In the Matter of

Section 63.71 Application of AT&T Services, Inc., For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Discontinue the Provision of Certain Packet-Based And Wavelength Business Services as Common Carriage Services and to Instead Offer Those Services as Private Carriage Services

WC Docket No. 19-323

OPPOSITION OF INCOMPAS

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SUMMARY

AT&T seeks to discontinue its common carrier Ethernet services offerings and reclassify them as private carriage offerings but its Application lacks the critical information necessary for the FCC to make a reasoned decision regarding these requests. INCOMPAS urges the Commission to remove AT&T’s Application from the FCC’s streamlined processing and automatic grant to provide time for AT&T to submit the information necessary for the Commission’s review and avoid a default approval of AT&T’s informationally deficient Application.

AT&T’s discontinuance request fails to provide an assessment of how the proposed discontinuance would affect the public convenience and necessity nor does it provide detail regarding whether alternative service options exist in the geographic areas where AT&T proposes to discontinue its services. FCC rule 63.71 provides the Commission the discretion to remove discontinuance applications from streamlined processing and the Commission traditionally has done so where there is a question regarding whether reasonable service substitutes exist or if the public convenience or necessity would be adversely impacted by the service discontinuance. The Commission also removes items from streamlined processing to request additional information from applicants and permit further Commission review. AT&T’s Application suffers from the same information deficiencies that motivated the Commission to remove other applications from streamlined processing and removing AT&T’s Application from streamlined processing is both appropriate and necessary in this instance.
AT&T’s reclassification request similarly lacks the detailed information required for the Commission to conduct its “nuanced” and fact-based analysis, as set forth in the Commission’s Business Data Services Order, of service reclassification requests. Moreover, the information AT&T does provide is replete with contradictory claims and information regarding its service operations and AT&T must be required to explain these inconsistencies so that the Commission can conduct a thorough and informed analysis of AT&T’s requests. In addition, Ethernet service is a key component of national communications networks – such as those underpinning financial, health and defense networks – and AT&T must be required to provide the information necessary for the Commission to make a reasoned assessment regarding how reclassifying AT&T’s Ethernet services could affect this critical infrastructure. Finally, AT&T has not made a showing of the impact of its proposed Ethernet service discontinuance on the geographic areas where AT&T currently operates and, consequently, it is unclear if there are geographic areas where customers potentially would be completely unserved or lack any meaningful Ethernet substitutes.

Removing AT&T’s Application from streamlined processing and requiring AT&T to provide the necessary information regarding its Ethernet service discontinuance and reclassification requests is critical to ensuring that the Commission is able to make a thorough and reasoned decision regarding AT&T’s Application.
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.  20554

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OPPOSITION OF INCOMPAS

INCOMPAS, by its undersigned counsel, hereby submits this Opposition in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice seeking comment on AT&T Services, Inc.’s (“AT&T”) application to discontinue the provision of certain Ethernet services on a common carriage basis and reoffer the same services on a private carriage basis (the “Application”).¹ For the reasons explained below, permitting the Application to remain on streamlined processing would undermine the public interest by circumventing the Commission’s service discontinuance and reclassification evaluation

¹ See also, Section 63.71 Application of AT&T for Discontinuance and Reclassification as Private Carriage (Oct. 21, 2019) (“Application”) and Statement in Support of Application of AT&T for Discontinuance and Reclassification as Private Carriage (Oct. 21, 2019) (“Statement”).
considerations. Consequently, INCOMPAS urges the Commission to remove AT&T’s Application from the Commission’s streamlined processing and automatic grant afforded to discontinuance application in order to receive additional information from AT&T demonstrating its compliance with the Commission’s standards for making a private carriage classification.

I. **AT&T’S APPLICATION SHOULD BE REMOVED FROM STREAMLINED PROCESSING BECAUSE AT&T FAILS TO PROVIDE INFORMATION NECESSARY FOR THE COMMISSION TO ASSESS THE IMPACT ON THE PUBLIC CONVENIENCE AND NECESSITY**

INCOMPAS, the internet and competitive networks association, represents internet, streaming, communications and technology companies, of all sizes, in advocating for competition policy across all networks. INCOMPAS works to promote and support laws and policies that promote competition, innovation and economic development. AT&T’s requested discontinuance of its common carrier Ethernet services and reclassification of those same services as private carriage potentially will negatively affect competition in the communications industry.

