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

FCC MAIL SECTION

FCC 93-401

AUG 19 12 01 PM '93

In the Matter of )

Tariff Filing Requirements for )  
Nondominant Common Carriers )

CC Docket No. 93-36

DISPATCHED BY

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1993 Released: August 18, 1993

By the Commission:

I. Introduction

1. On February 19, 1993, the Commission initiated a Notice of Proposed Rulemaking<sup>1</sup> in response to the United States Court of Appeals for the District of Columbia Circuit's invalidation of the Commission's long-standing "forbearance" (or "permissive detariffing") rules.<sup>2</sup> Generally, the Notice proposed significantly streamlined tariff regulation for domestic nondominant carriers previously subject to forbearance. The Notice tentatively concluded that existing tariff filing requirements are unnecessary and overly burdensome on nondominant carriers and that the public interest would be served by streamlining such requirements.

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<sup>1</sup> Tariff Filing Requirements for Nondominant Common Carriers, (CC Docket 93-36), Notice of Proposed Rulemaking, 8 FCC Rcd 1395, (1993) (Notice).

<sup>2</sup> On November 13, 1992, the court, in reviewing a Commission order disposing of a complaint filed by AT&T against MCI, vacated the permissive detariffing rules adopted in the Fourth Report of the Competitive Carrier proceeding. See, AT&T v. FCC, 978 F.2d 7272 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993 ("Forbearance Decision") cert. denied S. Ct. Docket # 92-1684, 1993 Lexis 4392; U.S., 61 U.S.L.W. 3853, (June 21, 1993); see also Notice at 1396, para 6. The court held that the Communications Act (Act) does not permit the Commission to adopt tariff "forbearance" rules because they contravene Section 203 of the Act. Consequently, all common carriers not otherwise exempt, including previously forborne nondominant carriers, must file tariffs pursuant to Section 203 of the Act.

2. On the basis of the extensive record developed in response to the Notice,<sup>3</sup> we now reaffirm our policy findings, adopted nearly a decade ago in Competitive Carrier,<sup>4</sup> and conclude that, while tariff regulation is required by the Act, traditional tariff regulation of nondominant carriers is not only unnecessary to ensure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market,<sup>5</sup> and the ability of carriers to respond quickly to market trends.

3. Accordingly, in this order, we modify our rules to establish, consistent with the statutory obligations imposed under the Communications Act, significantly streamlined federal tariffing requirements for nondominant common carriers. By our action today, nondominant carriers will be permitted to file their interstate tariffs on not less than one day notice. In addition, tariff content requirements will be amended to allow nondominant carriers to state in their tariffs either a fixed rate or a reasonable range of rates. Finally, under our revised rules, nondominant carriers will be required to file their tariffs and tariff revisions on

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<sup>3</sup> A list of the parties participating in this proceeding is attached hereto as Appendix A. The Small Business Administration (SBA) filed reply comments late. We will treat SBA's late filed comments as informal comments that will be considered in the interest of achieving a complete record. Other commenters have made motions for us to accept corrected comments. We also grant these motions in the interest of achieving a complete record.

<sup>4</sup> See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further Notice); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (Second Report), recon., 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21 1993; Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (Sixth Report), rev'd, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (MCI v. FCC).

<sup>5</sup> Second Report, 91 FCC 2d at 62, 65, 71; Competitive Carrier Further Notice, 84 FCC 2d at 453, 456, 471, 479.

three and one half inch floppy diskette and are given added flexibility in formatting their tariff filings.

## II. Background

4. On November 13, 1992, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the Commission's long-standing "forbearance" rules under which nondominant carriers were permitted to refrain from filing interstate tariffs.<sup>6</sup> In response, the Commission adopted a Notice of Proposed Rulemaking to consider the appropriate tariff filing requirements for previously forborne nondominant carriers and the impact of such requirements on the public interest.<sup>7</sup> As a result of the court's order, all nondominant carriers not otherwise exempt must now file tariffs pursuant to Section 203 of the Act.<sup>8</sup>

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<sup>6</sup> See Notice, 8 FCC Rcd at 1395. A comprehensive history of the court's forbearance decision is set out more fully in the Notice at 1395-96, paras. 3-6. We note that in January, 1992, we initiated a separate rulemaking proceeding to consider the legality of our permissive detariffing rule. Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 92-13, 7 FCC Rcd 804, 57 Fed. Reg. 6487 (1992). On November 5, 1992, the Commission adopted an order reaffirming the holding in Competitive Carrier that domestic nondominant carriers subject to forbearance may, but need not, file interstate tariffs. Tariff Filing Requirements for Interstate Common Carriers, Report and Order, CC Docket No. 92-13, 7 FCC Rcd 8072 (1992) ("Section 203 Order"). This order was released on November 25, 1992. In light of the court's November 13th decision, we stayed the effectiveness of the Report and Order until further notice. Tariff Filing Requirements for Interstate Common Carriers, Order, CC Docket No. 92-13, 7 FCC Rcd 7989 (1992). On June 4, 1993, the Section 203 Order was summarily reversed by the U.S. Court of Appeals for the D.C. Circuit. AT&T v. FCC, No. 92-1628 (US. App. June 4, 1993).

<sup>7</sup> Also in response to the court's invalidation of our forbearance rules, we modify, in Appendix B, Part 43.51 of our rules regarding carrier-to-carrier contracts to delete the specific reference to the forbearance policy.

<sup>8</sup> In lieu of forbearance, the streamlined tariff requirements adopted in the First Report of the Competitive Carrier proceeding once again apply to nondominant carriers. These rules can be found in Part 61 of the Commission's Rules. See 47 C.F.R. §61. On January 27, 1993, however, we issued a Public Notice stating that during the pendency of this rulemaking proceeding, we do not intend to take enforcement action against carriers affected by the court's Forbearance Decision for failure to comply with the technical

5. In the Notice, we stated that the application of our permissive detariffing rules during the past decade has directly led to increased competition in both the interexchange market, as well as other service markets, including the interstate access market.<sup>9</sup> We therefore tentatively concluded, consistent with previous findings made in Competitive Carrier, and as a matter of policy, that, while tariffs are required, traditional tariff regulation of nondominant carriers inhibits competition and the benefits that directly result therefrom. Accordingly, the Notice tentatively concluded that the public interest would be served in the near term by streamlining the interstate tariff filing requirements for nondominant carriers in a manner consistent with the Act.<sup>10</sup> In particular, the Notice sought comment on several specific proposals designed to significantly streamline tariff regulation of nondominant carriers including: a) allowing carriers to file their interstate tariffs on not less than one day notice; b) allowing carriers to state in their tariffs a maximum rate or range of rates as well as fixed rates; and c) requiring carriers to file their tariffs and tariff revisions on computer diskettes with a more flexible tariff format requirement.<sup>11</sup>

### III. Discussion

#### A. Applicability of Streamlined Tariff Regulation Generally

##### 1. Dominant/Nondominant Regulatory Classification.

###### a. Comments

6. As a threshold matter, several commenters urge the Commission to reexamine the dominant/nondominant regulatory

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requirements sections of our rules regarding the form of tariff filings. Tariff Filing Requirements for Interstate Common Carriers, Public Notice, FCC 93-51 (released January 27, 1993). On February 2, 1993, we issued a Public Notice waiving until April 5, 1993, the fourteen day notice requirement set forth in Section 61.58(b) of the Commission's rules for the filing of tariffs by nondominant carriers for services for which there were no tariffs on file. Public Notice, FCC 93-71 (released February 2, 1993). In an Order adopted on March 30, 1993, we further extended the interim blanket rule waiver until June 4, 1993. See 8 FCC Rcd 2555 (1993).

