



December 19, 2017

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

Re: *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services  
Tariff pricing Plans*, WC Docket No. 15-247

Dear Ms. Dortch:

In accordance with *Tariff Investigation Protective Order*,<sup>1</sup> *Data Collection Protective Order*,<sup>2</sup> and *Second Protective Order*<sup>3</sup> in WC Docket Nos. 15-247, 16-143, 05-25, and RM-10593 (collectively “*Protective Orders*”), Windstream Services, LLC (“Windstream”), INCOMPAS, and Sprint Corporation (“Sprint”) herein submits a redacted version of the attached filing in the above-referenced proceeding.

Windstream, INCOMPAS, and Sprint have designated for highly confidential treatment the marked portions of the attached document pursuant to the *Protective Orders*.

Pursuant to the *Protective Orders*, Windstream, INCOMPAS, and Sprint are filing a redacted version of the document electronically via ECFS, one copy of the highly confidential version with the Secretary, and delivering two copies of the highly confidential versions to Marvin Sacks, Pricing Policy Division, Wireline Competition Bureau.

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<sup>1</sup> *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order and Protective Orders, DA 15-1387 (Wireline Comp. Bur 2015).

<sup>2</sup> *Special Access for Price Cap Local Exchange Carriers*, Order and Data Collection Protective Order, DA 14-1424, 30 FCC Rcd. 11,657 (Wireline Comp. Bur. 2015).

<sup>3</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, DA 10-2419, 25 FCC Rcd. 17,725 (Wireline Comp. Bur. 2010).

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Please contact me if you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata", with a stylized flourish at the end.

John T. Nakahata  
*Counsel to Windstream Services, LLC  
and Sprint Corporation*

Attachment

cc: Marvin Sacks

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

In the Matter of	)	
	)	
Investigation of Certain Price Cap Local	)	WC Docket No. 15-247
Exchange Carrier Business Data Services	)	
Tariff Pricing Plans	)	

**REPLY COMMENTS OF WINDSTREAM SERVICES, LLC, INCOMPAS,  
AND SPRINT CORPORATION**

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December 19, 2017

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REPLY COMMENTS OF WINDSTREAM SERVICES, LLC, INCOMPAS,  
AND SPRINT CORPORATION

I. INTRODUCTION AND SUMMARY

Windstream Services, LLC (“Windstream”), on behalf of its affiliates and subsidiaries; INCOMPAS; and Sprint Corporation submit these reply comments in response to the *Public Notice* on the Tariff Investigation Order remand.<sup>1</sup> For the reasons explained in our opening comments,<sup>2</sup> the Commission should reaffirm and extend the remedies adopted in the *Order*, which would help promote competition in the market for business data services (“BDS”) and facilitate the transition to packet-based technologies. AT&T and Verizon filed comments asking the Commission to reverse the *Order*’s conclusion that the all-or-nothing provisions at issue were unjust and unreasonable under Section 201(b) of the Communications Act of 1934.<sup>3</sup>

The ILECs’ comments misconstrue the D.C. Circuit’s decision in *BellSouth v. FCC* and fail to provide new information to justify the tariff provisions that the Commission had found unlawful after considering a voluminous record. More importantly, AT&T’s misinterpretation of

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<sup>1</sup> See *Wireline Competition Bureau Seeks Comment in Connection with Court Remand of Tariff Investigation Order*, Public Notice, DA 17-1078 at 2 (rel. Nov. 3, 2017) (“*Public Notice*”); *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*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723 (2016) (“*Order*”).

<sup>2</sup> See Comments of Windstream Services, LLC, INCOMPAS, and Sprint Corporation, WC Docket No. 15-247 (filed Dec. 4, 2017) (“Windstream, INCOMPAS, Sprint Comments”).

<sup>3</sup> See Comments of AT&T Services, Inc. on Remand, WC Docket No. 15-247 (filed Dec. 4, 2017) (“AT&T Comments”); Comments of Verizon, WC Docket No. 15-247 (filed Dec. 4, 2017) (“Verizon Comments”). AT&T and Verizon do not dispute the *Order*’s conclusion that shortfall and early termination penalties cannot exceed the ILEC’s expectation value.