INCOMPAS urges the Commission to remove AT&T’s Application from the Commission’s streamlined processing and automatic grant provided for discontinuance applications. AT&T’s Application lacks the information critical to the Commission’s review of a service discontinuance and AT&T provides no assessment of the impact that permitting AT&T to offer the specified service on a private carriage basis could have on the public convenience and necessity. AT&T does not provide details showing how it would offer services if the Application is granted. AT&T does not show where it faces private carriage competitors – and where it does not. AT&T does not meaningfully address the risk that it will choose not to serve certain customers in the future. AT&T’s proposal would remove the protections that common carriage obligations afford to end users and the public, without any evidence that removal of
such protections would not harm the communications end users. Such a decision should not be made by default resulting from an automatic grant. Rather, the Commission should delay any grant and require AT&T to provide the additional information necessary for the Commission to make a reasoned decision.

A. **Commission Rule 63.71 Permits The Commission To Remove Discontinuance Applications From Streamlined Processing And The Commission Should Exercise This Authority To Remove AT&T’s Application From Streamlined Processing**

Section 63.71 of the Commission’s rules, 47 C.F.R. §63.71(f)(1), provides for streamlined processing and automatic grant of service discontinuance applications filed by Section 214 licensees, but the Commission retains the discretion to remove applications from streamlined processing and suspend the automatic grant process.\(^2\) The Commission traditionally has removed applications from streamlined processing where “there is question as to whether a service has reasonable substitutes or whether the present or future public convenience and necessity will be adversely affected.”\(^3\) Moreover, it is not uncommon for the Commission to remove an application from streamlined processing “to allow further review of the

\(^2\) See 47 C.F.R. §63.71(f)(1) (“The application to discontinue, reduce, or impair service, if filed by a domestic, non-dominant carrier, or any carrier meeting the requirements of paragraph (f)(2)(ii) of this section, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective.”) (emphasis added).

discontinuance application, consistent with [the Commission’s] statutory obligations” or to request additional information from the applicant.\textsuperscript{4}

For example, when Verizon sought to discontinue certain copper telecommunications services in parts of New Jersey and New York affected by Hurricane Sandy in 2013, numerous parties raised questions about the proposal and requested the Commission to remove the application from streamlined processing.\textsuperscript{5} Due to these concerns, and the Bureau’s request for additional information from Verizon about the application, the Bureau removed the application from streamlined processing and notified Verizon that the application would not be automatically granted.\textsuperscript{6}

Accordingly, precedent shows the Commission is not averse to using its authority to remove discontinuance applications from streamlined processing in order to allow the Commission to scrutinize an application and to avoid default approvals where “the public interest will not be served by an automatic grant.”\textsuperscript{7}

\textsuperscript{4} See Applications of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Services Will Not Be Automatically Granted, at 2, Public Notice, WC Dkt. Nos. 13-149 &13-150, Comp. Pol. File Nos. 1112 & 1115, DA 13-1758 (rel. Aug. 14, 2013) (“Verizon Streamline Removal PN”) (“Where there are concerns in the record as to whether a service has reasonable substitutes or whether the present or future public convenience and necessity will be adversely affected, the Commission may take a petition off the automatic grant if necessary to allow further review of the discontinuance application, consistent with its statutory obligations.”).

\textsuperscript{5} Id.

\textsuperscript{6} Id.

\textsuperscript{7} Id.
II. AT&T’S SERVICE RECLASSIFICATION REQUEST LACKS THE INFORMATION NECESSARY FOR THE COMMISSION TO COMPLETE ITS FACT-BASED ASSESSMENT IDENTIFIED IN THE BDS ORDER

At its core, AT&T’s discontinuance Application seeks to have the specified services reclassified as private carriage offerings. However, AT&T’s reclassification request suffers from the same type of information deficiency shortcomings that motivated the Commission to remove the Verizon and other applications from streamlined processing. The Commission conducts a fact-based and nuanced analysis when reclassifying services and AT&T has failed to provide the information necessary for the Commission to conduct its analysis. For this reason, INCOMPAS urges the Commission to remove the Application from streamlined processing to provide time for AT&T to provide the necessary information and for the Commission to thoroughly review that information.