<sup>9</sup> Notice, at 1396, paras. 10-11.

<sup>10</sup> Notice, at 1397, paras. 12-13.

<sup>11</sup> Id. at 1397-1399, paras. 14-26.

classification. For instance, AT&T and several Bell Operating Companies (BOCs) argue that the proposed streamlined tariffing requirements should be applied to specific telecommunications markets subject to competition, instead of applying the requirements based solely upon whether a carrier is deemed "dominant" or "nondominant."<sup>12</sup> These commenters contend that the Commission's asymmetrical regulation of dominant and nondominant carriers is outdated and does not accurately reflect existing competition in the marketplace.<sup>13</sup> PacBell, for example, urges the Commission to conduct a market analysis, using the criteria it applied in the Interexchange proceeding (Docket No. 90-132), to determine whether the assumption that dominant carriers are still "dominant" in all markets remains valid.<sup>14</sup> AT&T similarly asserts that the dominant/nondominant distinction is meaningless since there is robust competition in the interexchange market, and therefore, there is no basis to apply the Commission's proposals to "nondominant" interexchange carriers and not to AT&T.<sup>15</sup> SBA also urges the Commission to reexamine its regulatory structure for the telecommunications industry, and suggests that interexchange carriers should be categorized into separate tiers.<sup>16</sup> SWB also argues that although the Commission has sufficient legal authority to streamline tariff regulation, the "equal protection" guarantee under the fourteenth amendment of the U.S. Constitution prohibits the Commission from applying streamlined tariff regulation differently among carriers conducting the same business.<sup>17</sup>

7. On the other hand, telecommunications users, CAPs, and nondominant carriers generally endorse the Commission's dominant/nondominant regulatory dichotomy, and claim that the regulatory "reclassification" issue raised by AT&T and the BOCs is

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<sup>12</sup> See, e.g., Ameritech Comments at 6-11; AT&T Reply Comments at 11-13; Bell Atlantic Comments at 3-4, 10; BellSouth Comments at 2-8; NYNEX Comments at 12; PacBell Reply Comments at 6-8; SWB Reply Comments at 3.

<sup>13</sup> See, e.g., SWB Comments at 8-9; PacBell Reply Comments at 3-8; AT&T Comments at 15; Bell Atlantic Comments at 5-6; Bell South Comments at 3-4; NYNEX Comments at 12.

<sup>14</sup> PacBell Comments 9-11.

<sup>15</sup> AT&T Reply Comments at 15.

<sup>16</sup> SBA Comments at 9.

<sup>17</sup> See SWB Comments at 5-6, citing Yick Wo v. Hopkins, 118 U.S. 356, 373, 374 (1885); Garnett v. FCC, 513 F.2d 1056, 1060 (D.C. Cir. 1975).

beyond the scope of this proceeding.<sup>18</sup> These commenters contend that the purpose of the instant proceeding is to determine how best to implement tariffing requirements for nondominant carriers in light of the recent court decision, and not to uproot and discard the Commission's long-standing policy that designates carriers that lack market power as nondominant.<sup>19</sup>

b. Discussion

8. As stated, the purpose of the Notice was to consider the appropriate tariff filing requirements for carriers affected by the decision of the District of Columbia Circuit invalidating the Commission's "forbearance" rules.<sup>20</sup> While we recognize that conditions in the telecommunications marketplace have not remained static since the Commission first established the dominant/nondominant classification in the Competitive Carrier proceeding, the original scope of this proceeding did not include, and we do not expand the scope to include, the modification of the dominant/nondominant regulatory dichotomy.<sup>21</sup>

2. Applicability of Streamlined Tariff Regulation to Specific Classes of Carriers.

a. Background

9. In the Notice, we stated that competitive access providers (CAPs) have not been subject to interstate tariff filing requirements since their inception.<sup>22</sup> We noted that our policy since Competitive Carrier has consistently been that a carrier is

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<sup>18</sup> See, e.g., AdHoc Reply Comments at 6-7; MCI Reply Comments at 11-13; MFS Reply Comments at 10; Teleport Reply Comments at 2-3.

<sup>19</sup> See MCI Reply Comments at 12-13; Teleport Reply Comments at 3.

<sup>20</sup> See Forbearance Decision.

<sup>21</sup> Moreover, in response to SWB's contentions, we conclude that the dominant/nondominant regulatory classification does not violate any constitutional "equal protection" guarantee. We find that the dominant/nondominant dichotomy is grounded on a rational distinction between different classes of carriers that are not similarly situated, and thus our regulatory classification withstands any constitutional challenge since it is rationally related to our statutory obligations under the Communications Act. See, generally, City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985).

<sup>22</sup> See 8 FCC Rcd at 1397, para. 11.

nondominant unless we have previously found it to be dominant.<sup>23</sup> We therefore considered CAPs to be nondominant carriers, since they had not been declared dominant.<sup>24</sup> In the Notice, we also asserted that the proposed tariff requirements would not apply to cellular carriers, which were declared dominant in the Fifth Report of the Competitive Carrier proceeding.<sup>25</sup> Additionally, in the Notice, we tentatively concluded that nondominant operator service providers should not be subject to significantly streamlined tariff filing requirements because they are required to follow a unique requirement by filing informational tariffs for these services pursuant to Section 226 (h) of the Communications Act. We also invited parties to comment on our tentative conclusion regarding tariff filings by nondominant operator service providers.<sup>26</sup>

b. Comments

10. PennAccess argues that the Notice incorrectly implies that all CAPs are common carriers.<sup>27</sup> PennAccess asserts that CAP activities constitute private, rather than common, carriage and requests that the Commission declare that CAPs are not, by definition, common carriers required to file tariffs under the Act.<sup>28</sup> In response, PacBell urges the Commission not to alter its current classification of CAPs as nondominant common carriers.<sup>29</sup> PacBell argues that PennAccess' legal analysis is flawed and that CAP services clearly are common carriage.<sup>30</sup>

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<sup>23</sup> Id. at n. 30; See First Report, 85 FCC 2d at 10-11; see also 47 C.F.R. §61.3(t).

<sup>24</sup> See, e.g., Application of Teleport Communications, New York, Memorandum Opinion and Order, File No. 13135-CF-TC-(3)-92, 7 FCC Rcd 5986, 5987 (para. 14) (1992).

<sup>25</sup> See 8 FCC Rcd at 1396, n.12; see also, Fifth Report, 98 FCC 2d at 1204, n.41.

