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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**MAR 30 1992**

Federal Communications Commission  
Office of the Secretary

In the Matter of )

Tariff Filing Requirements for )  
Interstate Common Carriers )

CC Docket No. 92-13

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**COMMENTS OF  
AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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**AD HOC TELECOMMUNICATIONS  
USERS COMMITTEE**

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## SUMMARY

This proceeding brings the Commission, the interexchange industry and consumers to a regulatory watershed. Either the Commission can accept AT&T's invitation to recede from the competitive advances that have been fostered by its pro-marketplace policies over the last dozen years, or it can move forward to both solidify already-attained advances and further tailor its policies to address the continued growth of interexchange competition.

Most fundamentally, the Commission should reaffirm, both factually and legally, its policy of forbearing from requiring nondominant carriers to file tariffs. The cases cited by AT&T -- *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* 110 S.Ct. 2759 (1990) and *MCI Telecommunications Corporation*, 765 F.2d 1191 (D.C. Cir. 1985) -- are not to the contrary and the Commission's forbearance power has been emphatically recognized by Congress in its passage of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).

Moreover, the Commission should seize the opportunity to make further advances beyond the status quo. To insulate the marketplace against uncertainty caused by the inevitable appeals of its decision, the Commission should emphasize that, in the context of individualized transactions and resale common carriage, it finds additional sets of circumstances justifying forbearance above and beyond those justifying forbearance for nondominant carriers generally. In addition, the Commission should further streamline its regulation of such tariffs

as nondominant carriers do file, while clarifying its policies to assure that nondominant carriers do not use them as a loophole to evade their lawful contractual obligations.

Finally, the Commission should clarify that its rules and policies permit nondominant carriers to participate in the marketplace by means of private as well as common carriage, and provide for the routine grant (and in the case of resellers, a blanket grant) of authority to remove a portion of capacity from common carrier service in order to engage in private carriage.

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**COMMENTS OF  
AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (Committee) hereby submits its comments in response to the Notice of Proposed Rulemaking (NPRM) released by the Commission on January 28, 1992, in the above-captioned proceeding.

**I. INTRODUCTION**

It is unfortunate that the Commission has felt compelled to issue this NPRM, which contemplates that the Commission may reverse some aspects of its forbearance regulatory policy for nondominant interexchange carriers. The forbearance policy, and nondominant carriers' practices under that policy, have been essential ingredients of the thriving competition that has grown up in the interexchange marketplace. This competition has benefitted all consumers, exactly as the Commission projected that it would when it developed the forbearance approach for resellers a decade ago and, over the next three years, gradually extended it to more and more nondominant carriers in the *Competitive*

*Common Carrier* proceeding.<sup>1</sup> To assure that this intensely competitive marketplace not become the victim, rather than the foster child, of regulation, the Commission should take the following specific steps:

- (a) Exercise its discretion, newly ratified by Congress in passing the Telephone Operator Consumer Services Improvement Act of 1990, by preserving forbearance for OCCs as it exists today;
- (b) Clarify that while facilities-based carriers can elect to file tariffs for generic services, they do not thereby forfeit the right to engage in individualized transactions under contract, and expressly and separately forbear from requiring that these transactions be tariffed;
- (c) Expressly and separately forbear from requiring tariff filings by resellers, whose rates are necessarily constrained by the rates of the underlying facilities-based carriers;
- (d) Further streamline its regulation of the tariff filings that nondominant carriers do make;
- (e) Clarify the applicability and scope of the substantial cause test in the context of nondominant carrier filings, to assure that contracts are efficacious economic ordering devices in this industry as they are in the unregulated sphere; and

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<sup>1</sup> *Policy and Rules for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979); *First Report and Order*, 85 F.C.C.2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981); *Second Report and Order*, 91 F.C.C.2d 59 (1982), *recon. denied*, 93 F.C.C.2d 54 (1983); *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17308 (1982); *Third Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 46791 (1983); *Third Report and Order*, 48 Fed. Reg. 46791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 11856 (1984); *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *reversed and remanded sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

- (f) Spell out that its rules permit a nondominant carrier to provide a portion of its services on a private carriage, rather than a common carriage, basis.