A. The BDS Order Requires That Service Reclassification Decisions Reflect a “Nuanced Analysis” And Fact-Based Assessment

AT&T’s request to reclassify its Ethernet services as private carriage services should not be permitted to automatic grant under the Section 214 service streamlined processing. Rather, AT&T’s request must undergo the Commission’s “nuanced” and fact-based evaluation set forth in the Business Data Services (“BDS”) Order. Among other actions, the 2018 BDS Order clarified the Commission’s process for classifying Ethernet, or other business data services, as being provided on a private carriage or common carriage basis. Eschewing a broad stroke approach, the Commission explained that service classification decisions require a

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8 In re 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 Rated for Interstate Special Access Services, 32 FCC Rcd 3459 (2017) (“BDS Order”).
“nuanced” analysis and detailed “understanding and analysis of the facts regarding particular service offerings.” Consistent with this standard the Commission addressed and classified as private carriage the services of only certain competitive local exchange carriers and cable operators for which there was adequate service information in the record. For example, Comcast and Charter were described as each having “submitted detailed information about certain categories of services sufficient to enable us to classify [the services] as private carriage offerings.” BT Americas and ACS similarly had services classified as private carriage offerings based on information they provided to the Commission. In contrast, despite having some services classified as private carriage, certain of Charter’s and Comcast’s services were not classified because the companies did not provide sufficient information, leading the Commission to limit its review, stating, “[w]e focus here just on those services for which Comcast and Charter provide more details regarding the manner in which they are offered.”

For those carriers, such as AT&T, that provide business data services on a common carrier basis, the BDS Order directs that the carrier first submit an application to discontinue those services before they may be reclassified as private carriage offerings.

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9 Id., ¶ 267, 270.
10 Id., ¶¶ 270-273.
11 Id., ¶ 271.
12 Id., ¶ 273.
13 Id., n.669.
14 See Id., n.700 (“Where a provider subject to section 214 of the Act initially offers a given interstate service on a common carriage basis, that provider first would need to obtain
Critically, the *BDS Order* neither explicitly stated nor suggested that these “reclassification-discontinuance” applications would be processed in accordance with the Commission’s streamlined processing procedure for standard discontinuance applications. The lack of any discussion regarding streamlined processing of these reclassification-discontinuance filings is not surprising because the “nuanced analysis” required by the *BDS Order* does not lend itself to a streamlined application.

**B. AT&T’s Application Must Be Removed From Streamlined Processing To Avoid A Default Approval When The FCC Lacks The Information Necessary To Assess The Potential Impact of AT&T’s Ethernet Service Reclassification Request**

AT&T submitted a discontinuance Application but failed to provide the required information regarding the potential impact of the discontinuance on the public convenience and necessity or the level of detailed information necessary for the Commission to conduct its review of AT&T’s service offerings. AT&T’s Application is replete with the contradictory claims and information regarding its service operations that AT&T must be required to explain so that the Commission is able to conduct a thorough and informed analysis of AT&T’s requests. It is critical that the Application be removed from streamlined processing to avoid a default approval before AT&T provides a complete record of the required information and the Commission has had an opportunity to review that information.

As AT&T recognized in the Statement submitted in support of its Application, the FCC traditionally considers five factors when evaluating a service discontinuance application: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need...
for the service in general; (3) the need for the particular facilities in question; (4) increased charges for alternative services; and (5) the existence, availability, and adequacy of alternatives.\textsuperscript{15} AT&T acknowledged that FCC’s discontinuance criteria apply to discontinuance applications and yet AT&T purposely chose not to provide the information necessary to address those criteria.\textsuperscript{16} AT&T’s own assessment that its Application is “[u]nlike the typical discontinuance case” and its statement that AT&T is not discontinuing services does not excuse it from complying with the discontinuance rules. Its request to permit it to offer the services on a private carriage basis further underscores the need to remove the Application from streamlined processing and to avoid an automatic grant. The streamlined review and automatic grant process for discontinuance applications should be reserved for ordinary discontinuance applications and not inadvertently extended to the AT&T’s service reclassification request. Here, where AT&T has failed to provide evidence relating to the applicable standard, the Commission must remove the application from streamlined processing.

Moreover, in addition to lacking the information necessary for the Commission to conduct the nuanced and fact-based analysis for service reclassifications, AT&T’s Application is replete with inconsistent statements regarding AT&T’s service model. AT&T repeatedly asserts that its common carrier obligations prevent it from providing service offerings “tailored” to meet

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\underline{\textsuperscript{15}} AT&T Statement at 10, n.30. See also, e.g., \textit{In re: Technology Transitions; USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers}, 31 FCC Rcd 8283, ¶62 (2016).
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\underline{\textsuperscript{16}} AT&T Statement at 10. AT&T states it is “not proposing to cease offering any of these services.” \textit{Id.}
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the “individualized needs of each customer.” However, both AT&T’s Statement and the Daugherty Declaration contradict AT&T’s claims at every turn, identifying the ways that AT&T already customizes offerings even without reclassification of its services.