<sup>26</sup> See 8 FCC Rcd 1398, para. 20; 47 U.S.C. §226(h).

<sup>27</sup> See PennAccess Comments at 1-6.

<sup>28</sup> We note that AdHoc proposes that the Commission establish a mechanism for allowing nondominant carriers to offer a portion of their services as private carriage. AdHoc Reply Comments at 17-21.

<sup>29</sup> PacBell Reply Comments at 11-13.

<sup>30</sup> PacBell also opposes AdHoc's proposal that seeks to permit nondominant carriers to withdraw a portion of common carrier capacity in order to provide private carriage. PacBell Reply Comments at 11-12; See also, Comments of Teleport Communications

11. With regard to cellular carriers, CTIA and others assert that the issue of whether cellular carriers should be classified as nondominant is currently before the Commission in a separate proceeding.<sup>31</sup> These commenters urge the Commission to apply the streamlined tariff regulation proposed in this proceeding to cellular carriers.

12. With regard to nondominant carriers providing operator services, APCC and GCI urge the Commission to permit nondominant operator service providers (OSPs) to file one tariff in satisfaction of the statutory requirements of both Sections 203 and 226(h) of the Communications Act.<sup>32</sup> These commenters contend that such a requirement would provide relief from the administratively burdensome, and unnecessary task of having different formatting and filing responsibilities solely for the provision of operator services.<sup>33</sup> Finally, the parties state that in the event the Commission requires OSPs to file two separate tariffs, it should, at a minimum, not subject the filing carrier to more than one filing fee.<sup>34</sup>

c. Discussion

13. As to the regulatory classification of CAPs, we stress that nothing herein should be construed to alter the existing legal or regulatory status of carriers with respect to the offering of private or common carriage, including competitive access providers. As stated, the purpose of this proceeding is to determine how best to implement tariffing requirements for existing nondominant common carriers, not to engage in more general analysis of what carriers or services fall within the common carriage classification. As such, we reaffirm our conclusion in the Notice that CAPs are nondominant carriers because they have not been previously declared dominant. We also note that to the extent a particular entity is not a common carrier, of course it need not file a tariff.

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Group, CC Docket No. 91-141, filed August 6, 1991.

<sup>31</sup> See, e.g., Century Comments 1-3; CTIA Comments at 2; McCaw Comments at 1-2; see also, CTIA Request for Declaratory Ruling and Petition for Rulemaking, RM 8179 (filed January 29, 1993) (Hereinafter CTIA Petition).

<sup>32</sup> See APCC Comments at 4-5; CompTel Reply Comments at 9; GCI Comments at 5.

<sup>33</sup> See APCC Comments at 4-5; CompTel Reply Comments at 9; GCI Comments at 5.

<sup>34</sup> Id.

14. With respect to cellular carriers, we reaffirm our tentative conclusion that the significantly streamlined requirements we adopt today are currently inapplicable to cellular carriers, as they were previously declared dominant in the Fifth Report.<sup>35</sup> Moreover, we also find that because the issue regarding the appropriate regulatory classification of cellular carriers is presently being addressed in a separate proceeding, it is preferable to address the issue in that context.<sup>36</sup>

15. Finally, we conclude that the rule changes proposed in the Notice should not operate to modify or reduce the requirements for nondominant OSPs subject to section 226(h) of the Communications Act. While we recognize that this may place some added administrative burdens upon nondominant OSPs offering operator services, we note that, as implemented, section 226(h) sets forth specific requirements for carriers' telephone operator service tariffs, including precise content and format requirements.<sup>37</sup> Nevertheless, we do not preclude carriers from filing one tariff for both operator and other services as long as the relevant requirements are met. While as a general matter, tariff filings that comply with the requirements set forth in section 226(h) will contain sufficient information to satisfy the form and content requirements we set forth today for previously forborne nondominant carriers, we note that unlike the informational tariffs applicable to operator services that may be filed without a public notice period, the tariff filings of previously forborne nondominant carriers will require a minimum of one day notice. Consequently, to the extent a nondominant carrier offers both operator and other services and chooses to file one

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<sup>35</sup> See Fifth Report, 98 FCC 2d 1191, 1204 (1984) recon., 59 Rad. Reg.2d (P&F) 543 (1985).

<sup>36</sup> See CTIA Petition, (filed January 29, 1993). In addition, we note that the Commission is also currently considering a petition for declaratory ruling filed by Global Communications, Inc. requesting that cellular carriers be required to file tariffs for their service offerings to ships at sea. See Global Communications, Inc. Petition for Declaratory Ruling, Public Notice, 8 FCC Rcd 2147 (1993) Likewise, we note the issue of whether radio common carriers are exempt from federal tariffing requirements by virtue of Section 221(b) of the Communications Act has been raised, and will be addressed, in another proceeding. See PacTel Paging Request for Declaratory Ruling, Public Notice, 8 FCC Rcd 2637 (1993); See also, PacTel Paging Comments at 4-6; Telocator Comments at 2-4; Two-Way Comments at 1.

<sup>37</sup> 47 U.S.C. § 226(h) (1988); Procedures for Filing Informational Tariffs by Operator Services Providers, Public Notice, 7 FCC Rcd 3335 (1992).

tariff that meets the form and content requirements of section 226(h) for both services, it must do so on not less than one day notice.

**B. Tariff Filing Requirements for NonDominant Carriers**

**1. Tariff Notice Requirements**

a. Background

16. Currently, tariff filings of interstate domestic nondominant carriers are presumptively lawful and must be filed on not less than fourteen days notice.<sup>38</sup> In the Notice, we proposed to reduce our existing notice requirements to require that tariff filings of nondominant carriers be made on not less than one day notice.<sup>39</sup> We tentatively concluded that the current fourteen day notice period would harm competition, and declared that a one day notice period should more effectively enable market forces to work and prevent competitors from reacting anticompetitively to tariffs before they become effective. We also tentatively concluded that the proposed one day tariff notice requirement is lawful,<sup>40</sup> and that it would not impose a barrier to the Commission's ability to fulfill its responsibilities under the Act.<sup>41</sup> We sought comment on the legal and public interest impact of such a change.

b. Comments

17. Most commenters generally support the proposed notice requirements. These parties maintain that the Commission has the legal authority to implement the one day notice period, and that it would serve the public interest.<sup>42</sup> Parties asserting that

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<sup>38</sup> See 8 FCC Rcd at 1397, para.14; First Report, 85 FCC 2d at 1. The notice requirement for nondominant carriers filing tariffs is stated in Section 61.58(b) of our rules. 47 C.F.R. §61.58(b). We also note that under our current streamlined rules, nondominant carriers do not have to file cost support information along with their tariffs. 47 C.F.R. §61.38. This order does not alter this rule.

<sup>39</sup> 8 FCC Rcd at 1398, para. 19.

<sup>40</sup> 8 FCC Rcd at 1398, paras. 17-18.

<sup>41</sup> See 8 FCC Rcd at 1398, para. 18.