As the Commission found in the *Fourth Report and Order*, the application of traditional regulation to carriers without market power would create impediments to economic efficiency:

[R]egulation eliminating a firm's ability to earn economic rents does not increase output; does not decrease prices to consumers when unregulated intermediate suppliers are present; and can create difficult allocation problems and resulting inefficiencies.

*Fourth Report and Order*, 95 F.C.C.2d at 562. The Commission had concluded that competitive pressures would prevent the nondominant carriers from charging unjust and unreasonable rates or engaging in unlawful discrimination. *First Report and Order*, 85 F.C.C.2d at 31. Since tariffing requirements were not needed to prevent unlawful pricing, and since they resulted in substantial costs to the economy (and, for that matter, to the Commission's processes), the Commission found that elimination of those requirements, first for resellers and then for other classes of nondominant carriers, was in the public interest.

The Commission's actions in *Competitive Common Carrier* have been a major regulatory success story. Competition has burgeoned in the long-distance marketplace. To focus on one area very important for the Committee's members and other entities with needs for customized network solutions, the policy has enabled nondominant carriers to respond flexibly to requests for proposals (RFPs), to cost out their responses on a project-specific basis, and to formulate customer-responsive terms and conditions. This ability to respond on a project-

specific basis has intensified price and service competition among the nondominant carriers and AT&T. This competition, in turn, permits users to recapture much or all of the efficiencies attainable given their specific network needs.<sup>3</sup>

As a result of this growth in competition, the Commission has recently streamlined its regulation of most of AT&T's Basket 3 business services, including AT&T's outbound domestic business services, and has announced that it will streamline regulation of AT&T's 800 services as soon as 800 number portability arrives. *See Competition in the Interstate Interexchange Marketplace, Report and Order (Interexchange Competition Order)*, CC Docket No. 90-132, 6 FCC Rcd 5880, 5893-95, 5905 n. 233 (1991). The arrival of the marketplace at the point where the Commission can take such actions is a regulatory triumph.

Now, however, this progress is threatened. Impatient with the pace of the loosening of its own regulatory bonds (or perhaps desiring to dampen competition by the nondominant carriers), AT&T has prosecuted its complaint against MCI's non-tariffed service arrangements to the point where the Commission feels compelled to reexamine its policy permitting such arrangements. The Commission rightly concluded that it could not justifiably decide these global

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<sup>3</sup> AT&T's integrated Virtual Telecommunications Network Service (VTNS), provided under Tariff F.C.C. No. 12, originated as an AT&T competitive response to the nondominant carriers' ability to design customer-specific packages of services and offer them on a flexible, non-tariffed basis. VTNS, in turn, has placed reciprocal pressures on the nondominant carriers, forcing them to improve their integration of these packages and thereby compete on the basis of service as well as price.

issues in the context of AT&T's complaint itself, since the disposition of the complaint on substantive grounds would almost certainly have impacted many or all of the nondominant IXCs and their thousands of customers, and the NPRM was the result of this determination.<sup>4</sup>

The Commission should resist any urging to reinstitute tariffing requirements for OCCs as they existed prior to the adoption of forbearance. Any such action would be a major step backward for competition and would not be required by the Communications Act. The passage and signing of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) (now codified at 47 U.S.C. § 226), and TOCSIA's legislative history, demonstrate an understanding by both the legislative and the executive branch that the Commission has broad discretion under the Communications Act to forbear from requiring nondominant carriers to file tariffs. In the interest of preserving competition in this marketplace, the Commission should exercise that discretion by preserving forbearance for OCCs as it exists today.