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*BellSouth* and mischaracterization of the record, if adopted by the Commission, would drastically narrow the scope of Section 201(b) and hobble the Commission’s ability to enforce the Communications Act’s “just and reasonableness” requirement in a BDS marketplace that is largely without ex ante regulations and, at least in the near term, largely without facilities-based competitors to the ILECs.<sup>4</sup> Left unchecked, ILECs would be able to cement their control of the BDS marketplace and undermine the Commission’s prediction in the *BDS Order* of competition emerging in the medium term. For the reasons explained in further detail below, none of the arguments raised by AT&T or Verizon merits reversing the *Order*.

*First*, *BellSouth* is not at all relevant to the Commission’s analysis in the *Order* because the issue in that case was whether *BellSouth* unlawfully discriminated in favor of its own affiliate by introducing a discount plan. Section 201(b) was not addressed at all in the court’s decision. *BellSouth*’s only resemblance to the *Order* is that it also involved an ILEC discount plan that had minimum commitment levels. AT&T takes these superficial similarities and expands them into the broad proposition that all ILEC discount plans necessarily satisfy Section 201(b) because they are “voluntary” and because the customer is receiving a benefit in a “quid-pro-quo” transaction. This reading not only lacks any basis in *BellSouth* itself, but conflicts with Commission precedent on the distinction between the “just and reasonable” requirement under Section 201(b) and the nondiscrimination standards found elsewhere in the Communications Act.

*Second*, AT&T’s description of the tariff provisions at issue as voluntary “quid-pro-quo” exchanges of circuit portability for a percentage commitment sidesteps the real problem: the

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<sup>4</sup> *Business Data Services in an Internet Protocol Environment; Technology Transitions; 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*, Report and Order, 32 FCC Rcd. 3459 (2017) (“*BDS Order*”).

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provisions in ILEC tariffs that force wholesale customers to purchase nearly *all* of their special access circuits from the ILEC in order to obtain the benefits, discounted rates, and portability for *any* of those circuits. As the Commission found in the *Order*, the ILECs failed to provide any justification for imposing this all-or-nothing requirement as a condition of volume discount plans with circuit portability. Indeed, AT&T's own BellSouth Area Commitment Plan did not have such a requirement, and thus was not affected by the *Order*. AT&T did not provide any new information in its comments to support the business need for all-or-nothing requirements as a condition for portability plans. In any event, whether the all-or-nothing provisions are “voluntary” does not affect whether they impose anticompetitive harms by locking in demand, and thus does not immunize them from the just and reasonableness standard under Section 201(b) or from Section 2 of the Sherman Act.

*Third*, AT&T's argument also ignores record evidence of ILEC market power and thus overstates the degree of choice wholesale purchasers actually had in subscribing to plans with all-or-nothing provisions. Even under the *BDS Order*'s definitions of relevant product and geographic markets, ILECs presently own the only connection to a significant majority of customer locations in their incumbent territories. That majority reaches 86 percent when considering only buildings with lower bandwidth demand at around a DS3 and below, comparable to the services at issue in the *Order*. As commenters explained in the record leading up to the *Order*, signing on to plans with onerous lock-in provisions was necessary for wholesale customers to compete in those areas where the ILEC controlled the only connection to the customer location.

*Fourth*, AT&T fails to rebut record evidence of the anticompetitive effects of all-or-nothing provisions, which was the basis for the remedies adopted in the *Order*. These provisions

constrained customers’ ability to consider potential alternative providers. AT&T’s argument that customers have “headroom” above their minimum volume requirements, and thus are not constrained in their purchases, was directly refuted in the record. Moreover, the claim that customers could reduce their commitment levels under certain plans omits critical contract tariff provisions that render this option illusory. Finally, AT&T’s observation that only one customer has enrolled in its revised commitment plans since the *Order* does not mean that customers are “content” with their existing plans, but rather illustrates the strength of the plans’ lock-in effects.

## **II. *BELLSOUTH* DOES NOT SUPPORT REVERSING THE *ORDER***

As explained in our opening comments, the D.C. Circuit’s decision in *BellSouth* applied a different statutory standard to a different set of facts than those at issue in the *Order*.<sup>5</sup> AT&T’s comments misconstrued the D.C. Circuit’s reasoning in *BellSouth*, distorted the “choice” that its customers made with respect to its all-or-nothing plans, mischaracterized the Commission’s action in the *Order*, and simply made up counterfactual “disincentives” that it claimed would result from the *Order*. The Commission did not fall for the repeated attempts to misuse *BellSouth* before, and it should not do so now.

