

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

In the Matter of)
Ameritech Operating Companies) Transmittal No. 1847
Tariff F.C.C. No. 2)
Pacific Bell Telephone Company) Transmittal No. 539
Tariff F.C.C. No. 1)
Southwestern Bell Telephone Company) Transmittal No. 3428
Tariff F.C.C. No. 73)
Investigation of Certain Price Cap Local Exchange) WC Docket No. 15-247
Carrier Business Data Services Tariff Pricing Plans)

ORDER

Adopted: July 15, 2016

Released: July 15, 2016

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On July 1, 2016, Ameritech Operating Companies (Ameritech), Pacific Bell Telephone Company (PBTC), and Southwestern Bell Telephone Company (SWBT) (collectively AT&T) filed Transmittal Nos. 1847, 539, and 3428, respectively, proposing tariff revisions to Ameritech’s interstate access Tariff F.C.C. No. 2, PBTC’s interstate access Tariff F.C.C. No. 1, and SWBT’s interstate access Tariff F.C.C. No. 73, which they assert are “in compliance with the Commission’s rules, F.C.C. Order No. FCC 16-54 (the Order) and the requirements of the Communications Act of 1934, as amended.”¹ The proposed transmittals are scheduled to become effective on July 16, 2016.² Because we conclude that AT&T’s tariff revisions related to the aggregation of all purchases under a single plan constitute a restructured service for which AT&T has failed to make the required showing and violate the Commission’s Tariff Investigation Order,³ we reject Ameritech Transmittal No. 1847 proposed Section

1 Ameritech Operating Companies Tariff F.C.C. No. 2; Pacific Bell Telephone Company Tariff F.C.C. No. 1; Southwestern Bell Telephone Company Tariff F.C.C. No. 73 (filed July 1, 2016); see Letter from Kristin Shore, Executive-Director, Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 1847 (filed July 1, 2016) (Ameritech Transmittal Letter); Letter from Kristin Shore, Executive-Director, Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 539 (filed July 1, 2016) (Pacific Bell Telephone Company Transmittal Letter); Letter from Kristin Shore, Executive-Director, Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 3428 (filed July 1, 2016) (Southwestern Bell Telephone Company Transmittal Letter) (collectively Transmittal Letters).

2 See Transmittal Letters at 1.

3 See Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247, Tariff Investigation Order, FCC 16-54, 31 FCC Rcd 4723 (rel. May 2, 2016) (Tariff Investigation Order).

7.4.13(A), PBTC Transmittal No. 539 proposed Sections 7.4.18(E), and SWBT Transmittal No. 3428 proposed Section 7.2.22(E) as patently unlawful.⁴

II. BACKGROUND

2. In the *Tariff Investigation Order*, the Commission concluded that various incumbent LEC pricing plans were unjust and unreasonable and directed the incumbent LECs at issue, including AT&T, to submit a number of tariff revisions modifying or removing language from those plans. Specifically, the Commission directed AT&T to remove the relevant language requiring customers to aggregate all of their purchases under a single plan from the Ameritech DCP, SWBT DS1 TPP, and PBTC DS1 TPP.⁵ The Commission provided sixty (60) days for impacted incumbent LECs to file the tariff revisions, which required the revisions to be filed by July 1, 2016.⁶

3. AT&T filed the above-referenced proposed transmittals on July 1, 2016, to become effective on July 16, 2016.⁷ On July 8, 2016, three separate petitions were filed by the following parties, all similarly asking the Commission to reject, or alternatively suspend and investigate, the proposed AT&T transmittals: Windstream Services, LLC; Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC (collectively “Birch”); and U.S. TelePacific Corp. d/b/a TelePacific Communications and Alpheus Communications, LLC (“TelePacific/Alpheus”).⁸ Birch claims that AT&T’s proposal to modify its service offerings by eliminating circuit portability for new and renewing customers – referred to as “grandfathering” existing customers – represents “a new method of charging” for price cap services and therefore proposes restructured services, for which AT&T has failed to make the required showing.⁹ Windstream argues that AT&T’s improper discontinuance of portability plans would result in “an enormous rate increase outside of price cap protections,” in part because AT&T incorrectly took the position that its actions do not constitute a restructuring of existing rates and failed to comply with applicable rules governing a restructured service.¹⁰ TelePacific/Alpheus assert that the SWBT and PBTC transmittals are unlawful because their proposal to discontinue the TPP plans “while grandfathering existing customers (while prohibiting renewals)... contravenes the *Tariff Investigation Order*.”¹¹

⁴ The Bureau is concurrently releasing an Order suspending and designating for investigation the proposed shortfall and early termination penalty language submitted in the PBTC and SWBT transmittals.