For each of the four services at issue, the Daugherty Declaration confirms that AT&T already provides individualized customer offerings (even though operating under common carrier rules):

**AT&T Dedicated Ethernet (“ADE”)** – “Although AT&T publishes standard rates, terms, and conditions for ADE in its service publications, most customers negotiate individualized rates and terms that reflect their unique circumstances.”

**Ethernet Private Line Service – Wide Area Network – (EPLS-WAN)** – “To order service, customers generally must contact an AT&T sales representative. Although AT&T publishes standard rates, terms, and conditions in its Service Guide, most customers negotiate individualized rates and terms.”

**AT&T Ultravailable Network (“UVN”)** – “To order service customers generally must contact an AT&T sales representative and negotiate customized rates and terms.”

**AT&T Switched Ethernet (“ASE”)** – ASE customers almost always work with an AT&T sales team to enter into an individualized contract that often departs from the published rates, terms, and conditions.

It is hard to understand how AT&T purportedly is unable to respond to customers when its own declaration in support admits that AT&T in fact conducts individualized

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17 See, e.g., AT&T Statement at 2, 7-8, 12. See also e.g., Declaration of James Daugherty in Support of Application, ¶¶3, 13-15 (Oct. 21, 2019) (“Daugherty Declaration”).

18 Daugherty Declaration, ¶6.

19 Id., ¶8.

20 Id., ¶9.
negotiations with “most” customers and “often” departs from published rates, terms and conditions. At a minimum, AT&T needs to explain this inconsistency and provide more information showing how reclassification of the services as private carriage would further the public convenience and necessity. Generalized, self-serving conclusions are not sufficient in this regard.

AT&T also argues that its ability to respond to customer requests is constrained by “common carrier obligations” that prevent AT&T from responding “as aggressively as it would like” to customer requests for services.\(^{21}\) However, at no point does AT&T identify these common carrier obligations that allegedly inhibit AT&T’s actions service nor does AT&T explain how its offerings are in fact constrained by any common carrier requirements. At best, AT&T offers the circular reasoning that when it “considers its response to a competitor’s individualized offer, AT&T must expend substantial time and resources evaluating the extent to which its response must be curtailed due to its common carriage obligations.”\(^{22}\) In fact, as discussed above, AT&T’s admissions in its Statement and the Daugherty Declaration regarding existing negotiations belie any claims that AT&T experiences any meaningful constraints in its ability to effectively compete and meet customer requests. If AT&T seeks to offer customized service offerings – as it apparently regularly does – common carrier obligations do not prevent that activity; AT&T simply must be prepared to offer the same service terms and conditions to other customers. By its own words, AT&T contradicts its claims of being unable to compete

\(^{21}\) AT&T Statement at 2, 5. See also Daugherty Declaration, ¶¶ 14,17.

\(^{22}\) Daugherty Declaration, ¶17.
with its private carriage competitors and confirms that it actually is able to provide the individualized, tailored service offerings that the marketplace demands.

Finally, AT&T’s requested service discontinuance has the potential to significantly reduce the availability of AT&T Ethernet’s services and, therefore, any discontinuance decision must be based on a complete record that currently is lacking in AT&T’s Application. If permitted to “discontinue” its services, AT&T will convert its Ethernet Services to private carriage offerings, enabling AT&T to choose, not only on what terms to offer its service but, critically, whether AT&T will offer the services at all. Consequently, AT&T would have an unrestricted ability to choose not to renew expiring contracts or not to offer service to certain customers or classes of customers.

AT&T’s Application fails to provide any substantive discussion of this issue. Rather, AT&T’s only response to this potentially critical impact on the availability of service to the public is a self-serving footnote stating AT&T “typically” has no incentive to decline service. AT&T notes, almost in passing, that it “theoretically” would have the ability to “make case-by-case decisions about whether to offer service to any particular customer” but that it “typically has no marketplace incentive to turn away potential customers.”

Despite AT&T’s disingenuous characterization of a discontinuance approval, “theoretically” enabling AT&T to discriminate in its service offerings, AT&T’s power to cease providing service to a customer would be very real. Moreover, the promise that AT&T would honor any existing contracts provides no assurances that AT&T would be willing to offer the service and renew those contracts in the future.

\[\text{23 AT&T Statement at 14.}\]

\[\text{24 AT&T Application at 4 and AT&T Statement at 14.}\]
must be required to provide additional information regarding the impact of its service discontinuance to enable the Commission to carefully consider any decision.