<sup>42</sup> See, e.g., ALTS Comments at 5-7; APCC Comments at 5; AVIS Comments at 1; CNSUG Reply Comments at 2; CompTel Comments at 6; CTIA Comments at 1; Century Comments at 1; ELI Comments at 2-3; GE Americom Comments at 2-3; GTE Reply Comments at 8; GCI Reply Comments at 3; ITAA Comments at 2; LinkUSA Comments at 2-3; Locate

the Commission has sufficient legal authority to permit tariff filings upon one day notice cite section 203(b)(2) of the Act, which provides that the Commission, in its discretion and "for good cause shown," can modify the tariff notice provision so long as that period is not more than 120 days.<sup>43</sup> Commenters also rely upon Southern Motor Carriers Rate Conference v. U.S.<sup>44</sup> as support for adoption of one day notice.<sup>45</sup> Moreover, these commenters contend that the Commission was not ever and is not now statutorily obligated to perform any review of nondominant carrier tariff filings prior to the date they become effective.<sup>46</sup>

18. Parties advancing the public interest benefits of the one day notice rule state that the current fourteen day period inhibits the timely introduction of new services; inhibits rate reductions in response to other carriers' pricing; and creates additional costs and administrative burdens for carriers and the Commission.<sup>47</sup> They claim that permitting tariff filings to take effect upon one day notice would properly balance the Commission's statutory informational needs while also allowing carriers flexibility to respond to changing market conditions.<sup>48</sup> CAPs and others contend that one day notice serves the public interest because it would effectively limit the opportunity for dominant carriers to use the regulatory process to delay nondominant

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Comments at 5; MCI Comments at 5-6; SWB Comments at 15 MFS Comments at 8; McCaw Comments at 3; MMR Comments at 3; PacTel Comments at 6; Pilgrim Comments at 3-5; RCI Comments at 6; RGT Comments at 2; TRA Comments at 4; Teleport Comments at 1; Sprint Comments at 15-16; Telocator Comments at 7-8.

<sup>43</sup> See, e.g., ALTS Comments at 5; APCC Comments at 5; GTE Reply Comments at 7-9; GCI Reply Comments at 3-4; ITAA Comments at 2; LOCATE Comments at 5-6; MCI Comments at 12; MFS Comments at 8-10; MMR Comments at 5; RCI Comments at 6-7; Sprint Comments at 15; Telocator Comments at 7; SWB Comments at 15.

<sup>44</sup> Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985) [hereinafter, Southern Motor Carriers]

<sup>45</sup> See, e.g., MFS Comments at 8, n. 14; MMR Comments at 4.

<sup>46</sup> See, e.g., ALTS Comments at 5 n.10; MMR Reply Comments at 4-5; SWB Comments at 15; GCI Reply Comments at 2.

<sup>47</sup> See, e.g., GCI Comments at 2; Ameritech Comments at 5.

<sup>48</sup> See, e.g., Ameritech Comments at 5.

carriers' price changes.<sup>49</sup> Nondominant carriers also argue that there is no risk in adopting a one day notice rule, since, by definition, carriers without market power cannot successfully charge excessive rates, engage in unlawful behavior or otherwise violate the Act.<sup>50</sup> Finally, some commenters state that since the Commission lacks the resources to effectively monitor tariff filings made within the current fourteen day notice period, the alternative of reducing the period to the proposed one day notice would make no difference.<sup>51</sup>

19. On the other hand, commenters opposing the one day notice proposal argue that it is inconsistent with the Act.<sup>52</sup> NYNEX contends that the one day rule would unlawfully prevent review of tariffs before they become effective, and that the Section 208 complaint process is not an effective alternative substitute for reviewing tariffs before they become effective.<sup>53</sup> MMR adds that a one day notice period for rate increases would also frustrate the intent of Section 203(b) which requires public notice of such rate increases.<sup>54</sup> Sprint asks the Commission to retain the current fourteen day notice period since it finds the notice requirement neither a burden nor an impediment to its ability to compete in the marketplace.<sup>55</sup>

20. Telecommunications users and user groups urge the Commission to modify the one day notice proposal because they claim that in light of the "filed rate" doctrine, the one day rule would permit tariffs that abrogate existing long-term service arrangements to become effective prior to the user knowing of the

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<sup>49</sup> See, e.g., Ad Hoc Comments at 3; MFS Comments at 9-10; ALTS Comments at 6-7.

<sup>50</sup> See, e.g., ALTS Comments at 3; GTE Reply Comments at 8; GCI Reply Comments at 3.

<sup>51</sup> See, e.g., MFS Comments at 5, 8-9; SWB Reply Comments at 9.

<sup>52</sup> See, e.g., ABC/NBC Comments at 3; AdHoc Comments at 10; AirInc Comments at 8; GSA Comments at 7; NYNEX Comments at 5-8; MMR Comments at 3-5; PacBell Comments at 10.

<sup>53</sup> NYNEX Comments at 9-11.

<sup>54</sup> MMR Comments at 5.

<sup>55</sup> Sprint Comments at 15.

tariff's existence.<sup>56</sup> These parties propose several modifications to the one day notice rule along with additional tariffing requirements that they assert will address their concerns. These proposals include requiring carriers to "flag" tariff filings that abrogate existing service contracts; requiring carriers to notify customers if filed tariffs materially alter the provisions of existing contracts; extending the notice period for tariff filings that are inconsistent with an underlying service contract to either 14, 15 or 120 days; requiring carriers to demonstrate "substantial cause" for tariff filing; requiring the Commission to suspend any tariff that abrogates an existing service contract; and allowing users to terminate abrogated contracts without liability.<sup>57</sup>

c. Discussion

21. We now affirm our tentative conclusion that the public interest is served by permitting domestic nondominant carriers to file their interstate tariffs on not less than one day notice. We find that the costs of retaining the fourteen day notice period for the interstate tariff filings of nondominant carriers exceed any benefits which might exist. Consequently, we will permit nondominant carriers to file their interstate tariffs on one day notice. Moreover, in light of the competition among nondominant carriers and nondominant carriers' lack of market power, we further hold that such tariffs shall be presumed lawful.

22. Based upon the record developed herein, we conclude that, in the absence of permissive detariffing, a one day notice period for nondominant carrier tariff filings will best serve the public interest. We agree with those parties that state that the current notice period imposes direct and indirect costs on consumers by delaying the availability of new services and price reductions, and by distorting the competitive marketplace in general.<sup>58</sup> In particular, the record demonstrates that the current fourteen day notice rule, with its attendant regulatory delays and uncertainty, could potentially lessen a nondominant carrier's

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<sup>56</sup> See, e.g., ABC/NBC Comments at 3-6 ; AirInc Comments at 3-4; Citicorp Reply Comments at 2-3; GSA Reply Comments at 4-5; TCA Comments at 3; TSG Comments at 2-6. Under the "filed rate" or "tariff precedence" doctrine, tariffed rates are deemed to be the controlling legal rate. See also, Maislin Industries v. Primary Steel, Inc., 497 U.S. 116 (1990) [hereinafter, Maislin].