In addition to maintaining forbearance as a policy, the Commission should take steps to increase carriers' and their customers' choices of appropriate mechanisms for doing business. The Commission should clarify, for

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<sup>4</sup> One way to have avoided such an impact would have been to rule substantively and definitively against AT&T's allegations and to uphold the legality of the forbearance policy. Given the somewhat confusing developments in the law cited by the Commission in the NPRM at paras. 5-7, however, it is unsurprising if regrettable that the Commission saw the need for further ventilation of these issues by interested parties.

example, that while facilities-based carriers can elect to file tariffs for generic services -- as many if not most have historically done -- they do not thereby forfeit the right to engage in individualized transactions under contract, and the Commission should expressly and separately forbear from requiring that these transactions be tariffed.<sup>5</sup> The Commission also should expressly and separately forbear from requiring tariff filings by resellers, whose rates are necessarily constrained by the rates of the underlying facilities-based carriers.<sup>6</sup> For those tariffs which nondominant carriers do elect to file, the Commission should maximize the streamlining of its regulation of such filings, subject only to safeguards to assure that carriers do not use tariff filings to escape otherwise binding contracts. Finally, the Commission can and should spell out that its rules permit a nondominant carrier to provide a portion of its services on a private carriage, rather than a common carriage, basis; the portion of services offered as

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<sup>5</sup> To avoid any implication that this will render contracts and tariffs inconsistent with each other, the Commission should require that nondominant carriers' tariffs expressly state that they are not applicable to individualized transactions. The Commission should also make clear that it would have the power to forbear tariffing requirements for these transactions under even a narrow reading of its power to modify tariffing requirements.

<sup>6</sup> The only exception to this principle has been the ability of some Operator Service Providers (OSPs), thanks to circumstances not applicable to other resellers, to charge rates at what would appear to be a supracompetitive premium over the underlying facilities-based carriers' rates. The OSPs are, of course, the subject of TOCSIA; yet even TOCSIA requires only the filing of informational tariffs.

private carriage would by definition not be subject to the tariffing requirements of Title II of the Communications Act.<sup>7</sup>

**II. THE COMMISSION IS EMPOWERED UNDER THE COMMUNICATIONS ACT TO MAINTAIN FULL FORBEARANCE.**

Under Section 203(b) of the Act, the Commission possesses the express power to "modify the requirements" that interstate common carriers file tariffs, under circumstances to be defined by the Commission. It was on this specific power, as well as on its inherent power to shape its regulatory regime to fulfill the overriding goals of the Act, that the Commission relied in establishing the forbearance policy. AT&T has argued that subsequent appellate court decisions, in *MCI Telecommunications Corporation*, 765 F.2d 1186 (D.C. Cir. 1985) and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* 110 S.Ct. 2759 (1990), have cast doubt on whether the power to modify the tariffing requirements of the Act in specified circumstances includes the power to simply refrain from applying them to all nondominant carriers. But AT&T's reading of these cases does not

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<sup>7</sup> The Commission considered, but did not adopt, a similar approach for AT&T in the *Interexchange Competition* proceeding. The Commission's reasons for not adopting a private carriage regime for AT&T were not fully explained in the *Interexchange Competition Order*, but presumably the Commission was concerned about issues of implementation which arose owing to AT&T's lingering market power in a few of its common carrier services and the concomitant need to police the potential cross-subsidization of private carriage services by the common carrier services in which AT&T retains a modicum of market power. Of course, since the nondominant carriers by definition have no market power, these implementation concerns do not exist for them.

comport with their real holdings. Moreover, as will be seen below, even if these cases created some doubt as to the Commission's historic interpretation of the Act as giving it the power to forbear, Congress has now clearly ratified the Commission's interpretation by its enactment of certain strictly limited curbs on the exercise of the forbearance power in the operator services marketplace.