First, the court’s holding in *BellSouth* is not relevant because, unlike the *Order*, *BellSouth* did not involve the application or analysis of Section 201(b) of the Communications Act, but rather the nondiscrimination requirement in Section 272. AT&T ignores this critical distinction, stating only in conclusory fashion, in a footnote, that the distinction is “immaterial” to the reasoning in *BellSouth*.<sup>6</sup> However, the court’s analysis in *BellSouth* focused on whether, by

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<sup>5</sup> *BellSouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006); Windstream, INCOMPAS, Sprint Comments at 6-11.

<sup>6</sup> See AT&T Comments at 18 n.18.



offering the discount plans at issue, BellSouth treated non-affiliated carriers *worse* as compared to BellSouth's affiliate.<sup>7</sup> Because the plan resulted in a greater discount for the non-affiliated carriers, the court concluded that the plan could not have discriminated against those carriers in favor of BellSouth's affiliate.<sup>8</sup> The *BellSouth* court was not presented with, and thus did not rule on, any issue under Section 201(b). AT&T's assertion that there is no material difference between these two legal standards is not based on any analysis of Section 201(b) as applied to the facts in *BellSouth*, much less as applied to the facts at issue in the *Order*. The Commission also has held consistently that a nondiscrimination standard is different from the just and reasonable standard under Section 201, and that the same conduct that does not violate the nondiscrimination provision of Section 272 "may well constitute an unreasonable practice in violation of Section 201(b)."<sup>9</sup>

AT&T and Verizon both misconstrue the court's reasoning in *BellSouth* to stand for the overbroad proposition that "so long as [a] bargain is optional for both sellers and buyers, the Commission cannot properly invalidate it."<sup>10</sup> The *BellSouth* court did not make any such categorical statement when it applied Section 272, and certainly could not have done so with respect to Section 201(b). AT&T's suggestion that "voluntary" discount plans are necessarily "just and reasonable" is a non-sequitur, and goes against decades-long Commission precedent

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<sup>7</sup> See *BellSouth*, 469 F.3d at 1057.

<sup>8</sup> See *id.*

<sup>9</sup> *Implementation of the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd. 14409, ¶ 89 (1999); see also *MCI Telecommunications Corp. Revisions to Tariff FCC No. 1*, 69 F.C.C.2d 848, 855-56 ¶ 20 (1978) (noting "different discrimination issues raised under Section 202(a)" from Section 201(b)'s "just and reasonable criteria").

<sup>10</sup> AT&T Comments at 19; see also Verizon Comments at 3.

holding that discount plans to which purchasers agree may nonetheless contain unlawful terms.<sup>11</sup>

The same precedent rejects Verizon’s assertion that whenever “undiscounted rates are just and reasonable . . . the terms of a voluntary discount plan cannot have anticompetitive effects.”<sup>12</sup>

Conversely, accepting the argument that any ILEC offering that is “optional” is beyond regulatory scrutiny would strip the Commission’s authority and eviscerate the protections of the Communications Act for all but the most basic service that ILECs must offer.

Second, AT&T distorted or ignored record evidence by characterizing the all-or-nothing provisions as merely the “quid-pro-quo conditions” for “optional price-concession” plans similar to the discount plans in *BellSouth*.<sup>13</sup> For reasons that were explained extensively in the record leading up to the *Order*, circuit portability and the rates that required significant percentage commitments were never actually “optional” for any provider that hoped to compete against the ILEC in the markets for lower bandwidth BDS, which were, and remain, highly concentrated.<sup>14</sup>

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<sup>11</sup> See *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 F.C.C.2d 261, 283-284 ¶¶ 40-41 (1976) (concluding that resale restriction provisions in voluntary volume discount plans are unjust and unreasonable). Similarly, Verizon is incorrect in asserting that the terms of its discount plans are necessarily just and reasonable merely because its undiscounted tariffed rates have been accepted.