<sup>57</sup> See GSA Comments at 4-5; Ad Hoc Comments at 8; ICA Comments at 2; AirInc Comments at 7; TCA Comments at 9; Citicorp Reply Comments at 2-8; ABC/NBC Comments at 4-8.

<sup>58</sup> See, e.g., ALTS Comments at 6-7; GCI Reply Comments at 3-4; MMR Comments at 3-4; AT&T Comments at 16-17; SWB Comments at 16; MCI Comments at 5-6; MFS Comments at 9; GTE Reply Comments at 8.

incentive to initiate pro-consumer price and service changes. Thus, we agree that the fourteen day notice period can inhibit price competition due to the opportunity for competitors to develop a competitive response prior to the time the tariff would become effective.

23. Finally, contrary to the conclusion we reached for further streamlined services provided by AT&T,<sup>59</sup> which remains a dominant carrier, we conclude that given the growth in market and service offerings and the significant competition that has developed since the adoption of the Commission's Competitive Carrier decision, advance scrutiny of the interstate tariffs of nondominant carriers is unnecessary to protect the public interest.<sup>60</sup> As we stated in the Notice, since the streamlined rules have been in place, we have never invoked our statutory discretion to suspend and investigate nondominant carrier tariffs prior to their taking effect, and have only once rejected a nondominant carrier tariff.<sup>61</sup> We find that because by definition nondominant carriers cannot exercise market power, unlawful tariffs should be rare, and in those few instances in which they may occur, remedial action can be taken after the tariffs become effective.<sup>62</sup> Moreover, we note that aggrieved parties can still avail themselves of the Commission's complaint process to seek a determination of the lawfulness of any nondominant carrier tariff filing.<sup>63</sup> In addition, the one day notice period would not preclude the Commission from investigating and finding unlawful any tariff after it is filed.

24. We also conclude that the Commission has sufficient legal authority under section 203(b)(2) of the Act to authorize a one day notice period for nondominant carrier tariff filings.<sup>64</sup>

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<sup>59</sup> Interexchange Order, 6 FCC Rcd 5880, 5894, paras. 73-74.

<sup>60</sup> See Second Report at 65, 69; see also, Notice at 1396-97, para. 10.

<sup>61</sup> See Notice at 1397, para. 14.

<sup>62</sup> See 47 U.S.C. §§205 and 208. Accordingly, we do not find, as alleged by certain parties, that the complaint process, by itself, is an inadequate alternative to pre-effective tariff review. See NYNEX Comments at 9-11.

<sup>63</sup> 47 U.S.C. §208 (1988).

<sup>64</sup> See AT&T v. FCC, 503 F.2d 612, 615 (1974) ("...Section 203 (b) clearly provides that the FCC has the power to "modify" the notice requirement.") Significantly, while not controlling, we note that to the extent any court has passed upon a one day notice proposal, it has been permitted. Thus, in Southern Motor Carriers, supra, the court recognized that a "changed competitive situation"

Under Section 203(b)(2) the Commission is specifically granted authority to "modify" the notice requirements for tariff filings "upon good cause shown" either in "particular instances or by general order applicable to special circumstances or conditions." We believe that given nondominant carriers' lack of market power, as well as the substantially increased competition in relevant telecommunications markets, sufficient good cause exists to permit the Commission to modify the Commission's notice requirements and allow nondominant carrier tariffs to become effective on one day notice.

25. We are also not persuaded that the possibility of abrogating contracts under the "filed rate" doctrine warrants a longer notice period.<sup>65</sup> Although we are cognizant of the concerns raised by telecommunications users regarding the abrogation of existing contracts when carriers file tariffs, we believe that in light of the robust competition that has emerged in the telecommunications marketplace in the past decade as well as the nondominant carriers' lack of market power, it is highly unlikely that nondominant carriers would unilaterally raise contract rates in tariff filings. As the carriers themselves have noted, any carrier choosing to alter materially an existing long-term service arrangement through the tariff process, without first consulting the user, would risk harming its reputation and position in the competitive telecommunications marketplace. Moreover, we believe that large telecommunications users that usually negotiate such long-term service arrangements possess sufficient leverage in the market to discourage nondominant carriers from choosing a course of conduct harmful to the users' interests. With respect to the ability of users to be relieved of liability for the termination of contractual arrangements if a tariff is subsequently filed that unduly harms users, we expect that the changed regulatory circumstances will be a factor parties take into account when they are negotiating contracts. Further, we are prepared to resolve issues regarding the liability of users in such circumstances on a case by case basis. While we do not believe it is necessary to adopt a longer notice period than one day or to require automatic

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could provide sufficient legal justification for changing notice requirements and adopting a one day notice requirement for reduced rates under the Interstate Commerce Act (ICA). Although the ICC determined that seven days notice was appropriate in that case for rate increases, we reiterate that in light of the above-referenced competition in the telecommunications market and the lack of market power by nondominant carriers, pre-effective tariff review, even for rate increases, is not necessary in the instant situation.

<sup>65</sup> See *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990), citing *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915). See also, *American Broadcasting Company, Inc. v. FCC*, 643 F.2d 818 (D.C. Cir. 1980).

suspension of filings that alter contract rates, for the reasons given above, we do expect carriers to provide advance notice to customers prior to filing tariffs that will substantially alter the rates, terms, or conditions set out in contracts.

26. Moreover, we note that our proposed one day notice requirement would have no new effect upon any pre-existing long-term service contract. As a matter of law, under the filed rate doctrine, such contractual arrangements between carriers and users could always have been superseded by a subsequent tariff filing.<sup>66</sup> Further, even carriers that were previously subject to the Commission's forbearance rules were permitted to file tariffs if they so chose.<sup>67</sup> Thus, telecommunications users have historically faced and continue today to face the potential risk that a carrier could choose to file a tariff that alters a pre-existing long-term service contract. We will, of course, carefully examine, in post-effective tariff review, any petitions from users challenging the reasonableness of any substantial alterations, and could find them unlawful. Finally, we stress that should carriers choose to file tariffs that supersede a contractual provision, users may freely contest whether the tariff is just and reasonable under our complaint process and be made whole through an award of damages if appropriate.<sup>68</sup>

## 2. Tariff Content Requirements

### a. Background

27. In the Notice, we proposed to further reduce the tariff filing burdens on nondominant carriers by limiting the necessary information required in a tariff filing to include only information required under §203(a) of the Communications Act.<sup>69</sup> In addition, we specifically proposed to allow affected nondominant carriers to state in their tariffs either a maximum rate or a range of rates.<sup>70</sup> We solicited comment on the lawfulness of these

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<sup>66</sup> Thus, we decline to alter current standards regarding the liability of users that seek to terminate abrogated contracts.

<sup>67</sup> MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1195-96 (D.C. Cir. 1985).

<sup>68</sup> See 47 U.S.C. §208.

<sup>69</sup> See Notice at 1397, para 21.