⁵ *Tariff Investigation Order*, 31 FCC Rcd at 4772, para. 110.

⁶ *Id.*

⁷ See Transmittal Letters.

⁸ See Petition of Windstream Services, LLC to Reject or Suspend and Investigate (filed July 8, 2016); Petition of Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC to Reject or Suspend and Investigate (filed July 8, 2016); Petition of U.S. TelePacific d/b/a TelePacific Communications and Alpheus Communications LLC to Reject or Suspend and Investigate (filed July 8, 2016).

⁹ Birch Petition at 6-8. Birch also urges the Commission to find that there is a significant question as to whether AT&T’s proposed grandfathering of critically important portability plans constitutes an unjust and unreasonable practice under Section 201(b) because it would deny competitors access to a necessary wholesale input and would yield rate structures that would cause substantial harm to competition and consumer welfare. *Id.* at 9-11.

¹⁰ Windstream Petition at 3-5.

¹¹ TelePacific/Alpheus Petition at 10, 11-12.

4. The tariff language at issue is contained in Ameritech Transmittal No. 1847 proposed section 7.4.13(A),¹² PBTC Transmittal No. 539 proposed Sections 7.4.18(E),¹³ and SWBT Transmittal No. 3428 proposed Section 7.2.22(E).¹⁴

III. DISCUSSION

5. The Commission may reject a tariff filed by a carrier if the filing is “so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket.”¹⁵ The United States Court of Appeals for the District of Columbia Circuit has explained that the Commission has “the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face,” including “a tariff that conflicts with a statute, agency regulation or order.”¹⁶ Under this standard, we reject the specified language in Transmittal Nos. 1847, 539, and 3428 because the proposed language constitutes a restructured service for which AT&T has failed to make the showing required by the Commission’s rules and fails to make a substantial cause showing for the grandfathering of portability for existing customers of PBTC and SWBT.¹⁷ We also note that the proposed language raises significant questions about whether AT&T’s grandfathering violates the *Tariff Investigation Order* directive to remove language requiring customers to aggregate all of their purchases under a single plan from the Ameritech DCP, SWBT DS1 TPP, and PBTC DS1 TPP.¹⁸

6. Section 61.3(mm) defines a restructured service to be an “offering which represents the modification of a method of charging or provisioning a service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to customers.”¹⁹ This provision parallels the requirements related to rate restructuring as defined in Section 61.3(i), which defines a change in rate structure to be a “restructuring or other alteration of the rate components for an existing service.”²⁰ For price caps to properly restrain carrier rates, both types of restructuring must be covered.²¹ In fact, the essence of a restructure is that demand will shift among the different elements for

¹² “Effective July 16, 2016, the Discount Commitment Program (DCP) is no longer effective for new subscriptions. DCP will continue to be available to existing subscribers for the remainder of each subscriber’s 3 or 5 year DCP term.”

¹³ See Section 7.4.18 (E) (“Effective July 16, 2016, the DS1 High Capacity Service Portability Commitment is no longer available for new subscriptions or renewals. The DS1 High Capacity Service Portability Commitment will continue to be available to existing subscribers for the remainder of each subscriber’s 3 year DS1 High Capacity Service Portability Commitment term”).

¹⁴ Effective July 16, 2016, the DS1 High Capacity Service Portability Commitment is no longer available for new subscriptions or renewals. The DS1 High Capacity Service Portability Commitment will continue to be available to existing subscribers for the remainder of each subscriber’s 3 year DS1 High Capacity Service Portability Commitment term”).

¹⁵ *Municipal Light Bds. v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); see also *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

¹⁶ *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

¹⁷ *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6824, para. 312 (1990) (*1990 Price Cap Order*), *aff’d*, *Nat’l Rural Telecom Ass’n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993) (“We define restructured services as any that modify a method of charging or provisioning a service that does not result in a net increase of service options available to customers”).

¹⁸ See *infra* para. 11.

¹⁹ 47 C.F.R. § 61.3(mm).

²⁰ 47 C.F.R. § 61.3(i).

