

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T, Inc.)	
)	
Petitioner,)	
)	
v.)	No. 16-1166
)	
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

MOTION FOR VOLUNTARY REMAND

The FCC respectfully moves this Court to remand this case to the agency so that the Commission can reconsider the underlying order on review. The case is currently in abeyance. Undersigned counsel is authorized to represent that Petitioner AT&T, Intervenor CenturyLink, and Respondent the United States consent to the motion; Intervenor Sprint Corporation and INCOMPAS will study the Commission's motion and respond in due course; and Intervenor the Ad Hoc Telecommunications Users Committee does not consent to the motion. We have discussed the motion with counsel for Intervenor Level 3 Communications, but Level 3 was not in a position to provide a response in the time available.

In this case, AT&T seeks review of an FCC order entitled *Business Data Services In An Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016) ("*Order*"). In

that order, the Commission stated that certain provisions in tariffed pricing plans for “business data services” offered by AT&T, CenturyLink, and certain other telecommunications providers were unlawful. Business data services, or BDS, refers to the “dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections.” *Order* ¶ 12. The BDS providers in question offer their customers a form of flexibility known as “circuit portability plans”¹ in exchange for “all-or-nothing” commitments, which require customers to make all similar BDS purchases from one provider. *Order* ¶ 95. The tariffs in question also often contain penalties for shortfalls in purchases and for early termination. *Id.* ¶¶ 115 & 141. Last year, the Commission stated that these three forms of tariff term were unjust and unreasonable and so contrary to section 201(b) of the Communications Act, 47 U.S.C. § 201(b). *Order* ¶ 88.

In its Statement of Issues before this Court, AT&T asserts that the *Order* is contrary to *BellSouth v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006), in which this Court vacated an earlier FCC order finding that certain other BDS tariff terms were unlawful as arbitrary and capricious. AT&T also discussed *Bellsouth* in the proceeding below. *See* AT&T Direct Case at 29-30.

¹ Circuit portability plans “enable customers to avoid early termination fees when disconnecting individual circuits before their term commitments expire, provided they commit to maintaining a high percentage of their initial volume commitment over the duration of a plan.” *Id.* ¶ 95.

The *Order* on review did not address *Bellsouth*. Because that case, like the *Order* on review, addresses the lawfulness of BDS tariff terms, the Commission believes that it would be appropriate to consider the extent to which the reasoning in the *Order* is compatible with the *Bellsouth* decision. Remand would permit the Commission to do so, or to otherwise reconsider its determination.

Respectfully submitted,

June 13, 2017

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS,
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FEDERAL COMMUNICATIONS COMMISSION
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No. 16-1166

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on June 13, 2017, I electronically filed the foregoing Motion for Voluntary Remand with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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