<sup>70</sup> In the Notice, we stated that our proposed rule changes do not alter the existing rule that nondominant carriers filing tariffs are not required to file cost support information along with their tariffs. 8 FCC Rcd at 1398, n. 39; 47 C.F.R. §61.38.

proposals, including whether they comply with Section 203(a) of the Act.

b. Comments

28. Many commenters endorse the Commission's rate proposals and state that, if adopted, these policies would serve the public interest.<sup>71</sup> For instance, TRA and TCA claim that maximum rate or range of rate tariffs would minimize the costly administrative burdens imposed on small carriers by current tariffing requirements and would also ease the Commission's burdens.<sup>72</sup> LinkUSA contends that permitting small carriers to state in their tariffs a range of rates would greatly reduce their filing fee expenses.<sup>73</sup> Moreover, some parties assert that allowing carriers to publish a maximum tariff rate will foster an environment among carriers where flexibility for rates, terms, and conditions for telecommunications services will be quickly offered to the customer.<sup>74</sup>

29. Commenters that support the proposed maximum rate and rate range proposal contained in the Notice argue that the Commission has the requisite legal authority to implement this proposal.<sup>75</sup> These parties contend that maximum rate and range of rate tariffs would comply with Section 203's statutory requirements because such tariffs would "specify" that charges may fall below a specific rate or within a zone of rates and that no customer

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<sup>71</sup> See, e.g., SBA Comments at 6; Ameritech Comments at 5; Ad Hoc Comments at 2-4; MCI Comments at 2-4; ALTS Comments at 2-4; AirInc. Comments at 2-4; Avis Comments at 4 n.8; CTA Comments at 3-5; LOCATE Comments at 4; MFS Comments at 3-7; GCI Comments at 2.

<sup>72</sup> TCA Comments at ; TRA Comments at 4.

<sup>73</sup> LinkUSA Comments at 3-4.

<sup>74</sup> TRA Comments at 4-5.

<sup>75</sup> See, e.g., AdHoc Comments at 6-7; ALTS Comments at 8-9; GCI Comments at 12; GTE Reply Comments at 10; ITAA Comments at 3-6; McCaw Comments at 3-4; MCI Comments at 8, 14-15; MFS Comments at 10; Pactel Paging Comments at 9-11; RCI Comments at 6; RGT Comments at 2-3; Small Business Administration Comments at 7-8; Sprint Comments at 3-4; Teleport Comments at 2; TRA Comments at 5. BellSouth and Southwestern Bell additionally support this proposal to the extent it is applied equally to all carriers of like competitive services. See, BellSouth Comments at 6-8; SWB Comments at 16-17.

would be charged a rate above the maximum or outside the zone.<sup>76</sup> Commenters also state that Section 203(b)(2) gives the Commission the authority to modify the requirements of Section 203 in its discretion and upon good cause shown, including the degree of specificity of a tariffed rate.<sup>77</sup> Moreover, MCI and Sprint contend that, contrary to AT&T's assertion, judicial precedent interpreting Section 203(b) supports the Commission's authority to modify the requirements of Section 203(a) regarding the information that carriers must provide on charges in their tariffs.<sup>78</sup> In this regard, CTIA also asserts that the D.C. Circuit Court has previously endorsed range of rate tariff filings and contends that such precedent is relevant here because section 203 of the Communications Act is similar to the Natural Gas Act under consideration in that case.<sup>79</sup> Additionally, GTE contends that the Commission can implement its maximum rate or range of rates proposals, but notes that Section 203 must be interpreted in conjunction with Sections 201 and 202 of the Act so that any charges filed under a maximum rate or range of rate tariff must still be just and reasonable and nondiscriminatory.<sup>80</sup>

30. On the other hand, several dominant carriers and other commenters assert that the Commission's proposal to permit nondominant carriers to establish rates in their tariffs as a maximum or within a range of rates is unlawful.<sup>81</sup> For example, according to AT&T, several judicial decisions significantly limit the Commission's discretion under Section 203(b)(2) to modify

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<sup>76</sup> See, e.g., MCI Comments at 14-15; Sprint Comments at 5-7.

<sup>77</sup> Sprint Comments at 5, citing 47 U.S.C. §203(b)(2) (1988).

<sup>78</sup> See, e.g., MCI Comments at 10-15; Sprint Comments at 4-6. The parties contend that the only two limitations imposed by the courts on the Commission's Section 203(b)(2) modification authority is that it may not: a) limit the statutory scheme of carrier-initiated rates or b) eliminate the tariff filing requirement in its entirety. See also, Sprint Reply Comments at 5.

<sup>79</sup> CTIA Comments at 4 citing Associated Gas Distributors v. FERC, 824 F.2d 981, 1007 (D.C. Cir. 1987) [hereinafter Associated Gas]. See also, 15 U.S.C. §§ 717(c), 717(d); MCI Comments at 10-11.

<sup>80</sup> GTE Reply Comments at 10.

<sup>81</sup> See, e.g., Allnet Reply Comments at 1; AT&T Comments at 3; Bell Atlantic Comments at 8; GSA Comments at 7; NYNEX Comments at 5; PacBell Comments at 10.

existing tariffing requirements.<sup>82</sup> Furthermore, AT&T and others contend that the Commission's proposal to permit carriers to file a range of rates or maximum rates would effectively dispense with the tariff filing requirements of the Act and would thus exceed the Commission's authority.<sup>83</sup> They claim that a tariff containing a range of rates or a maximum filed rate violates the requirements of Section 203 since it would not constitute a "specified" charge as contemplated under the statute.<sup>84</sup> Moreover, AT&T and NYNEX maintain that if nondominant carriers are permitted to file tariffs that do not show a specific schedule of charges, it will be difficult for the Commission to monitor compliance with the nondiscrimination provisions of Section 202 of the Act.<sup>85</sup> Ameritech proposes that the Commission should require nondominant carriers to file all customer contracts containing specific prices so that it does not run afoul of the statutory requirements of section 203.<sup>86</sup>

31. Other parties also argue that our proposed tariff content requirements would not serve the public interest.<sup>87</sup> For instance, GSA maintains that the proposed maximum rate or range of rate tariff filings would be unresponsive and counterproductive to the objective of providing consumers with sufficient information in which to make informed business decisions in the marketplace.<sup>88</sup>

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<sup>82</sup> See AT&T Reply Comments at 2-8, citing American Telephone and Telegraph v. FCC, 978 F.2d 727 (D.C. Cir. 1992); MCI Communications Corp. v. FCC, 765 F.2d 1186 (1985). See also, AT&T Comments at 7-8 citing Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) (hereinafter Regular Common Carrier Conference), accord Maislin.

<sup>83</sup> AT&T Reply Comments at 4; Bell Atlantic Reply Comments at 4; PacTel Comments at 11-14.

<sup>84</sup> See AT&T Comments at 6-7; NYNEX Comments at 6; Bell Atlantic Comments at 8-9; NYNEX Comments at 6-8.

<sup>85</sup> AT&T Comments at 4; NYNEX Comments at 7.

<sup>86</sup> Ameritech Comments at 11-13.

