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

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

REPLY COMMENTS OF AT&T SERVICES, INC. ON REMAND

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Pursuant to the Commission's Public Notice in the above-captioned docket, released November 3, 2017 ("Public Notice"), AT&T submits these reply comments addressing the issues on remand from the D.C. Circuit.

The only filing in support of the *Tariff Order*[1] is a joint filing from Windstream, INCOMPAS, and Sprint (hereafter, "Windstream"). Windstream makes two principal arguments, neither of which is correct. First, Windstream dismisses the D.C. Circuit's *BellSouth* decision as limited to its facts, but Windstream never grapples with the court's holding that the voluntary nature of both the carrier's offer and the customer's acceptance effectively preclude any finding of harm under any of the statutory reasonableness standards. Second, Windstream claims the *Tariff Order* was supported by the record, but in fact the Commission completely ignored extensive evidence that these plans did not, and could not, foreclose competition in the BDS marketplace.

[1] Tariff Investigation Order and Further NPRM, *Business Data Services in an Internet Protocol Environment et al.*, 31 FCC Rcd. 4723 (2016) ("*Tariff Order*").

Indeed, contrary to Windstream's suggestion, the subsequent *BDS Order*[2] directly undermines, rather than assumes the continuing validity of, the *Tariff Order*. In the *BDS Order*, the Commission found the existence of widespread competition based on data from the 2013-2015 time period—when these portability plans were in effect—thus directly refuting the "lock-in"/foreclosure theory on which the *Tariff Order* was premised.

ARGUMENT

I. THE *TARIFF ORDER* IS NOT COMPATIBLE WITH *BELLSOUTH*.

The principal issue on remand is "the extent to which the reasoning in the [*Tariff*] *Order* is compatible with the *BellSouth* decision."[3] As AT&T explained, the *Tariff Order* cannot be reconciled with *BellSouth*: when a carrier's discount offer and the customer's acceptance of that offer are both voluntary, such a plan "is most naturally viewed as a bargain containing terms that both benefit and burden its subscribers." *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006). The *quid pro quo* terms that "burden" subscribers in such plans are not a cognizable "harm" under the Act. *Id.* at 1059 ("whatever problems [those customers] might have experienced due to their lack of headroom are more appropriately attributed to their free choice than to the 90% commitment requirement").

Windstream argues that the *BellSouth* case has no application outside its specific facts.[4] Indeed, most of Windstream's discussion of *BellSouth* is a recitation of its facts. But the logic and

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[2] Report & Order, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd. 3459 (2017) ("*BDS Order*").

[3] Public Notice, *Wireline Competition Bureau Seeks Comment in Connection with Court Remand of Tariff Investigation Order*, WC Docket No. 15-247, at 2 (Nov. 3, 2017).

[4] *See* Comments of Windstream Services, LLC, INCOMPAS, and Sprint Corp., *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, at 6-11 (filed Dec. 4, 2017) ("Windstream Comments").

principles of the *BellSouth* opinion apply with at least as much force to the facts here, and Windstream makes almost no attempt to explain why that is not so.

Most fundamentally, Windstream ignores *BellSouth*'s holding that, when judging the reasonableness or potential competitive "harms" of a specially offered discount plan, the plan must be judged against the but-for world—*i.e.*, the world in which the plan is not offered at all—not against a hypothetical plan with a different set of "benefits" and "burdens." *Id.* at 1057. In this case, with respect to AT&T, there are two options in the but-for world—month-to-month rates, and term discount plans enforced through early termination liabilities ("ETLs")—neither of which the *Tariff Order* finds unlawful. Under those circumstances, *BellSouth* permits only one conclusion: the portability plans here could only make customers better off, compared to the baseline of the but-for world, by giving them an additional option under which they could cancel a substantial number of circuits without incurring ETLs. Customers that believed they would benefit from the portability plans voluntarily chose to enroll, and customers that did not want to accept the commitment levels in these plans chose not to enroll.[5] As in *BellSouth*, there is no cognizable argument under any statutory reasonableness standard that the offering of these additional, voluntary options harmed any party.

In that regard, the Commission made the same basic mistake in the *Tariff Order* that led to reversal in *BellSouth*. Rather than assessing the portability plans against the but-for world without any portability plan, the Commission compared them to other plans—notably, the AT&T/BellSouth ACP—that allowed customers to choose how many circuits they would put in the plan and also had a different commitment structure. The Commission's result, of course, leads

[5] *See* Comments of AT&T Services Inc. on Remand, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, at 17 (filed Dec. 4, 2017) ("AT&T Remand Comments").

to the same "headscratching outcome" decried by the D.C. Circuit, in which the customers that wanted the voluntarily offered plan are denied access to it, while no other customers are made better off. *BellSouth*, 469 F.3d at 1057. The "headscratching" nature of that outcome has been confirmed by the fact that, after the Commission pressured AT&T to tariff the Commission's preferred alternative, almost all of AT&T's customers have *voluntarily* chosen to stick with their original, supposedly "unlawful" portability plans.