<sup>12</sup> Verizon Comments at 2. Moreover, as was noted in the record, it is doubtful that ILEC DS1 and DS3 rates in price cap areas would necessarily have been just and reasonable, i.e., under the price cap, absent the significant volume of purchases by wholesale customers at the discounted rates. See Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3, WC Docket No. 15-247, at 15 (filed Feb. 5, 2016) (“Joint CLECs Opposition”) (“[I]f a large number of customers were to actually pay the undiscounted rates, the incumbent LECs’ revenues would likely exceed the limit allowed under price caps, and they would need to lower the undiscounted prices.”).

<sup>13</sup> See AT&T Comments at 17-18.

<sup>14</sup> See Opposition of Windstream Services, LLC, WC Docket No. 15-247, at 3-12 (filed Feb. 5, 2016) (“Windstream Opposition”); Joint CLECs Opposition at 14-18; Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Docket No. 05-25, RM-10593, at 22 (filed Feb. 11, 2013) (“Joint CLEC 2013 Comments”); Stanley M. Besen & Bridger M. Mitchell, Anticompetitive Provisions of ILEC Special Access Arrangements,

The opposition and supporting declarations to the ILECs’ direct case filed by Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3 (“Joint CLECs”) detailed how, for competitive providers that purchase ILEC special access services as inputs into their own downstream communications solutions, incurring “exorbitant circuit termination penalties under the incumbent LECs’ term discount plans” without circuit portability “is not a realistic option.”<sup>15</sup> Windstream’s opposition to the ILECs’ direct case likewise highlighted the necessity of access to ILEC last-mile connections at reasonable rates as inputs into its own downstream services.<sup>16</sup>

Moreover, just as it failed to do in its direct case, AT&T again fails to substantiate its assertion that it incurs substantial costs in providing circuit portability,<sup>17</sup> or explain why the analogous plan in BellSouth’s tariff did not contain similar all-or-nothing provisions. AT&T’s comments offered no new supporting information or reason for the Commission to revisit the conclusions it had reached after considering the extensive record compiled in the tariff investigation. Instead, AT&T offers an analogy, likening circuit portability to insurance against early termination liability.<sup>18</sup> But this analogy does not explain why portability should be

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¶ 16 (Feb. 11, 2013) (attached to Joint CLEC 2013 Comments) (“Besen & Mitchell”); Reply Declaration of Joseph Farrell On Behalf of CompTel, (July 29, 2005) (attached to Reply Comments of CompTel, Global Crossing North America, Inc. and NuVox Communications, WC Docket No. 05-25, RM-10593, ¶ 4 (filed July 29, 2005)).

<sup>15</sup> Joint CLECs Opposition at 17.

<sup>16</sup> See Windstream Opposition at 5-10, 16.

<sup>17</sup> See AT&T Comments at 8; *Order* ¶ 99 (“Neither Verizon nor AT&T, CenturyLink, and Frontier provided more detailed business justifications for their all-or-nothing requirements other than general business arguments that their terms and conditions are necessary to reduce cost or ensure predictability, certainty, or efficiency.”).

<sup>18</sup> See AT&T Comments at 7, 10.

available only on an all-or-nothing basis, given that purchasing all of one’s policies from the same insurer generally is not a prerequisite to purchasing *any* policy from that provider.

Third, AT&T mischaracterized the *Order*, stating that, just as the Commission had done in *BellSouth*, in invalidating the discount plans for not offering a linear discount rate, it invalidated all-or-nothing provisions “because it would have preferred . . . a different optional bargain with a different mix of benefits and burdens.”<sup>19</sup> The *Order* did not prescribe any given “mix of benefits and burdens” to be included in the revised tariff plans. Indeed, the Commission went out of its way *not* to disturb any existing agreements, including those containing all-or-nothing provisions.<sup>20</sup> In a similar vein, AT&T lambastes the *Order* for “categorically denouncing” all portability plans with all-or-nothing provisions, “no matter what their percentage commitments.”<sup>21</sup> But the *Order* invalidated only those specific tariffs under investigation, all of which required customers to purchase between 80 and 95 percent of the number of circuits in the commitment levels, which in turn were set through the all-or-nothing provisions.<sup>22</sup> There is nothing “conceptually incoherent” about the Commission evaluating actual tariff provisions and considering their anticompetitive effects and other harms, instead of hypothetical plans, as AT&T apparently suggests.<sup>23</sup>

Fourth, AT&T asserts that invalidating the all-or-nothing provisions would lead to the same “headscratching outcome” as in *BellSouth*, in which an incumbent would decline to offer

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<sup>19</sup> See AT&T Comments at 19.