But even without this clear expression of legislative intent, the cases do not support a rollback from forbearance. *Maislin*, first of all, does not even purport to address forbearance, for the Interstate Commerce Commission (ICC) had not, in that case, established a forbearance policy. Instead, while *leaving in place* the tariffing regime for motor carriers, the ICC had established a policy prohibiting as an unreasonable practice the charging of the tariffed rates in instances in which the carrier had negotiated a different rate directly with the shipper. It was this contradiction that the Supreme Court highlighted as beyond the ICC's power, since tariffs mandatorily filed establish, by law, the lawful rate for the services to which they apply. The ICC has *not* excused the carrier from filing tariffs -- and in particular had not relied on its power to modify tariffing requirements themselves under 49 U.S.C. § 10762(d)(1). Thus, the Court did not address, even in passing, the lawfulness of a forbearance policy. It held only that, not having forborne from requiring carriers from filing tariffs, the ICC could not,

as a blanket matter, declare that to collect tariff rates instead of contract rates was an unreasonable practice.<sup>8</sup>

*MCI v. FCC* might at first glance appear more troubling. In that case the Court of Appeals overturned the *Sixth Report and Order in Competitive Common Carrier*, in which the Commission had gone beyond forbearance to adopt rules which would require nondominant carriers both to cancel their tariffs then on file and to refrain from filing tariffs in the future. In that case, the Court expressly stated that it was *not* reaching the question of whether forbearance itself was within the Commission's power (765 F.2d at 1196) and indeed noted that the move from forbearance to forbiddance "fundamentally altered" the regulatory regime (765 F.2d at 1190). Any references in the case to forbearance as such are therefore mere dicta and any assertion that *MCI v. FCC* controls the instant proceeding is wrong as a straightforward matter of law.

This is not to deny the Commission's need to examine the Court's reasoning in *MCI v. FCC* to determine whether it sheds any light on the scope of the Commission's authority. But the Commission should refrain from assuming that sweeping pronouncements by the Court are literally applicable to the forbearance scenario. Such a course would not only be incautious but would be

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<sup>8</sup> The Court therefore obviously did not reach the question whether voluntarily filed tariffs under a forbearance regime would override contracts. But to remove any doubt, the Commission should require that nondominant carriers' tariffs expressly state that services may in some instances be provided under contract, and that the tariff rates do not apply to such provisions of service.

an abdication of the Commission's duty to exercise its own independent expert judgment about the meaning of the statute it is called upon to administer. Thus, the inevitable reliance by AT&T on Court language such as "'Shall,' the Supreme Court has stated, 'is the language of command'" cannot simply be accepted at face value but must be assessed by the Commission in relation to its uncontested power to modify tariffing requirements under certain circumstances, and in relation to other sources of authoritative guidance on how the Act is to be interpreted; indeed, the Court in *MCI v. FCC* expressly recognized that "'Shall' . . . 'is the language of command'" does not hold true in the face of "a clearly expressed legislative intention to the contrary." 765 F.2d at 1191, *quoting CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Fortunately, just such a clearly expressed legislative intention is supplied not only by Section 203(b) itself, but also by subsequent Congressional action that plainly ratifies the Commission's conclusion that it possessed forbearance power. In 1990, five years after *MCI v. FCC*, the Congress passed the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), Pub. L. No. 90-435, *codified at* 47 U.S.C. § 226. This act was specifically designed to rectify what the Congress considered abuses by some members of a small subgroup of the class of nondominant carriers -- operator service providers. The Congress was well aware that the Commission had forborne from regulating nondominant carriers, and quite plainly saw nothing unlawful, or even doubtful, about the Commission's assertion of the power to forbear. Indeed, both the

Senate and House committee reports on TOCSIA expressly noted that OSPs had been largely deregulated under the Commission's forbearance policy, but neither expressed disapproval of forbearance nor even raised a legislative eyebrow. See H.R. Rep. No. 101-213, 101st Cong., 1st Sess. (1989) at 6; S. Rep. No. 101-439, 101st Cong. 2d Sess. (1990) at 3-4, *reprinted in* 101 U.S. Code Cong. & Admin. News 1577, 1579-80. Given its express awareness of forbearance, in determining what course to take regarding OSPs, the Congress could easily -- if AT&T's narrow interpretation of the Commission's powers were correct -- have simply enacted legislation clarifying the existing Communications Act to the effect that the Commission's powers did not extend to forbearance and that, accordingly, OSPs (and other nondominant carriers) must file tariffs.