<sup>87</sup> See, e.g., Bell South Comments at 3-6; AT&T Comments at 13; GTE Reply Comments at 3-7; USTA Comments at 4-5; Bell Atlantic Comments at 5; PacBell Reply Comments at 3-8.

<sup>88</sup> See GSA Reply Comments at 9-10. GSA states that in order to address this concern, the Commission should require, at a minimum, that all nondominant tariff filings include the same information contained in AT&T's tariffs, as required by the Commission's Interexchange Proceeding.

c. Discussion

32. On the basis of the record, we find that amending traditional tariff content requirements for previously forborne nondominant carriers would provide numerous benefits to the public. As several commenters indicate, allowing nondominant carriers the flexibility to submit tariffs that provide for a reasonable range of rates will reduce the tariff revision costs and the concomitant administrative burdens normally associated with the preparation and filing of new rate schedules for each minor revision occurring under our current requirements. We would expect that the rates charged by such nondominant carriers will reflect these reduced costs in the services offered to the consumer. Moreover, we affirm our tentative conclusion in the Notice and find that providing nondominant carriers with substantial flexibility should promote competition by enabling these carriers to respond immediately to changed market conditions. Further, we find that consumers and taxpayers will also likely experience the corresponding benefits of lower administrative costs to the Commission and carriers in light of the reduced number of tariffs requiring processing. Consequently, we now amend our rules to permit affected domestic nondominant carriers to file tariffs including either a fixed rate or a reasonable range of rates. In this regard, we believe that, on balance, the public interest would be best served by permitting nondominant carriers to state in their tariffs either a range of rates or fixed rate, instead of a maximum rate as proposed in our Notice.

33. We further find that we have sufficient authority under the Communications Act to permit nondominant carriers to include in their tariffs either fixed rates or a reasonable range of rates. We conclude that this tariff content requirement is consistent with section 203 of the Act, and will not interfere with our overall ability to monitor compliance with the nondiscrimination provisions of section 202 of the Act.<sup>89</sup>

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<sup>89</sup> Several parties urge the Commission to permit nondominant carriers to reference in their tariffs the schedules and rates of other carriers' tariffs. See e.g., Avis Comments at 7; LinkUSA Comments at 5; McCaw Comments at 5; PacTel Paging Comments at 9; RCI Reply Comments at 5-6. We do not modify section 61.74 of our rules, which prohibits tariff publications to make references to any other tariff publication or to any other documents or instruments. Carriers may continue, however, to seek waivers of this provision upon a proper showing and such waivers will of course be granted if it so serves the public interest. See 47 C.F.R. §1.3; see e.g., Pegasus Cellular Telephone Company, Inc., Application No. 1, Special Permission No. 93-653 (August 3, 1993); South Carolina Net, Inc., Application No. 1., Special Permission No. 93-510 (June 18, 1993).

34. Pursuant to section 203(a), every common carrier is required to file "schedules showing such charges for itself" as well as "showing the classifications, practices, and regulations affecting charges." We conclude that, while section 203(a) clearly sets forth this minimum requirement, the Commission has discretion regarding the manner in which such schedules shall set forth their rates, including the type and content of information that carriers must file. Accordingly, we find that by stating a reasonable range of rates or a fixed rate, nondominant carriers would be sufficiently disclosing their charges as required by section 203 because any interested member of the public would be able to discern, by examining the tariff filing, the reasonable zone of rates within which the customers would be charged.

35. Our conclusion in this regard is further supported by the Commission's express authority under section 203(b) to modify the requirements of section 203, either in particular instances or by general order.<sup>90</sup> The Court of Appeals for the Second Circuit has specifically held that section 203(b) of the Communications Act permits the Commission to "modify requirements as to the...information contained in, tariffs..."<sup>91</sup> While the courts have held that this modification authority does not permit the Commission to eliminate the tariffing requirement altogether,<sup>92</sup>

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<sup>90</sup> On July 7, 1993, the U.S. District Court for the District of Columbia issued a preliminary injunction directing MCI to comply with a Commission order that interprets the interstate tariff filing requirements of section 203 of the Communications Act. See AT&T v. MCI, 8 FCC Rcd 3202 (1993) [hereinafter May 4 Order]. We note, however, that while the court held that MCI did not comply with the requirements of section 203, as then interpreted by the Commission, the court did not preclude the Commission from modifying section 203 pursuant to section 203(b) of the Communications Act. See AT&T v. MCI, 1993 U.S. Dist. Lexis 9084, Case No. 93-1147, (D.C. D.C. July 7, 1993) Motion for Reconsideration pending, filed July 19, 1993; see also May 4 Order. In fact, it was conceded by petitioners that should the FCC "...in the future seek to ease existing requirements and enter[s] an order that survives appellate review, then the law will change ...." AT&T v. MCI, Case No. 93-1147 (D.C. D.C. 1993) Transcript of Proceedings at 14.

<sup>91</sup> See American Telephone and Telegraph Co. v. FCC, 503 F.2d 612, 617 (2d Cir. 1974) (hereinafter Enlarged Notice) citing American Telephone and Telegraph Co. v. FCC, 487 F.2d 864, 879 (2d Cir. 1973) (hereinafter Special Permission).

<sup>92</sup> See MCI v. FCC, 765 F.2d 1186 (1985); see also, AT&T v. FCC, 978 F.2d 7272 (D.C. Cir. 1992).

we believe that Commission is permitted, as here, to modify the specific content requirements of tariffs."<sup>93</sup>

36. We also find unpersuasive the suggestion that section 203 confers no greater power to modify tariff content requirements than that granted to the ICC under a similar ICA provision.<sup>94</sup> Although courts sometimes find the ICA's language instructive when construing the Communications Act, it has been made clear that "the FCC should not be restrict[ed]...to a course of action that has been dictated by the requirements of the transportation industry."<sup>95</sup> In fact, the fundamental statutory structures of the ICA and the Communications Act differ in significant respects. In particular, the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA -- 49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the "requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in section 203(c)) that motor carriers "shall provide...transportation only if the rate for the transportation or service is contained in a tariff..."<sup>96</sup> By contrast, the modification authority contained in Section 203(b) applies, by its terms, to that requirement as well.

37. Significantly, the Commission has in the past held that its own modification authority may differ from that granted to the ICA.<sup>97</sup> Moreover, we note that while the ICC has at times

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<sup>93</sup> Thus, we do not conclude that the Commission's section 203(b) modification authority has been eviscerated by the courts. See AT&T Reply Comments at 3-4, n.5.

<sup>94</sup> See AT&T Comments at 8-9.

<sup>95</sup> Report and Order, 7 FCC Rcd 8072, 8076 (Citing General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971). See also AT&T v. FCC, 503 F.2d 612, 616-17 (2nd Cir. 1974) (Section 203 of the Communications Act is "not...a carbon copy of the Interstate Commerce Act.").

<sup>96</sup> We note that it was for this reason the court struck down the ICC's tariff content rule in Regular Common Carrier Conference. See Regular Common Carrier Conference v. U.S., 793 F.2d 376, 379.