<sup>20</sup> See *Order* ¶ 111 (declining “to apply corrective action to existing agreements under these plans”).

<sup>21</sup> See AT&T Comments at 27.

<sup>22</sup> See *Order* ¶ 102.

<sup>23</sup> See AT&T Comments at 26.

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any discount plan if it were prohibited from offering an unlawful one.<sup>24</sup> However, one of AT&T's own commitment plans, BellSouth's Area Commitment Plan, did not contain any unlawful all-or-nothing provisions even though it offered circuit portability, and consequently was not affected by the *Order*.<sup>25</sup> AT&T never explained why the absence of all-or-nothing provisions did not create a "disincentive" for BellSouth to offer circuit portability, but would do so for its other operating companies.<sup>26</sup> Moreover, CenturyLink, Frontier, and Verizon all submitted revised tariffs removing the specific all-or-nothing provisions declared unlawful in the *Order*, but maintained the availability of portability plans to customers.<sup>27</sup> Although AT&T initially attempted to restructure its rates to eliminate the circuit portability plan, it ultimately chose to refile the portability plan without the all-or-nothing provisions rather than submit the supporting information to justify its rate restructuring.<sup>28</sup> The responses of the ILECs following the *Order* have thus shown that enforcing Section 201(b) does not "leav[e] customers with a narrower choice between undiscounted rates and basic term-discount plans with no portability option."<sup>29</sup>

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<sup>24</sup> See AT&T Comments at 20.

<sup>25</sup> See *Order* ¶ 110.

<sup>26</sup> See Joint CLECs Opposition at 75.

<sup>27</sup> See CenturyLink Operating Companies, Tariff FCC No.11, Transmittal No. 85 (July 1, 2016); Frontier Telephone Companies, Tariff FCC Nos. 13 and 14, Transmittal No. 68 (July 15, 2016); Verizon Telephone Companies, Tariff FCC Nos. 1, 11, 14 and 16, Transmittal No. 1335 (July 1, 2016).

<sup>28</sup> See, e.g., Ameritech Operating Companies, Tariff FCC No. 2, Transmittal No. 1848 (July 21, 2016).

<sup>29</sup> AT&T Comments at 20.

**III. THE COMMISSION’S CONCLUSIONS IN THE *BDS ORDER* SUPPORT EXTENDING RATHER THAN UNDERMINING THE REMEDIES ADOPTED IN THE *ORDER***

The *Order* implemented important, though incomplete, remedies to address the anticompetitive effects of ILEC volume commitment plans.<sup>30</sup> The *Order*’s remedies and findings were supported by evidence compiled by the Commission in its years’ long examination of ILEC commitment plans. In the wake of the *BDS Order*, including its (unduly narrow) recognition of non-competitive markets for DS1 and DS3 services and its (erroneous) prediction of emerging facilities-based competition in the “competitive” markets, it is more critical than ever that the Commission reaffirm the *Order*. Otherwise, the reinstitution of all-or-nothing provisions would sabotage the Commission’s own prediction of competition by further locking up even potentially addressable demand into multiyear contracts.

**A. The Commission’s Finding of Anticompetitive Effects of Lock-In Provisions Is Supported by the Record**

As Windstream, INCOMPAS, and Sprint explained in their opening comments, the *Order*’s conclusion that all-or-nothing provisions had an anticompetitive effect was well supported by the record.<sup>31</sup> The all-or-nothing provisions “preclude customers from electing to lower the amount of DS1 and DS3 services purchased at the inception of a high percentage commitment plan or option.”<sup>32</sup> Faced with punishing shortfall penalties, customers could not switch to an alternative provider even if that provider offered a lower-cost service.<sup>33</sup> The

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<sup>30</sup> See Windstream, INCOMPAS, Sprint Comments at 19-24.

<sup>31</sup> See *id.* at 11-13.

<sup>32</sup> *Order* ¶ 103.