The Congress did not follow this course, however. Instead, it followed what the committees and the bill's sponsors described as a minimalist regulatory tack, noting at one point:

*The bill will help to protect consumers from the problems caused by the entrance of these new carriers [OSPs] while avoiding overly stringent regulation that could harm the development of a competitive operator services market.*

S. Rep. No. 101-439 at 5, 101 U.S. Code Cong. & Admin. News at 1581 (emphasis added). The preamble to TOCSIA itself recognizes that "[T]he divestiture of AT&T and decisions allowing open entry for competitors in the telecommunications marketplace produced a variety of new services and many new providers of existing telephone services." TOCSIA, § 2(1). Thus, TOCSIA does not require the Commission to impose full-blown pre-forbearance tariffing

requirements even to address the recognized problem area of OSPs. Instead, it merely requires the OSPs to file informational tariffs, to be used by the Commission (i) to identify for further investigation instances in which OSP rates do not on their faces appear just and reasonable; and (ii) to monitor generally the effects of competition in the industry. Importantly, TOCSIA expressly allows the Commission to waive even this requirement -- thereby returning to forbearance for OSPs -- after a specified period if certain conditions have been attained in the marketplace. TOCSIA, § 3(h)(1)(B), 47 U.S.C. § 226(h)(1)(B).<sup>9</sup>

Patently, the Congress determined that there was no reason to disturb the forbearance status quo for nondominant carriers generally -- or even for OSPs except in the strictly limited ways specifically set forth in TOCSIA. The determination constitutes a clear legislative ratification of the Commission's conclusion that it possessed the power under the Communications Act to forbear from imposing the tariffing requirements on nondominant carriers. The President's signing of TOCSIA indicates executive ratification of this interpretation as well. Given this clear guidance, the Commission should not be

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<sup>9</sup> TOCSIA also, of course, imposes certain disclosure and unblocking requirements on OSPs and aggregators to mitigate the captive or unaware customer problem, requires the Commission to engage in continuing monitoring of the industry, and mandated a Commission rulemaking to consider further steps to advance the purposes of TOCSIA and to examine certain problems of access through, and compensation for, aggregators. But these matters do not dilute the point here: the tariffing requirements imposed on OSPs were minimal, limited in time, limited expressly to OSPs, and clearly founded on a baseline of forbearance for other nondominant carriers' services.

spooked by AT&T's interpretation of two inapposite court decisions into retreating from a policy that has stood the marketplace in excellent stead for many years.<sup>10</sup> It should retain its forbearance policy for all nondominant carriers.

**III. THE COMMISSION SHOULD EXPRESSLY AND SEPARATELY FORBEAR FROM REQUIRING NONDOMINANT CARRIERS' INDIVIDUALLY NEGOTIATED TRANSACTIONS AND THE SERVICE OFFERINGS OF RESALE COMMON CARRIERS TO BE TARIFFED.**

While the Commission should keep forbearance in its most general form, it would be naive to assume that AT&T -- and perhaps others -- will not pursue an appeal of that decision, probably based on AT&T's reading of *MCI v. FCC* and *Maislin*. This will perpetuate the uncertainty that already hinders the free workings of the interexchange marketplace. While the Commission cannot forestall AT&T from exercising its appellate rights, it can and should decrease lingering marketplace uncertainty by holding unequivocally that additional "special circumstances" exist which make it particularly appropriate to forbear in two more

