

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Tariff Filing Requirements for
Nondominant Carriers

)
) CC Docket No. 93-36
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**Comments of the
INFORMATION INDUSTRY ASSOCIATION**

The Information Industry Association ("IIA") hereby files these comments in the above-captioned proceeding in response to a Petition for Partial Reconsideration filed by the Ad Hoc Telecommunications Users Committee ("Ad Hoc"). IIA earlier had offered brief comments related to this proceeding after a ruling by the D.C. Circuit found that the Commission's "forbearance" rule violated section 203 of the Communications Act by permitting non-dominant carriers, e.g., MCI, to offer services on an untariffed basis.(1) At that time, the Association offered no opinion about the D.C. Circuit's disapproval of the Commission's "forbearance" policy.(2) However, IIA expressed concern that contract confidences could be breached unnecessarily. IIA views the instant Ad Hoc petition as indicative of the real concerns in the information industry about the viability of contractual arrangements in the current regulatory environment and supports the Ad Hoc petition for reconsideration of these important issues.

IIA is a trade association representing some 500 companies pursuing business opportunities associated with the creation, distribution and use of information. Since 1968, IIA has grown to include entrepreneurs and established companies that use a wide range of communications media, including local exchange and interexchange carriers, to distribute information worldwide.

(1)Comments of the Information Industry Association, AT&T Communications, Complainant v. MCI Telecommunications Corporation, Defendant, File No. E-89-297 (May 21, 1993).

(2)AT&T v. FCC, 978 F2d 727 (D.C.Cir. 1992) (rehr'g den. Jan. 21, 1993).

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IIA's member companies are engaged in long- and short-term contractual arrangements with a variety of carriers responsible for the delivery of their enhanced service products. Whether these products consist of online information, data management or other services, many IIA members have found competitive and business advantages in agreeing to non-tariffed, private contracts. These contracts form the important foundation upon which companies rely for their marketing, pricing and operations. The confidentiality of these contracts, as a normal course of doing business, gives many companies the assurance that they have unique product arrangements to meet their needs, and those of their customers, in ways which critically differentiate them from their competitors.

As IIA has argued in the past, providers in the information industry remain dependent on telecommunications providers for the most ubiquitous, effective and cost efficient means of delivering services. Although other distribution methods are possible, the use of the existing telecommunications infrastructure represents an ease of use, timeliness and market penetration that is not equaled by other methods. The very nature of information service products necessitates their delivery via a telecommunications network which is prompt, reliable and cost-efficient.

IIA believes that the concerns expressed by Ad Hoc are legitimate and substantial. The petition demonstrates how the absence of enforceable contracts in unregulated markets threatens business. IIA agrees that "unless the Commission acts...sophisticated users will have a strong disincentive against doing business with many non-dominant carriers. And unsophisticated users are likely to face situations in which non-dominant carriers flout what the users thought were firm commitments."(3)

(3)Ad Hoc Telecommunications Users Committee, Petition for Partial Reconsideration, Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, page 2 (Sep. 22, 1993).

Absent Commission action, telecommunications transmission facilities will remain the only component of successful information service offerings over which information providers lack full contractual control. Information providers can successfully contract with their employees, information sources, equipment manufacturers, office buildings and even billing and collection agents. However, under the current regulatory situation, a nondominant carrier need only file a superseding tariff in order to abort a preexisting contract. The information provider is left with little recourse to ensure the continued delivery of its services and would likely have no choice but to acquiesce to the new tariff terms — no matter how unfair.

Indeed, because in today's marketplace many telecommunications providers also offer enhanced and information services on their own, there are additional incentives to abrogate contracts. The primacy given to tariff filings offers a regulatory shield that could tempt telecommunications carriers to breach contracts in circumstances which would harm their competitors.(4)

IIA encourages the Commission to accept the Ad Hoc petition for reconsideration and to weigh carefully the proposals it contains. Information providers should have more than one day's notice of proposed tariff filings, and this notice should require disclosure and evaluation of preexisting contracts which might be jeopardized. The Commission should extend the effective date of tariff adoption, and mandate suspension and investigation of tariffs which substantially contradict existing contracts. Finally, the Commission should require a high standard of justification to permit abrogation of any contract and allow any detrimentally affected customer the opportunity to terminate its commitment without liability.

(4)See Ad Hoc Petition, page 5.

Information providers enter into contract arrangements anticipating good faith and full performance. This expectation is frustrated by a loophole that would render the contract null and void by the mere submission of a tariff. The public interest will be served best if carriers bear a heavy burden to prove the justifiability of filing a tariff in contradiction to an existing contract.

Ultimately, the issues facing the Commission in this proceeding are complex and difficult to resolve. IIA previously has urged that the Commission preserve the confidentiality of any contracts entered during the pendency of its "forbearance" policy in order to avoid damage or other awards that would affect the financial viability of carriers. We also urged the Commission not to place any liability on end users. Today, we join Ad Hoc in encouraging the Commission to act further to ensure that these contracts not become the victims of usurping tariffs introduced primarily for the purpose of contract abrogation and unfair competitive advantage.

Respectfully submitted,



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