<sup>33</sup> *Id.* ¶ 105 & n. 273; Comments of XO Communications, LLC, WC Docket No.15-247, at 21-26 (filed Feb. 5, 2016) (“XO Comments”); Declaration of Gary Black, Jr. on Behalf of Level 3 Communications, LLC (“Black Decl.”) ¶ 16 (Feb. 5, 2016), attached as Appendix A to

Commission considered evidence of market concentration as well as the declarations of wholesale customers in reaching its conclusion in the *Order*. In addition to direct evidence in the record, the Commission in its order designating the issues for investigation also drew on economic literature explaining how “long-term access arrangements also raise potential anticompetitive concerns since they tend to ‘lock up’ the access market.”<sup>34</sup> AT&T’s arguments in its direct case were considered and rejected as meritless by the Commission, and the Commission should again reject its restatement of those same arguments.

**Market Share.** First, AT&T argues that it does not control a large enough share of the market for DS1 channel terminations to be able to foreclose the market from potential competitors.<sup>35</sup> AT&T asserts that “the portion of BDS revenues subject to this investigation represented at most about 10 percent of the total available BDS revenues in the marketplace.”<sup>36</sup> Even assuming that the revenue share is accurate, AT&T’s argument fails because it conflates its share of the market for DS1 channel terminations with the market for *all* BDS, and it ignores specific geographic markets by looking only at the entirety of “AT&T” in-region territory.”<sup>37</sup> Looking at the entire BDS market in all of AT&T’s incumbent territory does not tell the Commission anything about the extent of AT&T’s dominance in the market for DS1 services in

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Joint CLECs Opposition; Joint CLECs Opposition at 35 (explaining that Level 3 has declined to purchase from alternative providers “[b]ecause the penalties that Level 3 would incur by switching providers would far exceed these potential savings”).

<sup>34</sup> *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd. 11417, ¶ 19 (2015) (“*Designation Order*”); *see also id.* nn. 52-54.

<sup>35</sup> *See* AT&T Comments at 23-24.

<sup>36</sup> *Id.* at 23.

<sup>37</sup> *Id.*

individual geographic markets. The Commission in the *BDS Order* recognized that BDS above the speed of DS3 is competitively distinct from lower bandwidth services.<sup>38</sup> The *BDS Order* also concluded that the geographic market for BDS is within one half-mile of the customer's location,<sup>39</sup> and although we disagree with this definition, that is still far more precise than the geography used in AT&T's argument.

Focusing on the relevant markets shows that ILECs have far larger market shares in their incumbent territories. ILECs own the *only* facilities-based connection to 86 percent of buildings with lower aggregate bandwidth (50Mbps and below) demand.<sup>40</sup> Even including locations with higher demand, AT&T and Verizon still own the only connection to \*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\* [REDACTED] \*\*\*END HIGHLY CONFIDENTIAL\*\*\* of the buildings with BDS demand in their respective incumbent territories. Given this highly concentrated market in which the ILECs dominate, the approximately 30 percent of TDM revenue represented by services sold through the ILEC plans at issue is a sufficiently large portion of the market for the ILEC to foreclose potential competitors.<sup>41</sup>

**Transition to Ethernet.** Second, AT&T argues that the “rapid and ongoing shift . . . away the DS1 services at issue to alternatives such as Ethernet . . . refutes” the risk of foreclosure.<sup>42</sup> This exaggerates the rate at which Ethernet is replacing DS1 services, and in any event does not disprove the anticompetitive harm that the Commission found in the *Order*.

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<sup>38</sup> *BDS Order* ¶ 16.

<sup>39</sup> *Id.* ¶ 39.

<sup>40</sup> See Windstream, INCOMPAS, Sprint Comments at 16.

<sup>41</sup> See *id.* at 31-32 (citing *United States v. Microsoft*, 253 F.3d 34, 70 (D.C. Cir. 2001)).

<sup>42</sup> AT&T Comments at 24.