²¹ See 47 C.F.R. §§ 61.3(i) and (mm).

which the carrier is charging. This demand shift occurs in both a “change in rate structure” and a “restructured service.” Under the grandfathering proposed by AT&T, new and renewing customers will not have circuit portability, meaning that new or renewed demand will shift to other services and rate elements of those services.

7. Birch and Windstream contend that the proposed revisions constitute a restructured service, claiming both that AT&T’s modification of its service offerings by eliminating circuit portability for new and renewing customers represents “a new method of charging” for price cap services,²² and that “the shift in demand and attendant increase in revenue” and decreased options available to customers that would result from implementation of the grandfathering provisions render the proposal a restructured service.²³

8. AT&T disputes that the proposed revisions constitute a restructured service, arguing that a “restructured” rate under Section 61.3(mm) is a new offering that redefines an existing service, while its proposal “does not replace any existing service or option.”²⁴ Moreover, in its response filed on July 14, 2016, AT&T argues that the proposed tariff revisions are not a restructure because a restructured rate is a “new offering that redefines an existing service” and a restructured service “replaces an existing service.”²⁵ AT&T further argues that it treated the filing as a restructure and provided Tariff Review Plans (TRPs) showing no changes to the API and PCI.²⁶

9. We agree with the position taken by Birch and Windstream that AT&T’s proposed revisions constitute a restructured service. By “grandfathering” portability, AT&T is plainly modifying the manner in which it is charging for services, ensuring that customers pay higher shortfall and early termination penalties and decreasing the provisioning options available to customers.²⁷ A carrier proposing a restructured service must revise its rates to account for the proposed restructure and demonstrate that these rates will not yield Actual Price Indices (APIs) that exceed the applicable Price Cap Indices (PCIs) and would not yield Service Band Indices (SBIs) that exceed the applicable pricing bands.²⁸ Although AT&T now claims in its Reply that it made the required showing, we do not find that argument to be credible.²⁹ To comply with the price cap rules, carriers proposing a restructured service must convert “the existing rates into rates of equivalent value under the proposed structure” and then compare “the existing rates that have been converted to reflect restructuring to the proposed restructured rates.”³⁰ This showing “may require use of carrier data and estimation techniques to assign customers of the preexisting service to those services (including the new restructured service) that will remain or become available after restructuring.”³¹ Therefore, to make a proper showing under 61.49(e), AT&T would have to make some estimation both as to the number of customers that would be paying higher termination penalties once their portability plans expire, and as to the number of customers that would be shifting demand to either shorter term plans or month-to-month plans.³² AT&T made none of those

²² See Birch Petition at 6-7.

²³ See Windstream Petition at 4.

²⁴ See Ameritech D&J at 3-4, n.6; PBTC D&J at 5-6, n.6; SWBT D&J at 5-6, n.6.

²⁵ AT&T Reply at 13 (emphasis in original).

²⁶ *Id.* at 14.

²⁷ See Birch Petition at 7-8; Windstream Petition at 4.

²⁸ See 47 CFR §§ 61.46(c), 61.47(d), 61.49(e).

²⁹ We note that, in contrast to the approach taken by AT&T, Verizon modified its proposed shortfall penalties in the form of a rate restructure.

³⁰ See 47 CFR §§ 61.46(c), 61.47(d), 61.49(e).

³¹ *Id.*

estimations, nor did it provide any explanation for why it believes that grandfathering its portability plans would have no impact on its API or PCI.³³ We therefore reject AT&T's arguments.

10. In addition, we find that AT&T failed to demonstrate that the grandfathering of portability for existing customers of PBTC and SWBT, by prohibiting such customers from renewing the plans, is supported by "substantial cause." Such a showing is required to justify the reasonableness of a modification of material tariff provisions in the middle of a tariff term.³⁴

11. We also note that Petitioners raised significant questions about whether AT&T's grandfathering violates the *Tariff Investigation Order* directive to remove language requiring customers to aggregate all of their purchases under a single plan from the Ameritech DCP, SWBT DS1 TPP, and PBTC DS1 TPP. In the *Tariff Investigation Order*, the Commission noted the importance of portability, explaining that "[b]y most accounts, circuit portability is crucial for competitive LECs serving retail customers whose terms of service rarely coincide with the competitive LECs' underlying pricing plan term commitments with incumbent LECs."³⁵ The *Tariff Investigation Order* also explained the unreasonable nature of all-or-nothing provisions, citing assertions from competitive LECs that they subscribe to BDS pricing plans because they provide crucially needed circuit portability in addition to DS1 and DS3 discounts, and noting that existing all-or-nothing provisions prevent the customer from splitting its purchases between two or more plans when a customer subscribes to the portability plan.³⁶ The Commission found that such provisions "preclude customers from managing their business data services in an economically efficient manner, restricting how they purchase services from the incumbent LEC plans and restricting their ability to consider competitive alternatives," found them unlawful, and ordered their removal from the specified tariffs.³⁷ Instead of removing the proscribed language, AT&T has in essence removed the portability option, which raises substantial concerns about its compliance with the specific instructions of the *Tariff Investigation Order*.³⁸ These concerns also apply to the extent that portions of AT&T's tariffs, although grandfathered, remain in effect, thereby raising further questions of lawfulness.

