

ORAL ARGUMENT NOT YET SCHEDULED

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

AT&T, Inc.)	
)	
Petitioner,)	
)	
v.)	Nos. 16-1166
)	16-1145, & 16-1177
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**REPLY TO OPPOSITION TO
THE FCC’S MOTION FOR VOLUNTARY REMAND**

The parties challenging the *Order* under review (petitioner AT&T and intervenor CenturyLink) agree with respondents (the FCC and the United States) that the Court should remand this case to the Commission so that it may reconsider the *Order* on review. Only two entities that intervened to defend the *Order*—Sprint and INCOMPAS—oppose remand. But the Court, the agency, and all the parties to the administrative proceeding have an interest in allowing the agency an opportunity to reconsider its decision, including considering whether the agency’s actions are consistent with this Court’s *Bellsouth* decision. This is especially so because the Commission’s membership has changed since it issued the order on review.

1. Remand would benefit judicial economy far more than retaining the case. The Commission moved to put this case into abeyance on February 3, 2017. As the Commission explained in that motion, “a majority of the Commission’s current members, including the Commission’s newly designated chairman, dissented from the order,” and thus abeyance would “allow the Commission to review how to proceed in this case and to consider whether to revisit the actions taken.” FCC 2/3/17 Mot. at 2, attached as Ex. A. The Court granted the abeyance motion on February 23, 2017. The Commission then moved for voluntary remand, explaining that remand would also allow the Commission to consider the relevance, if any, of *Bellsouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006), to the tariffs in question, “or to otherwise reconsider its determination.” FCC 6/13/17 Mot. at 2-3. No briefs have been filed in this case, nor has it been set for oral argument.

Intervenors argue strenuously that *Bellsouth* is not relevant to the *Tariff Review Order*. Opp. 2-4. Petitioner AT&T clearly disagrees and apparently plans to argue with equal force that *Bellsouth* is “governing law” that prohibits the Commission’s action in the *Order*. See AT&T Statement of Issues at 1. The Commission did not address *Bellsouth* in the *Order* and so has an interest in doing so now. If the case is remanded, both sides can present their arguments to the Commission, and the Commission can reach its own conclusion. Then, if the

matter is appealed again, a reviewing court would have the benefit of the agency's views, including the agency's interpretation of the Communications Act provisions flagged by Intervenors here. Opp. at 3.

In any event, whatever the ultimate importance of *Bellsouth*, we have also emphasized that the composition of the Commission has changed since the agency issued the *Order*, and that a majority of the current Commission dissented from the *Order*. FCC 2/3/17 Mot at 2 (Ex. A). We thus also seek remand so that the Commission can “reconsider its determination” separate and apart from *Bellsouth*. Allowing the Commission to revisit this *Order*, in light of *Bellsouth* or otherwise, is clearly more efficient—for the parties and the Court—than proceeding with review of an order that may no longer represent the position of the FCC.

2. Intervenors also argue that the Court should retain this case so that it can be heard along with the petitions for review of a separate FCC rulemaking order now pending before the Eight Circuit, which intervenors hope the Eight Circuit will transfer here. See *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3460, 2017 WL 1632988, ¶ 6 (2017) (“*BDS Rulemaking Order*”), *pet. for review filed in Citizens Telecomm. v. FCC*, No. 17-2296 (8th Cir. filed June 12, 2017). But that speculative possibility is no basis for this Court to retain a case that the agency wishes to reconsider. In any event, the cases are distinct and their review will overlap little, if at all. As the FCC will

argue in the Eighth Circuit in opposition to transfer, this case concerns a targeted investigation of whether particular tariff terms from four BDS providers are “just and reasonable” under the Communications Act. *See Order* at ¶ 88. By contrast, the *BDS Rulemaking Order* under review in the Eighth Circuit is a broad-ranging rulemaking, setting out new rules to govern pricing prospectively in the entire BDS market. *See BDS Rulemaking Order* at ¶ 5. The proceedings are also procedurally distinct, with different dockets and different records.¹ As the Wireline Competition Bureau stated when it initiated the tariff investigation, “[t]he investigation ... is being initiated and will be conducted as a separate proceeding with its primary focus on the reasonableness of the tariff pricing plans designated in this Order.” *Investigation of Certain Price Cap Local Exch. Carrier Bus. Data Servs. Tariff Pricing Plans*, 30 FCC Rcd 11417, ¶ 1 n.2 (Wireline Comp. Bur. 2015).