Although BDS customers are increasingly demanding packet-based services, the record shows that TDM-based services constitute a majority of the BDS market.<sup>43</sup> Moreover, record evidence indicates that additional demand would have shifted to competitive providers, which are likely to be offering Ethernet, but for the lock-in effects of the ILECs' all-or-nothing plans.<sup>44</sup>

Windstream's own experience has been consistent with those of the Joint CLECs, and even after the remedies implemented in the *Order*, Windstream still has to forgo considering alternative BDS wholesale providers because of the commitment levels in ILEC plans and the threat of shortfall penalties.<sup>45</sup>

**Harm to Customers.** AT&T further asserts that because customers that have subscribed to portability plans including all-or-nothing provisions "have a large amount of 'headroom' available," it follows that the same customers are not constrained by those provisions from purchasing from competitive providers.<sup>46</sup> This argument, which is repeated from AT&T's direct case, has been thoroughly refuted in the record by the Joint CLECs, which detailed the ways in which "AT&T misrepresents the extent to which wholesale buyers have headroom."<sup>47</sup>

Specifically, the Joint CLECs informed the Commission that "\*\*\*\*BEGIN HIGHLY

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<sup>43</sup> *Order* ¶ 7.

<sup>44</sup> See Joint CLECs Opposition 60-61.

<sup>45</sup> See Windstream, INCOMPAS, Sprint Comments at 19.

<sup>46</sup> AT&T Comments at 24.

<sup>47</sup> Joint CLECs Opposition at 57-61

<sup>48</sup> *Id.* at 58.

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REDACTED \*\*\*\*\*END HIGHLY CONFIDENTIAL\*\*\*\*\*<sup>49</sup> Moreover, as the Joint CLECs explained, entering into these agreements in the first place was necessary because competitors “have generally found it to be impossible to compete without subscribing to a lock-up plan,”<sup>50</sup> and \*\*\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*\*\* REDACTED

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Even wholesale customers that have headroom above the volume commitment levels are constrained from considering alternative suppliers because \*\*\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*\*\* REDACTED

REDACTED \*\*\*\*\*END HIGHLY CONFIDENTIAL\*\*\*\*\*<sup>52</sup> Again, Windstream’s own experience is consistent with those others have described in record. Currently, Windstream \*\*\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\*\*\* REDACTED

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AT&T’s assertion that customers may “immediately move circuits . . . and receive corresponding reductions” in their commitment levels,<sup>53</sup> and thereby reduce the lock-in effect of

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<sup>49</sup> *Id.* at 59.

<sup>50</sup> *Id.* at 55.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 60-61. Alternatively, if customers all have significant headroom that would enable them to switch to purchase from competitive providers *and* avoid shortfall penalties, then the *Order*’s remedies should not have had any impact on the ILECs’ business objectives or create any disincentive to offer portability plans without all-or-nothing provisions.

<sup>53</sup> AT&T Comments at 26 n.23.

all-or-nothing provisions, is similarly misleading. To support this claim, AT&T cites a reference in the *Order* to the Ameritech portability plan. But, as the Joint CLECs explained, those tariff provisions alone do not paint the entire picture. Customers, including Windstream, are also frequently subscribed to overlay agreements that provide credits against shortfall and other penalties charged by AT&T. These overlay agreements, in turn, require customers to subscribe to portability plans and also independently set the minimum commitment levels that customers must meet in order to receive the credits against unreasonably high penalties.<sup>54</sup> Ameritech contract tariff offer 223 requires Windstream to “subscribe to the 5 year [DCP],”<sup>55</sup> and to “purchase all interstate DS1 special access services from [Ameritech] subject to a [DCP].”<sup>56</sup> Failure to purchase all of its DS1 special access circuit from a DCP would make Windstream liable for the shortfall and termination penalties assessed under those plans.<sup>57</sup> “\*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\* [REDACTED] [REDACTED]”\*\*\*END HIGHLY CONFIDENTIAL\*\*\*<sup>58</sup> the overlay agreement contained exactly the lock-in provisions that AT&T claims did not exist in its underlying DCP tariffs.

Not surprisingly, because existing overlay agreements were unaffected by the *Order*, most wholesale customers have not been able to switch from their existing DCPs to the ones filed by AT&T after the *Order*. Doing so would have been a breach of the overlay agreement,

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<sup>54</sup> See Ameritech Operating Companies Tariff FCC No. 2 § 22.223.5(C) (setting minimum purchase levels equal to 90 percent of the number of in-service DS1 channel terminations as of the measuring date).

<sup>55</sup> *Id.* § 22.223.6(B).

<sup>56</sup> Ameritech Operating Companies Tariff FCC No. 2 § 22.223.5(H).

<sup>57</sup> See *id.* §§ 22.223.5(C); 22.223.6(B).