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<sup>10</sup> Indeed, the *Maislin* case lends strong support to this reading of the legislative history. In *Maislin*, the Supreme Court expressly found that, by granting the ICC the specific power to allow contract carriers to diverge from their filed rates in certain circumstances, Congress had effectively demonstrated (a) that it understood that the Act did not previously grant the ICC a general power to enact such a policy; and (b) that it intended *not* to permit the ICC to extend this policy to motor common carriers. 110 S.Ct. at 2770-71. Here, by the same token, fully aware of the Commission's general forbearance policy, Congress has chosen to modify that policy only in carefully circumscribed circumstances, thereby evincing a clear intent to leave the policy intact in other circumstances.

circumscribed areas: individualized transactions and resale common carriage. The Commission should also make clear that entities who resell service at a profit, but do not hold themselves out as providing service indifferently to the public, are not common carriers and accordingly are not subject to Title II of the Act.

AT&T's position in its complaint has essentially been premised on its narrow reading of the language of Section 203(b) of the Act, which provides that:

The Commission may . . . modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions . . . .

The *MCI v. FCC* Court focused on the words "particular instances" and "special circumstances or conditions" in holding the *Sixth Report and Order* to have overstepped the bounds of the Commission's powers under Section 203(b). Of course, as noted above, the Court did not hold forbearance unlawful, and Congress has since made clear that forbearance is a completely permissible regulatory approach for the Commission. Nevertheless, to meet any contention that the competitive situation that nondominant carriers face is not a sufficiently "special circumstance[]" or condition[]" and that these words require the Commission to adopt something less than complete forbearance, the Commission should make clear that additional special circumstances justify forbearance apply to individualized transactions and to resale common carriers.

As to individualized transactions, the Commission should find specifically that (i) the marketplace for individualized packages is especially

intensely competitive; (ii) transactions tailored to the needs of a particular customer are especially likely to be structured in a manner that, if widely known, could divulge confidential or competitively sensitive information about that customer; (iii) any generalized public interest in knowing the rates, terms and conditions of a particular transaction is reduced by the fact that the service package is less likely to be generally useful; and (iv) allowing nondominant carriers to make individualized contracts on a confidential basis will counteract any tendency the market might show toward cartelization by building in a "cartel-cheating" mechanism.<sup>11</sup> Given the Commission's previous, and unchallenged, finding that any price discrimination engaged in by nondominant carriers is virtually certain to be lawful because justified by competitive forces (*First Report and Order*, 85 F.C.C.2d at 31), these findings will clearly provide independent grounds for forbearance as to these transactions.

The Commission has equally strong independent grounds for forbearing from requiring tariffing by resale common carriers, grounds that were well articulated in the *Second Report and Order*:

[T]he continued imposition of tariff and entry and exit requirements upon carriers without facilities of their own undeniably has the effect of delaying new services and dampening innovation and marketing strategies. In short, the efficient functioning of the marketplace is distorted . . . .

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<sup>11</sup> Of course, reasons (i) and (iv) apply to nondominant carriers' generic tariffs as well, but their applicability to individualized transactions is especially strong.

[Moreover,] where a multitude of substitutable services are potentially or actually available, and many of the resale [common] carriers are simply arbitrageurs, resellers lack the ability to raise their prices to unreasonable levels or engage in practices proscribed the Act except at substantial risk of losing customers and profits.

*Second Report and Order*, 91 F.C.C.2d at 67-68. Indeed, as the Commission noted, a resale common carrier faces not only generalized competition, but also the brute fact that (except for value plainly added) it cannot raise its prices above those of the underlying facilities-based carrier, or its customers will simply migrate to that other carrier. *Id.* at 69. These competitive circumstances are clearly "special" and fully justify forbearance for resale common carriers.

