent LECs to freeze the tariffed rates for end-user channel terminations in newly deregulated counties, as long as those services remain tariffed.’”⁶

AT&T entered into contracts—existing at the time of the effective date of the *BDS Order* and that are still in effect—that provide the option to purchase BDS circuits for 5-year and 7-year terms at lower rates than the shorter terms offered for these circuits.⁷ By eliminating those options AT&T will be both unilaterally changing the terms of existing contracts that would otherwise have permitted new purchases at those lower long-term rates, thereby raising rates on BDS services in violation of the Commission’s *BDS Order*. As Windstream demonstrates, the increases can be as high as 24.4%.⁸ In addition to violating the letter and spirit of the Commission’s transition established the *BDS Order*, this is unjust and unreasonable practice and would result in unreasonable rates, terms and conditions under section 201(b) of the Act. Indeed, these are generally the same set of facts as where at issue when the Bureau, in 2013, concluded there existed “substantial questions of lawfulness of AT&T’s tariff revisions” that required they

³ Petition of Windstream Services, LLC to Reject or Suspend and Investigation, In the Matter of Ameritech Operating Companies Tariff F.C.C. No. 2, *et al*, at 1-2, filed Sept. 5, 2017 (“Windstream Petition”).

⁴ *Stay Denial* at ¶ 42, citing *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, ¶ 167 (Apr. 28, 2017) (“BDS Order”).

⁵ See 47 C.F.R. § 1.776 (to be effective upon OMB approval of information collections).

⁶ *Stay Denial* at ¶ 42.

⁷ See Windstream Petition at 9-10.

⁸ *Id.* at 11.

suspend the tariff revision for further investigation.⁹ This time the Bureau is additionally confronted with violations of the *BDS Order*.

Significantly, AT&T is not removing the services themselves from the tariff, just key pricing options for those services. Thus, the discussion in the *BDS Order* related to the incumbent's ability to remove "affected services" from the tariff (and not be subject to the freeze)¹⁰ and the discussion in the Price Flex Contract Tariff related to the terminating of "Subject Services"¹¹ are not applicable. Nor does the tariff language to which AT&T cites in its Opposition provide AT&T cover. AT&T leaves out key language and factors related to that provision. Section 41.193.6(I) reads in full:

Subject Services are subject to certain rates, charges and general terms and conditions in other sections of SWBT Tariff F.C.C. No. 73 (***Sections 2-General Regulations, 5-Ordering Access Service, and 13-Additional Engineering, Additional Labor & Miscellaneous Services***), and such terms and conditions 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. 193.***¹²

First, the tariff changes AT&T proposes are not in sections 2, 5 or 13—the sections specified in the tariff provision, the language of which AT&T conveniently left out of its quote; Second, the language notes that the services are subject to certain rates, charges and *general* terms and conditions in other sections of the tariff, but only specifically discusses terms and conditions being modified through tariff filings. The language does not provide for the modification of rates, i.e., pricing options. Third, the provision goes on to say "such tariff modifications will not change the Terms and Conditions described in this Contract Offer No. 193."¹³

⁹ *Suspension and Investigation of AT&T Special Access Tariffs*, Order, 28 FCC Rcd. 16525, WC Docket No. 13-299, DA 13-23349, ¶ 6 (Pricing Policy Div. Wireline Competition Bureau Dec. 9, 2013).

¹⁰ The *BDS Order* states that "[c]arriers, including non-incumbent LECs, may remove the relevant portions of their tariffs for the affected services at any time during the transition, and the rate freeze does not apply to services that are no longer tariffed." *BDS Order* at ¶ 169.

¹¹ Some or all of the Price Flex Contract Tariffs between AT&T and Windstream contain language similar to the following: "Nothing 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." Windstream Petition at 12.

¹² Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 41.193.5(I) (emphasis added).

¹³ *Id.*

Finally, AT&T's claim that the purpose of the transmittals are "to facilitate the transition to an all-Internet Protocol ("IP") network by discontinuing (on a grandfathered basis) the longest term lengths for certain legacy TDM services"¹⁴ is likewise not determinative, as its desire to transition technology does not permit it to violate the law to accomplish this objective and in any event it has other means available to reconcile its desire to effect a timely IP transition with the transitional rate-related safeguards in the BDS Order. For example, AT&T could simply provide greater discounts on shorter term contracts (or contracts for IP services) so that customers would desire such arrangements, *i.e.*, provide an inducement as opposed to penalty to encourage customers to switch to shorter-term contracts (or contracts for IP services), or provide 5 or 7 year options terminable by AT&T at the point at which it discontinues its TDM network (which may be the point of AT&T's existing language reserving the right to terminate services).¹⁵ Indeed, if the market for these services were truly competitive (as AT&T continuously claims) it would not withdraw longer-term contracts without simultaneously providing discounts to its shorter term contract, because in a competitive market forcing customers off long-term contracts would simply encourage them to seek alternatives more quickly.

In short, AT&T is seeking to unilaterally change key provisions of the tariff, raising the pricing of the services on impacted purchasers, while attempting to maintain the deemed lawful status of tariffs. As this violates the BDS Order and Sections 201(b) of the Act, the Bureau must reject, or suspend for investigation, these transmittals.

Respectfully submitted,

/s/ Karen Reidy

Karen Reidy

Vice President, Regulatory Affairs

cc: Jay Schwarz
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¹⁴ See, Ameritech Operating Company (Ameritech), Description and Justification, Transmittal No. 1862, filed Aug. 29, 2017.

¹⁵ See n. 11, *supra*.