<sup>58</sup> \*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\* [REDACTED] \*\*\*END HIGHLY CONFIDENTIAL\*\*\*.

which would have eliminated the credits and again exposed customers to massive shortfall penalties. AT&T's observation that only one customer "has enrolled in in a new portability plan" does not mean that customers "are perfectly content to keep" their prior plans.<sup>59</sup> It means, rather, that the Commission needs to extend the remedies in the *Order* to mitigate the anticompetitive effects of ILEC special access plans.<sup>60</sup>

**B. Because the *BDS Order*'s Prediction of Competition Hinges on Addressable Demand, the Commission Should Reaffirm that Anticompetitive All-or-Nothing Provisions Are Unlawful**

In the wake of the *BDS Order*, it is even more important that the Commission stays vigilant to ensure ILECs do not exploit their near-term market power to lock up addressable demand and stifle any hope of emerging facilities-based competition in the medium term. The Commission concluded that some counties lack the prospect of medium term competition even in the *BDS Order*'s sanguine predictions. It would be irrational for the Commission to then permit ILECs to reinstitute tariff provisions that would only further entrench their dominant position in these markets.

A staunch defender of the competition conclusions made in the *BDS Order*, AT&T barely mentions that order or its conclusions in its opening comments. The silence is telling. The *BDS Order*'s key predictions about entry by facilities-based competitors, even if otherwise reasonable, would collapse if there was not sufficient addressable demand to support the significant investment needed to enter the market.<sup>61</sup> AT&T's quip that customers appear "content" to remain in the volume commitment plans found to be unlawful by the Commission

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<sup>59</sup> AT&T Comments at 28.

<sup>60</sup> See Windstream, INCOMPAS, Sprint Comments at 19-24.

<sup>61</sup> See Windstream, INCOMPAS, Sprint Comments at 24-26.

reveals the strength of all-or-nothing provisions' grip on BDS customers. If the Commission reverses the findings and remedies in the *Order*, ILECs could reinstate the same or even more onerous provisions.

The anticompetitive effect in the BDS market would remain even after mandatory detariffing and after the ILECs have transitioned their own customers to Ethernet. Armed with such a ruling, ILECs could be confident that the Commission would validate these plans if challenged under Section 201(b) and Section 208. The ILECs would thus be able to extend their current position as the only provider in the vast majority of locations actually capable of providing BDS by locking in those customers to Ethernet services as well. The record in this proceeding shows that this is not a hypothetical scenario. \*\*\*BEGIN HIGHLY

CONFIDENTIAL\*\*\* [REDACTED]

[REDACTED] \*\*\*END HIGHLY CONFIDENTIAL\*\*\*<sup>62</sup> The Commission should not allow the ILECs to sabotage the already-dubious prediction on which the Commission based its new regulatory framework in the *BDS Order*.

**C. The ILECs Do Not Dispute that Shortfall and Early Termination Penalties Cannot Exceed the Expectation Damages**

In their comments, neither AT&T nor Verizon contend that they should be allowed once again to charge shortfall and early termination penalties that exceed the expectation value of the volume commitment plans. As explained in our opening comments,<sup>63</sup> the *Order*'s finding that

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<sup>62</sup> \*\*\*BEGIN HIGHLY CONFIDENTIAL\*\*\* [REDACTED] \*\*\*END HIGHLY CONFIDENTIAL\*\*\*.

<sup>63</sup> See Windstream, INCOMPAS, Sprint Comments at 13-15.

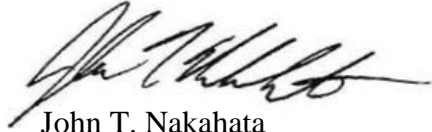
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such excessive penalty provisions are unlawful simply restates and applies black-letter contract law of damages. That excessive penalty provisions exacerbated the anticompetitive lock-in effect of the all-or-nothing provisions was a separate reason for the *Order*'s conclusion that they are unlawful. Thus, regardless of what the Commission concludes with respect to the lock-in provisions, there is no basis to allow ILECs to reinstate excessive penalty provisions into their tariffs.

IV. CONCLUSION

For the reasons discussed above, the Commission should build on and expand the remedies implemented in the *Order* or, at a minimum, affirm the *Order* in its entirety.

Respectfully submitted,



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