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Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13
	)	

COMMENTS OF
TELE-COMMUNICATIONS ASSOCIATION

Tele-Communications Association ("TCA"), by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. As TCA discusses herein, if the Commission eliminates its forbearance policy, it should contemporaneously take steps to ensure mutual enforceability of service agreements between users and carriers.

I. STATEMENT OF INTEREST

TCA is an association of telecommunications managers. Its members represent over one thousand small, medium and large users of telecommunications services, including state and local government agencies, corporations, and public and private hospitals and universities. Because many of TCA's members procure interexchange transmission services from non-dominant carriers, TCA has a direct interest in this important proceeding.

II. SUMMARY

The Notice raises issues concerning the lawfulness of the Commission's forbearance policy, under which non-dominant

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carriers are permitted not to file tariffs.[1] The Notice solicits comments on several questions. Of most importance to TCA are the series of inquiries in paragraph 8(d) of the Notice, which asks how the Commission's other rules and policies should be changed if forbearance is found unlawful, and how such changes would affect users.[2]

One highly conceivable outcome of this docket is that non-dominant carriers will be required to file tariffs reflecting their service agreements with particular customers, and that those tariffs will be allowed to take effect on, at most, 14 days' notice.[3] The Commission's current policies allow tariffs that are inconsistent with underlying contracts to take effect as long as they are supported by "substantial cause." Consequently, there is a real risk that, if non-dominant carriers are required to file

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[1] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979); Second Report and Order, 91 F.C.C. 59 (1982); Fourth Report and Order, 95 F.C.C.2d 554 (1983). In MCI Telecommunications Corp. v. FCC, the Court of Appeals determined that the FCC could not prohibit carriers from filing tariffs. 765 F.2d 1186 (D.C. Cir. 1985).

[2] TCA is not addressing the legal issue of whether the Commission must require that tariffs be filed. Rather, it is addressing a contingent issue that would be raised if the Commission imposes such a requirement.

[3] If this happens, the Commission may wish to consider a six month transition period before carriers have to file tariffs. Doing so would allow carriers and users to ensure that the new requirement does not adversely affect existing arrangements.

tariffs and those tariffs are subject to streamlined review, users will have little opportunity to object to tariffs that abrogate contractual arrangements.

TCA accordingly recommends that the Commission adopt the following modifications to its tariff filing rules:

- any tariff filing that is inconsistent with the rates, terms, or conditions in an end user contract must explicitly so state and must be filed on 120 days' notice;
- any such filing should be presumed unreasonable, automatically suspended for the maximum statutory term, and should not be allowed to take effect unless the carrier makes a detailed and compelling showing that the change is just and reasonable; and
- if such a tariff filing is permitted to take effect, the Commission should provide that adversely affected users have the right to terminate service without liability, notwithstanding any term commitment or termination liability imposed by either the contract or the tariff.

In addition, the Commission should declare unreasonable any filing that abrogates a commitment in a tariff not to unilaterally alter rates, terms, or conditions.

III. IF NON-DOMINANT CARRIERS ARE REQUIRED TO FILE TARIFFS, THE COMMISSION SHOULD PROVIDE FOR MUTUAL ENFORCEABILITY OF CARRIER-CUSTOMER SERVICE AGREEMENTS.

A. Under The Commission's Current Policies, Tariffs That Are Inconsistent With Underlying Contracts Are Permitted To Take Effect As Long As The Carrier Demonstrates "Substantial Cause."