For purposes of analyzing the appropriate policy for resale common carriers, it is also important to remember that not all resellers of communications service for profit are common carriers. Many resellers do not hold themselves out indifferently to serve the public, but "make individualized decisions in particular cases whether and on what terms to serve"; these resellers are, under black letter law, *not* common carriers, whether or not they earn a profit. *See, e.g., National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (*NARUC II*); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*); *see also, e.g., AT&T v. FCC*, 572 F.2d 17, 26 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (profit relevant for resellers as an "indicium" of the holding out test, not as a substitute for it). Among resellers in particular, common carriers and private carriers are essentially self-selecting by their practices. A reseller who chooses to

keep a tariff on file is signalling its intention to be a common carrier for the part of its services covered by the tariff.<sup>12</sup> A reseller who chooses not to file, conversely, must inevitably do its business by private arrangement, and this carries with it almost inevitably individualized decisions on how and when to deal.<sup>13</sup>

A reseller who does not have a practice of making individualized decisions on its transactions, moreover, has a strong incentive to memorialize its standard practices in a tariff, since tariffing reduces the costs the reseller would otherwise incur in negotiating thousands of separate transactions. Given the size and market position of most such resellers, this fact supports a strong presumption that resellers who do not choose to file are *ipso facto* acting as private, not common, carriers and therefore are not subject to Title II of the Act. Accordingly, the question of forbearance for these resellers simply does not arise.

This self-selecting aspect to common carriage is fully consistent with the Act. As the Commission succinctly noted in the *NorLight* case, entities are common carriers where they are under a legal compulsion to serve the public

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<sup>12</sup> For a reseller, as for other entities, it is perfectly acceptable to offer a portion of its services as private carriage and the rest as common carriage, as discussed further hereinbelow.

<sup>13</sup> Indeed, as the Private Radio Bureau has noted, even the use of a form contract is not inconsistent with private carrier status, since the use of such contracts is extremely widespread in many commercial contexts in which there is no question of common carriage. *General Telephone Co. of the Southwest*, 3 FCC Rcd 6778 at para. 10 (Priv. Rad. Bur. 1988). As the Bureau might have noted, absent market power -- which the resellers by definition do not have -- such contracts are almost inevitably subject to negotiation.

indiscriminately, or where they do so voluntarily in the absence of legal compulsion. *NorLight*, 2 FCC Rcd 132 at para. 18, *on reconsideration*, 2 FCC Rcd 5167 (1987), *citing NARUC I* at 641, 642. There can be no serious argument that resellers are under any legal compulsion to act as common carriers,<sup>14</sup> and therefore it is particularly appropriate that the Commission allow them to self-select in a manner that enhances marketplace efficiency and minimizes the Commission's regulatory burden.

For resellers in particular, then, the Commission should adopt an express presumption that if a reseller does not file a tariff, it can be assumed to be a private carrier -- and accordingly not subject to Title II -- unless there is clear and convincing evidence to the contrary.<sup>15</sup>

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<sup>14</sup> Not only do resellers have no market power, they do not even control any facilities, and if they cease to provide carriage, common or private, their underlying carriers remain available to provide service to the resellers' customers. Accordingly, there can be no tenable legal theory for requiring resellers to provide common carriage.

<sup>15</sup> Part V of these comments advocates that the Commission clarify that its rules permit nondominant carriers to offer both common and private carriage, and smooth the way for nondominant carriers to do so in a manner that maximizes their ability to respond to marketplace needs. Obviously, resellers in particular are able to provide both common and private carriage.

**IV. THE COMMISSION SHOULD FURTHER STREAMLINE ITS REGULATION OF THOSE TARIFFS THAT NONDOMINANT CARRIERS ELECT TO FILE, BUT SHOULD TAKE STEPS TO ASSURE THAT THE FILING OPTION WILL NOT ALLOW THE CARRIERS TO RENDER THEIR CONTRACTS UNENFORCEABLE.**

To increase customer choices and marketplace flexibility, the Commission should -- subject to one exception to be identified below -- adopt maximum streamlining and minimum content requirements for such tariffs as nondominant carriers do elect to file. A one-day notice period, proposed but not adopted for some AT&T services in CC Docket No. 90-132, is appropriate for most if not all nondominant carrier filings. Similarly, the Commission should permit those carriers to file summary tariffs, particularly for individualized transactions.