<sup>97</sup> Enlarged Notice at 616-617. Similarly, while we note that the courts have upheld rate range rules as adopted by the Federal Energy Regulatory Commission when such rules required all rates below the maximum rate to be filed thereafter, we do not believe the FCC is required to adopt such an approach. Associated Gas

rejected proposed tariffs containing a range of rates, it has also found that tariffs containing a range of rates have had positive effects on the marketplace.<sup>98</sup> We also find that unlike the range of rate tariffs rejected in Regular Common Carrier Conference, where the court found that it was impossible to determine any rate from the face of the tariff, under the rules we adopt today permitting a reasonable range of rates, carriers are required to set forth a specified reasonable range of rates so that the zone of rates could be determined from the face of the tariff.<sup>99</sup>

38. We also disagree with those commenters that argue that our proposed tariff content rules would negate the nondiscrimination provisions of section 202(a) of the Act. Section 202(a) of the Act provides: "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service..."<sup>100</sup> Of course, tariffs must not contain rates or practices that are unreasonably discriminatory in connection with like services. Significantly, the Commission has found in the Competitive Carrier proceeding that carriers lacking market power, such as the nondominant carriers affected here, are presumptively unable to engage in unreasonable discrimination.<sup>101</sup> Pre-effective tariff

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Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988). In light of the likely lack of ability of nondominant carriers to engage in unreasonable discrimination and to charge unreasonable rates, we believe it is unnecessary in the communications context to adopt such a reporting system. Of course, the Commission retains the authority to obtain additional information from carriers regarding the precise rates charged should it be deemed necessary. See, e.g., Section 218, 47 U.S.C. §218.

<sup>98</sup> Regular Common Carrier Conference--Petition for Declaratory Order--Range of Discounts and Customer Account Codes, 8 I.C.C. 47 (1991); Range Tariffs Of All Motor Common Carriers--Show Cause Proceeding, 1992 Lexis 301 (December 23, 1992).

<sup>99</sup> The court in Regular Common Carrier Conference set aside an ICC order that permitted freight forwarders subject to tariff regulation to provide services to shippers at unpublished rates determined by averaging prior charges to shippers. The court held that it impossible to determine from the face of the tariff either what the charged rate was, or what method was used to determine the specified rate. See Regular Common Carrier Conference, 793 F.2d 376 (D.C. Cir. 1986).

<sup>100</sup> 47 U.S.C. Sec. 202(a).

<sup>101</sup> First Report and Order at 21, 31.

review for nondominant carriers is therefore replaced by the competitive market which properly controls the tariff rates and structures proposed by such carriers. Moreover, we stress that the Commission retains its authority to investigate existing tariffs after they take effect and to find them unlawful, and retains its authority under section 208 to entertain complaints and act accordingly.<sup>102</sup>

### **3. Tariff Form Requirements**

#### **a. Background**

39. In the Notice, we tentatively concluded that existing tariff form requirements applicable to nondominant carriers, as adopted in Competitive Carrier, are unnecessary.<sup>103</sup> We stated that since existing requirements were generally designed for dominant carriers, they may be overly burdensome in light of the less stringent tariff review standard used to evaluate nondominant carrier filings. Consequently, we proposed to simplify our existing form requirements for tariffs of nondominant carriers. Specifically, we proposed to: a) require that nondominant carrier tariffs and any updates to those tariffs be filed on three and one half inch floppy diskettes; b) simplify the requirements for formal transmittal letters; c) require carriers to indicate in their tariffs, in whatever way they prefer, that new or changed material is present; and d) permit carriers to state, in any form, tariff charges and classifications, practices and regulations affecting such charges as required under Section 203(a) of the Act. We invited parties to comment on the proposals set forth above and solicited additional comment on any other alternative means to reduce the administrative burdens on nondominant carriers.

#### **b. Comments**

40. On the whole, commenters generally express support for the proposed tariff form requirements for nondominant carriers enumerated in the Notice.<sup>104</sup> Several commenters assert that the

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<sup>102</sup> See 47 U.S.C. §208.

<sup>103</sup> See 8 FCC Rcd at 1397, para. 12.

<sup>104</sup> See, e.g., AdHoc Comments at 6-10; ALTS Comments at 8-9; Ameritech Comments at 3; Century Comments at 10; ELI Comments at 3; GCI Comments at 3-5; ITAA Comments at 4-6; LinkUSA Comments at 4-7; McCaw Comments at 12-13; MCI Comments at 9-17; MFS Comments at 11; PACTel Comments at 8-15; Pilgrim Comments at 1; RCI Reply Comments at 6; RGT Comments at 1; SBA Comments at 8-10; Sprint Comments at 11-15; TCA Comments at 6; Teleport Comments at 1; TRA Comments at 6.

proposed form requirements would help to reduce both the expense and administrative burdens associated with new tariff filings, by providing nondominant carriers with the significant flexibility in composing such tariffs.<sup>105</sup> Commenters also maintain that the Commission has the legal authority under Sections 203 and 4(i) of the Communications Act to adopt its tariff form proposals.<sup>106</sup>

41. Certain commenters did object, however, to the particular format proposed. For example, GSA, Sprint, and TRA object to the Commission's proposal to establish Word Perfect 5.1 as the word processing standard for all nondominant tariff filings and contend that since many carriers do not currently use the Word Perfect word processing program, they would have to incur a significant expense to convert to that format.<sup>107</sup> They propose that carriers be allowed to provide floppy diskettes in the American Standard Code for Information Interchange (ASCII) format, which the Commission could then easily decode and convert into a Word Perfect document.<sup>108</sup> Sprint also urges that the current format of tariff transmittal letters should be retained because it serves as a valuable guide to changed tariff information.<sup>109</sup> Moreover, some parties state that carriers should be given the option of either continuing to file tariffs under the existing paper format or filing under the floppy diskette format.<sup>110</sup> Finally, GSA urges the Commission to require carriers to file tariffs on an electronic bulletin board service (BBS) and to allow the general public access to that BBS.<sup>111</sup>

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<sup>105</sup> For example, APCC and LinkUSA state that such added flexibility would reduce the substantial costs of the consultants and attorneys usually needed to assist in complying with the statutory tariff filing requirements, as well as paper and weight-based shipping costs. APCC Comments at 6; LinkUSA Comments at 5.

<sup>106</sup> See, e.g., AT&T Comments at 14-15; GCI Comments at 3-5; MCI Comments at 9-10.

<sup>107</sup> See GSA Reply Comments at 12; Sprint Comments at 12; TRA Comments at 6.

<sup>108</sup> Id.

<sup>109</sup> Sprint Comments at 14.

<sup>110</sup> See, e.g., GTE Reply Comments at 9; Sprint Comments at 12; TRA Comments at 6. TRA also contends that should the Commission adopt this proposal, the FCC should reduce the existing \$490 filing fee for floppy diskette filings and maintain the current fee structure for paper filings. TRA Comments at 6.

<sup>111</sup> GSA Reply Comments at 13-14.