Historically, communications carriers have been allowed to file tariffs that abrogate commitments made in underlying contracts, and those tariffs generally have been allowed to

take effect.[4] In the early 1980s, the Commission recognized the harshness of the tariff precedence doctrine and attempted to ameliorate its most drastic inequities. Specifically, in a case involving RCA American Communications, the Commission held that it will not allow tariffs that are inconsistent with underlying contracts to take effect unless the carrier can demonstrate "substantial cause" for the inconsistency.[5]

In practice, however, the substantial cause test has not been a significant evidentiary hurdle. For example, in the case that gave rise to the substantial cause requirement, the carrier filed a tariff with the Commission offering a ten year schedule of rates and conditions for satellite transmission services.[6] Only two years into the ten year period, the carrier filed a new tariff, which inter alia, increased rates by 15 percent. In a series of rulings, the Commission determined that unforeseen events -- including inflation, loss of a satellite, and launch delays --

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[4] See, e.g., American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) ("ABC"), where the D.C. Circuit affirmed an FCC ruling that allowed a carrier to increase its tariffed rates notwithstanding a contractual agreement not to do so; see also, AT&T Co., 86 F.C.C.2d 689, 705 (1981).

[5] See RCA American Communications, 86 F.C.C.2d 1197 (1981).

[6] Id. at 1198.

justified the rate increase.[7] Accordingly, even under the substantial cause test, a carrier may raise its negotiated rates simply because it experiences unanticipated cost increases.

B. The Tariff Precedence Doctrine Interferes with the Workings of the Competitive Interexchange Marketplace.

One of the Commission's guiding principles for the past decade has been to attempt to replicate the incentives and attributes of a competitive marketplace whenever possible.[8] To a considerable measure, the Commission has succeeded in these efforts. For example, its pro-competitive policies, in combination with the divestiture, have resulted in a competitive marketplace for many interexchange services.

There remains one fundamental difference, however, between competition in the interexchange marketplace and in virtually any other market for goods and services: by virtue of the tariff precedence doctrine, IXCs can engage in conduct that would constitute a material breach of a commercial contract, yet still hold the customer to its end of a much

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[7] RCA American Communications, Inc., 2 F.C.C. Rcd 2363, 2367-68 (1987), aff'd sub nom., Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991).

[8] See, e.g., Policy and Rules Concerning Rates for Dominant Carriers; Report and Order and Second Further Notice of Proposed Rulemaking, 4 F.C.C. Rcd 2873, 2886 (1989) ("AT&T Price Cap Order").

less attractive bargain. This distinction seriously interferes with the workings of the marketplace.

As an initial matter, users are deprived of certainty which is essential in setting budgets, planning expenditures, and comparing bids from different service providers. In addition, many users do not realize that their contracts are not mutually enforceable, and accordingly they do not take steps to minimize their exposure to unilateral rate increases or detrimental changes in service terms and conditions. Moreover, even those users who are aware of the tariff precedence doctrine must expend substantial time and resources seeking imperfect ways to minimize their exposure -- such as negotiating an agreement with the carrier that creates a right to terminate without liability in the event of a rate increase. Often, however, users are not successful in obtaining such clauses. In other cases, they must concede on other terms and conditions or accept higher rates simply in order to gain a right that is unquestioned in the marketplace generally.[9]

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[9] The Commission should recognize that a competitive marketplace alone does not ensure against such unilateral changes in material terms. Long-term agreements generally contain provisions that require users to pay substantial penalties for early termination. Accordingly, even though the carrier risks alienating a customer or obtaining a reputation for unreliability, it may still be profitable to increase rates and hold the customer to the remainder of its service term.

C. If The Commission Eliminates the Forbearance Policy, It Should Ensure That Users Are Protected Against Tariff Filings That Abrogate Carrier-Customer Contracts.

If the Commission eliminates the forbearance policy, non-dominant carriers will be required to file tariffs implementing their contractual arrangements.[10] Obviously, such a requirement would considerably increase the incidence of tariffs that, either inadvertently or intentionally, abrogate underlying contracts. Moreover, because the Commission almost certainly would permit non-dominant carriers to file tariffs on short notice, users would have little or no opportunity to protect their interests.

The Commission has considerable discretion to establish the parameters by which justness and reasonableness are measured.[11] TCA respectfully urges the Commission to interpret Section 201(b) of the Communications Act as creating a strong presumption that tariffs that are inconsistent with underlying contracts are unreasonable. Specifically, as discussed below, such filings generally

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[10] If carriers are directed to file tariffs, it might be prudent to allow six months before the new requirement becomes effective. Such a transition period would allow carriers and users to adapt to tariffing and ensure that no existing arrangements are compromised.