In this latter regard, it is notable that, as the rules are now written, nondominant carriers may file contract tariffs, but only under the same procedural constraints as AT&T.<sup>16</sup> These constraints are plainly not appropriate for nondominant carriers -- whatever one may think of their appropriateness for AT&T -- and the Commission should remove them. First, as already noted the Commission should reduce the notice period for nondominant carriers to one day. Second, the Commission should allow nondominant carriers maximum flexibility in determining what information should appear in their contract-based tariffs, and

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<sup>16</sup> Appropriately, the prohibition on AT&T's offering certain services in contract-based tariffs, set forth in Section 61.55 of the Commission's Rules, 47 C.F.R. § 61.55, does not apply to the nondominant carriers.

should not rigidly apply the requirements of Section 61.55(c) of the Rules. The Commission should, for example, allow nondominant carriers to state bands for rates rather than specific rates.

Having taken steps to maximize the efficiency of the marketplace for interexchange services, and in particular having given OCCs the right to provide service pursuant to non-tariffed contracts as well as by tariffs, the Commission should take steps to assure that those contracts serve their intended marketplace function -- by confirming that they will be binding on the OCCs to the same extent that ordinary commercial contracts are binding on the parties thereto. As the Commission has recognized in both *Competitive Common Carrier* and the *Interexchange Competition* proceeding, allowing carriers to negotiate individually tailored contracts for service can benefit customers, improve efficient resource allocation and further increase competition. See, e.g., *Interexchange Competition Order* at paras. 102-106. In particular, the Commission should avoid allowing the "substantial cause" test for filing tariffed alterations of contracts to become a loophole for nondominant carriers to avoid the enforcement of those contracts, thereby negating the marketplace benefits of the contractual mechanism.

The economic benefits of contracts depend on their ability to enable the parties to order their relationships in predictable ways, and this is achieved only by making them *binding* on both parties, except in the most extraordinary circumstances. See generally, e.g., R. Posner, *Economic Analysis of Law* 79 et seq.,

and authorities cited therein. The "substantial cause" test is intended, of course, to address at least a portion of this concern. It sprang originally from the Commission's recognition that, when a customer enters into a long-term transaction with a carrier pursuant to a tariff, its reliance interest is entitled to weight in the determination whether the carrier's subsequent attempt to unilaterally change the terms of the transaction by a tariff revision is just and reasonable. See *RCA American Communications, Inc.*, 84 F.C.C.2d 353 (1980), Report and Order, 86 F.C.C.2d 1197 (1981), *on reconsideration*, 2 FCC Rcd 236 (1987). As such, the "substantial cause" test is a formulation of the justness and reasonableness test for particular circumstances, not a separate test. See *Showtime Networks, Inc. v. FCC*, 932 F.2d 1, 6 (D.C. Cir. 1991).

Although the Committee is not persuaded that a "substantial cause" approach is the only avenue available to the Commission for protecting customers' reliance interests, the Commission need not alter the fundamental structure of that approach, so long as it clarifies the approach both procedurally and substantively. Procedurally, the Commission should do two things. First, it should make explicit that the "substantial cause" test is to be used not only in disposing of petitions to reject, suspend or investigate tariff filings which unilaterally modify contracts or long-term arrangements entered into under tariffs,<sup>17</sup> but also in

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<sup>17</sup> In the *Interexchange Competition* proceeding, the Committee requested similar clarification of the substantial cause test as it applies to AT&T attempts to alter the terms of arrangements under the contract tariff mechanism. Since, as noted above, the contract tariff mechanism is  
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