* * * * *

Both the parties challenging the *Tariff Investigation Order* and the agency that adopted it agree that a voluntary remand is warranted in this case so that the

¹ The tariff investigation under review in this Court is WC Docket 15-247, while the main BDS rulemaking has numbers WC Docket No. 16-143 and WC Docket No. 05-25. *See Order* at 1. As petitioners point out (Opp. 4), an FNPRM for the rulemaking appears in the same document as the tariff investigation order. *Compare Order* ¶¶ 11-85 & 159-534 (“Further Notice Of Proposed Rulemaking” and accompanying background and industry overview) *with id.* ¶¶ 86-158 (“Tariff Investigation Order”). The proceedings remain distinct, however, and the mere fact that both appeared in one document is irrelevant.

agency can consider *Bellsouth*'s application to this case and to otherwise revisit the decision. There is thus no reason for this Court to retain the case. Intervenor's pending 8th-Circuit motion to transfer a separate, general rulemaking case to the D.C. Circuit does not counsel in favor of a different result. The motion should be granted.

Respectfully submitted,

June 30, 2017

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

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2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Matthew J. Dunne

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June 30, 2017

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

AT&T, Inc., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

No. 16-1166

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on June 30, 2017, I electronically filed the foregoing Reply to Opposition to the FCC's 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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EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
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AT&T, Inc.)	
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Petitioner,)	
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v.)	Nos. 16-1145
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Federal Communications Commission)	
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**MOTION OF FEDERAL COMMUNICATIONS COMMISSION
TO PLACE THIS CASE IN ABEYANCE**

The Federal Communications Commission respectfully requests that the Court place this case in abeyance because of recent changes in the membership and leadership of the Commission. Holding this case in abeyance will allow the newly constituted Commission an opportunity to determine how it plans to proceed with respect to this case, including in the underlying administrative proceedings.

Undersigned counsel is authorized to represent that Petitioner AT&T and Intervenor CenturyLink consent to the motion, Respondent the United States does not oppose the motion, and Intervenor Level 3 Communications, Sprint Corporation, INCOMPAS, and the Ad Hoc Telecommunications Users Committee take no position on the motion.

In this case, AT&T seeks review of the FCC order *Business Data Services In An Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016). In that order, the Commission found unlawful certain provisions in pricing plans for “business data services” offered by AT&T, CenturyLink, and certain other telecommunications providers. Commissioners Pai and O’Rielly dissented from the order.

Briefing has not yet been scheduled in this case. This petition for review was filed on June 2, 2016. In the time since, the composition and leadership of the Commission have changed. Commissioner Rosenworcel left the Commission earlier this year because her term expired. Then, on January 20, 2017, the FCC’s prior chairman resigned, leaving the agency with three commissioners (Commissioners Clyburn, Pai, and O’Rielly). Most recently, on January 23, 2017, Commissioner Pai was designated FCC chairman. As a result, a majority of the Commission’s current members, including the Commission’s newly designated chairman, dissented from the order at issue here. Given that fact, undersigned counsel have been authorized to move this Court to hold this case in abeyance to allow the Commission to review how to proceed in this case and to consider whether to revisit the actions taken in these orders.

For the foregoing reasons, the Court should grant this unopposed motion and place this case in abeyance.

February 3, 2017

Respectfully submitted,

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/s/ Matthew Dunne

Matthew J. Dunne
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v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

**No. 16-1145 (and
consolidated cases)**

CERTIFICATE OF SERVICE

I, Matthew J. Dunne, hereby certify that on February 3, 2017, I electronically filed the foregoing Motion of Federal Communications Commission to Place This Case in Abeyance 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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