12. We direct AT&T to file tariff revisions that are compliant with the *Tariff Investigation Order* within thirty (30) days from the date of this Order. The tariff revisions shall remove in each case the relevant language requiring customers to aggregate all of their purchases under a single plan. Should AT&T file tariff revisions grandfathering portability for either new or existing customers, we direct AT&T to treat such filings as a restructured service and file the appropriate materials required by section 61.49(e) of our rules. In addition, if AT&T files tariff revisions grandfathering portability for existing

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³² See Birch Petition at 7-8.

³³ The SWBT and PBTC D&Js generally state that the grandfathering "does not constitute a 'restructuring'" and provide none of the requisite detail that would be required substantiate such a claim. See SWBT D&J at 5; PBTC D&J at 5.

³⁴ *RCA American Communications, Inc.*, CC Docket No. 80-766, Memorandum Opinion and Order, 86 F.C.C.2d 1197 (1981) ("In balancing the carrier's right to adjust its tariff in accordance with its business needs and objectives against the legitimate expectations of customers for stability in term arrangements, we conclude that the reasonableness of a proposal to revise material provisions in the middle of a term must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time. If a carrier can make a showing of substantial cause, its decision to alter tariff terms will be considered reasonable").

³⁵ *Tariff Investigation Order*, 31 FCC Rcd at 4768, para. 102 n.263.

³⁶ *Id.* at 4768-69, paras. 102-103.

³⁷ *Id.* at 4772, paras. 110-111.

³⁸ We note that Frontier, which had similar all-or-nothing language in its Optional Payment Plan, was able to comply with the *Tariff Investigation Order*. Birch Petition at 5 n.12.

customers of the PBTC and SWBT plans, by prohibiting the renewal of such plans, we direct AT&T to make a substantial cause showing. We note that until such tariff revisions are filed, the tariff language requiring the aggregation of all of a customer's purchases in a single plan and the removal of its renewal clause, have been found to be unlawful by the Commission and are thus unenforceable by AT&T. We also note that, because AT&T failed to file compliant tariff revisions, it is currently in violation of the *Tariff Investigation Order*.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201(b), 202, 203, 204, and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201(b), 202, 203, 204, and 205, and authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the language pertaining to grandfathering in the proposed Ameritech Operating Companies Tariff F.C.C. No. 2 contained in Transmittal No. 1847, Section 7.4.13(A); Pacific Bell Telephone Company Tariff F.C.C. No. 1 contained in Transmittal No. 539, Sections 7.4.18(E); and Southwestern Bell Telephone Company Tariff F.C.C. No. 73 contained in Transmittal No. 3428, Section 7.2.22(E) ARE HEREBY REJECTED;

14. IT IS FURTHER ORDERED that, pursuant to section 61.69 of the Commission's rules, 47 C.F.R. § 61.69, Ameritech Operating Companies, Pacific Bell Telephone Company, Southwestern Bell Telephone Company SHALL FILE tariff revisions, within five business days from the release date of this order, to remove the specified language from its tariffs and noting that its proposed replacement language was rejected by the Federal Communications Commission.

15. IT IS FURTHER ORDERED that we direct AT&T within thirty (30) days from the date of this Order to file tariff revisions consistent with the direction provided in paragraph 12 of this Order.

16. IT IS FURTHER ORDERED that the Petitions of Windstream Services, LLC; Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC; and U.S. TelePacific Corp. d/b/a TelePacific Communications and Alpheus Communications, LLC to Reject or Suspend and Investigate the proposed tariff revisions contained in Ameritech Operating Companies Transmittal No. 1847, Pacific Bell Telephone Company Transmittal No. 539, and Southwestern Bell Telephone Company Transmittal No. 3428 are GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

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