C. AT&T Fails To Show That The Public Convenience And Necessity Would Not Be Adversely Impacted By The Requested Service Reclassification

In addition to confirming the Commission’s nuanced and fact-based framework for classifying services, the BDS Order also suggested that some service offerings may fall into a “gray” area between common carriage and private carriage.25 The BDS Order explained that where a provider’s conduct in offering services could be consistent with either common carriage or private carriage, any decision to reclassify the service can be informed by the provider’s historical regulatory treatment of the service.26 If AT&T’s Ethernet service offering is considered to fall within this gray area, AT&T’s history as a common carrier makes it critical that the FCC have the time and information it needs to undertake a thorough consideration of the potential impacts of AT&T’s proposed service reclassification.

AT&T’s Application failed to show why the public convenience and necessity would not be harmed if AT&T’s Ethernet services were classified as private carriage. The Daugherty Declaration admits that AT&T is a common carrier27 and it is this “historical regulatory consideration[]” that must be taken into account in any Commission decision to reclassify AT&T’s common carrier service offerings.

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26 Id.

27 Daugherty Declaration, ¶ 17.
Any decision to reclassify AT&T’s services as private carriage needs to consider the impact of a reclassification. Among other issues, the Commission should consider in a reasoned fashion the impact of AT&T’s requested reclassification on national communications networks. Ethernet access infrastructure is a key component underpinning the nation’s financial services, defense, and healthcare networks. Permitting AT&T, and the possibly many other Ethernet providers that likely would follow AT&T’s lead, to offer Ethernet on a private carriage basis would exempt these providers from the Commission authority under Title II of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, et seq. The Commission’s recent communications network supply chain protection rulemaking proceeding and order addressing national security threats to the nation’s communications network, 28 highlighted some very real concerns. Is the Commission ready to cede its Section 201(b) authority to ensure the security of critical infrastructure? Similarly, reclassifying AT&T’s Ethernet services and ceding Title II authority, would eliminate the Commission’s ability to collect valuable data regarding the presence of problematic information and communications technology in Ethernet and private carrier business data services networks. However, AT&T’s Application lacks the information or any analysis of the potential impact of its requested reclassification. For example, absent information regarding AT&T’s Ethernet Service customer base it is impossible for the

Commission to accurately assess any national security concerns that could arise if AT&T were permitted to operate as a private carrier.

Moreover, AT&T also has not made a showing of the impact of an Ethernet Service discontinuance on the geographic areas where AT&T currently operates. AT&T’s Application offers high-level assertions regarding the availability of alternative sources of Ethernet services.\(^{29}\) However, the Application lacks any granular evidence or even an assertion that there are alternative sources of the discontinued or reclassified Ethernet services or suitable alternative in each geographic area where AT&T intends to discontinue and reclassify its services.

It is very likely that the extent of competition AT&T faces varies geographically, and some areas may be adversely affected even if AT&T faces sufficient competition in other geographic areas. Unfortunately, it is unclear if there are geographic areas that potentially would be completely unserved or lack any meaningful Ethernet substitutes. INCOMPAS members have recounted challenges obtaining from AT&T services under the existing common carrier rubric, including the ASE service that AT&T proposes to discontinue. In particular, members in rural areas often lack alternative options for their Ethernet services or other business data services needs and INCOMPAS members have reported significant delays in getting AT&T to respond to requests for service. As a result, the customer experiences difficulty obtaining service from AT&T at fair rates and terms, presumably because AT&T has no competition and therefore no incentive to compete on terms or rates for the customer’s business. These reports are present

\(^{29}\) See, e.g., AT&T Statement at 11 (“Many facilities-based providers offer packet-based services (and other competing services), and no provider has a high market share”).
even though AT&T currently operates as a common carrier and is under an obligation to provide service to qualifying customers. Were AT&T to reclassify the services as private carriage, AT&T would have no legal obligation to serve these customers, and they may face even greater difficulties in securing suitable services.

III. CONCLUSION

For the foregoing reasons, the Commission should remove AT&T’s Application from streamlined processing and require AT&T to provide the additional information necessary for the Commission to conduct a thorough and reasoned review consistent with the Commission’s review and approval standards.

Respectfully Submitted,

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