[11] See, e.g., AT&T Price Cap Order, 4 F.C.C. Rcd at 3109-11; Policy and Rules Concerning Rates for Dominant Carriers, 5 F.C.C. Rcd 6786, 6823 ("LEC Price Cap Order").

should be subject to the same standards as price cap tariffs that propose above-cap rates:

First, carriers should be required explicitly to identify any tariff filings that are inconsistent with underlying contracts. Moreover, these filings should be made on 120 days' notice, in order to permit an adequate response by affected users. The Commission has undoubted authority to take this step under Section 203(b)(2) of the Communications Act.[12]

Second, the Commission should suspend such filings for the full statutory period and require a detailed and compelling demonstration that the increased rates or changed terms and conditions are just and reasonable.[13] In

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[12] TCA also notes that the Commission already requires a 90-day notice period for price cap tariffs that seek to increase rates above the Service Band Index (and therefore, must be supported by a "substantial cause" showing). See AT&T Price Cap Order, 4 F.C.C. Rcd at 3103. In discussing price cap regulation, the Commission noted that "[o]ne of the fundamental premises of a price cap approach is that during the periods in which a given price cap is in effect, consumers have a legitimate expectation that they will not be paying rates in excess of those caps." Policy and Rules Concerning Rates for Dominant Carriers; Notice of Proposed Rulemaking, 2 F.C.C. Rcd 5208, 5215 (1987). Given the increased expectation of rate stability in the case of tariffs that reflect underlying service agreements, the greater notice period is clearly warranted.

[13] Under price cap regulation, tariffs proposing above-cap rates must be accompanied by extremely detailed cost justification, and generally will be suspended for the full five months permitted by the Communications Act. See 47 C.F.R. §§ 61.48(e), 61.58(c)(3); AT&T Price Cap Order, 4 F.C.C. Rcd at 3111. Similar rules clearly should apply to tariffs proposing above-contract rates.

addition, the Commission should state, as it did with respect to above-cap filings, that tariffs that abrogate underlying contracts will be found lawful only in "rare instances, if any...."[14]

Third, the Commission should provide that, if any such filing is allowed to take effect, the customer will automatically have the right to terminate the service agreement without liability, notwithstanding any tariff or contractual provision to the contrary. This provision is necessary to provide some redress to customers who lose the benefit of their bargains.

D. The Commission Should Protect Users Against Unilateral Changes In Tariff Provisions That Were Intended To Guarantee Particular Rates, Terms, and Conditions.

Today, many tariffs contain commitments that the carrier will not unilaterally alter the rates and relevant terms and conditions. In some cases, these tariffs also provide that the customer may terminate without penalty if the carrier breaches its agreement. However, either of these provisions conceivably could be nullified by a subsequent tariff revision, absent a Commission rule prohibiting the practice. TCA accordingly urges the Commission to declare unlawful, pursuant to Section 201(b), tariff filings that seek to

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[14] LEC Price Cap Order, 5 F.C.C. Rcd at 6852 n.400.

abrogate commitments made in long-term tariffs not to modify rates, terms, and conditions.[15]

IV. CONCLUSION

For the foregoing reasons, if the Commission eliminates the forbearance doctrine, it should adopt policies and regulations that promote the mutual enforceability of service agreements between carriers and customers.

Respectfully submitted,

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[15] The court in ABC expressly declined to address the issue of whether a tariff may bind a common carrier not to file a revised tariff. ABC, 643 F.2d at 825. Moreover, in the RCA decision the Commission did not consider the situation where the original tariff itself commits the carrier not to engage in subsequent, unilateral revisions. RCA Communications, Inc., 86 F.C.C.2d at 1197.

CERTIFICATE OF SERVICE

I, Jennifer A. Wyllie, certify that on this 30th day of March, 1992, I caused copies of the foregoing "Comments of Tele-Communications Association" to be hand delivered to the following:

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