Windstream also claims (at 9) that the *Tariff Order* here was different from the one in *BellSouth* because the Commission here "had compiled a voluminous record" that supported a finding of marketplace foreclosure. In fact, as discussed in the next section, the Commission never considered any of that "voluminous" evidence or tried to explain how the portability plans at issue foreclosed competition, and its failure to consider the evidence was yet another way in which the Commission failed to follow *BellSouth*. But the bottom line is that, in the D.C. Circuit's words, "whatever problems [AT&T's customers] might have experienced due to their lack of headroom are more appropriately attributed to their free choice than to the [percentage] commitment requirement[s]." *BellSouth*, 469 F.3d at 1059.

II. THERE IS NO MERIT TO ARGUMENTS THAT THE RECORD AND THE *BDS ORDER* SUPPORT THE FINDINGS IN THE IN THE *TARIFF ORDER.*

There is also no merit to Windstream's arguments that: (1) the Tariff Order is supported by the record evidence or (2) the Tariff Order should be upheld to facilitate "predictions" made in the *BDS Order*.[6]

[6] *See* Windstream Comments at 15-25.

A. The Tariff Order Is Not Supported By The Record.

In the *Tariff Order*, the Wireline Competition Bureau prohibited the disputed tariff provisions based on an erroneous finding that those provisions "locked in" so much demand that competitors were "foreclosed" from effectively competing in the BDS marketplace.[7] Windstream argues that this finding was valid based on the record materials cited in the *Tariff Order*. That is not correct.

First, Windstream omits that the Bureau ignored virtually all of the evidence that overwhelmingly refuted this lock-in/foreclosure theory. For example, among other things,[8] the *Tariff Order* ignored the data submissions and economic testimony establishing that: (1) the disputed tariffs accounted for less than 10% of BDS demand, leaving 90% of demand available to competitors; (2) customers who did purchase under the AT&T tariffs had sufficient "headroom" to migrate large portions of the demand that are purchased under these tariffs to competitors; and (3) customers who purchased under the AT&T tariffs did, in fact, migrate large portions of their customers to competitors, as evidenced by AT&T's very substantial decline in revenues.[9] The Bureau's failure to address such key data and testimony is the epitome of arbitrary decision-making.

Second, the Bureau's findings in the *Tariff Order* are inconsistent with the Commission's findings in the *BDS Order*. In the BDS proceeding, the Commission and others analyzed one of

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[7] *BDS Order* ¶¶ 80-141.

[8] In its opening comments, AT&T summarized the other portions of the evidentiary record demonstrating that there was no basis for the Bureau's findings in the *Tariff Investigation Order*. AT&T Remand Comments at 21-28.

[9] Brief of AT&T Inc. in Support of its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, at 13, 34 (filed Jan. 8, 2016) ("AT&T Direct Case"); Declaration of Paul Reid, attached as Attachment 1 to AT&T Direct Case, ¶¶ 4, 18.

the largest collections of competitive data for BDS ever gathered by the Commission. In the *BDS Order*, the Commission found, based on analyses of these data conducted by multiple economists (as well as other record evidence), that there is robust competition in the BDS marketplace, and that BDS competitors were expanding, not contracting.[10] Critically, a large portion of the data relied on by the Commission for this finding were from 2013-2015,[11] a time period when the disputed tariff provisions were in full effect. Thus, the Commission has found that, notwithstanding these disputed tariff provisions, competition for BDS actually flourished. This finding directly contradicts the Bureau's unsupported findings that those provisions foreclosed competition.

B. The *Tariff Order* Is Not Needed To Facilitate Any "Predictions" Made In The BDS Order.

Windstream's remaining argument is based on a misrepresentation of the *BDS Order*. According to Windstream, the *BDS Order* is based on the "prediction" that competition for BDS will arise in the near future.[12] On this premise, Windstream argues that, absent the prohibitions adopted in the *Tariff Order*, competitors will be foreclosed, thus frustrating the "predictions" in the *BDS Order*.[13] This argument is wrong at every level.

First, the *BDS Order* is not premised on the "prediction" that competition will arise in the near future. Rather, the *BDS Order* found that competition already exists. It finds that providers compete for customers in buildings located within about a half mile their networks, and that competitors have built networks within a half mile of the vast majority of buildings in areas where

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[10] *BDS Order* ¶¶ 27-38.

[11] Order, *Special Access for Price Cap Local Exchange Carriers*, 29 FCC Rcd. 14346 (2014).

[12] Windstream Comments at 15-25.

[13] *Id.*

it granted relief from certain *ex ante* regulations.[14] This deregulation was thus based on *actual* competition, not predicted competition.[15]

Second, as explained above, the evidence submitted in the tariff investigation proceeding and the findings in the *BDS Order* both demonstrate that the disputed tariff provisions did not foreclose competition; rather competition flourished while those provisions were in effect. Thus, it is simply not true that, absent the *Tariff Order*, competition will be foreclosed in any way that could frustrate the *BDS Order*.

Third, Windstream seems to misapprehend the ongoing impact of the *Tariff Order*. Windstream itself states that the *BDS Order* requires AT&T and others to detariff BDS services in the 91 percent of locations with BDS demand where the Commission found competition to be present.[16] Thus, maintaining the *Tariff Order*—which only applies to tariffed services—would have no impact in those locations, and thus could not even theoretically affect any predictions about competition in those areas.

[14] *BDS Order* ¶¶ 39-45, 86.

[15] *Id.* ¶ 97.

[16] Windstream Comments at 16.

CONCLUSION

The Commission should reverse the *Tariff Order* in relevant part and dismiss the underlying complaints with prejudice.

Respectfully submitted,

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