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

OCT 29 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Tariff Filing Requirements )  
for Nondominant Common Carriers )

CC Docket No. 93-36

To the Commission:

COMMENTS OF AERONAUTICAL RADIO, INC.

Aeronautical Radio, Inc. ("ARINC"), by its attorneys, hereby submits these comments on the petition<sup>1</sup> filed by the Ad Hoc Telecommunications Users Committee ("Ad Hoc") seeking partial reconsideration of the FCC's Memorandum Opinion and Order in the above-captioned proceeding.<sup>2</sup> Ad Hoc has asked the Commission to reconsider its decision insofar as the agency declined to adopt rules that would limit the ability of service providers unilaterally to abrogate contractual arrangements with their customers.

ARINC fully supports Ad Hoc's request. The goals the FCC has sought to achieve in streamlining non-dominant tariff filings will be seriously undermined without appropriate safeguards to ensure the enforceability of the agreements

<sup>1</sup> Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, "Petition of Ad Hoc Telecommunications Users Committee for Partial Reconsideration," filed Sept. 22, 1993 (Ad Hoc Petition"); see also 58 Fed. Reg. 53,204 (1993) (Public Notice of filing and pleading schedule).

<sup>2</sup> Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752 (1993) ("Memorandum Opinion and Order").

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underlying such tariffs. Indeed, absent such safeguards, a truly competitive market for telecommunications services cannot exist.

ARINC is the communications company of the air transport industry and is owned and operated by the airlines and other aircraft operators. ARINC provides the civil aviation community with a variety of voice and data telecommunications services on a not-for-profit basis and frequently represents industry interests in regulatory and other forums. The airlines are large users of telecommunications services and rely heavily upon their ability to make contractual arrangements with carriers to secure the sophisticated combinations of services they require to support their nationwide and worldwide communications and reservations systems.

ARINC applauds the FCC's decision to streamline tariff filing requirements for non-dominant carriers. Telecommunications users have become accustomed to dealing with service providers through contractual arrangements as the most efficient means of meeting their business needs. As a result of the Commission's pro-competitive policies, ARINC and the airlines enjoy access to a wide variety of telecommunications services offered by a large number of service providers. The FCC's action facilitates the continuation of these practices in the public interest.

Nonetheless, ARINC agrees with Ad Hoc that the Commission must in addition establish safeguards to prevent the unilateral abrogation of the contracts users have negotiated with service providers. Reliance on contractual arrangements has become widespread throughout the industry since the FCC's decision years ago to forbear from requiring nondominant carriers to file tariffs.<sup>3</sup> As Ad Hoc has shown, the re-adoption of relaxed tariff filing requirements without adequate safeguards places those contracts -- as well as any future, similar arrangements -- into jeopardy.<sup>4</sup>

Ad Hoc correctly points out that, even if a user has had the foresight to incorporate into its contract provisions prohibiting tariff abrogation, those provisions themselves may be superseded by a tariff filing.<sup>5</sup> ARINC therefore agrees with Ad Hoc that the agency should "take steps now to avoid the crisis enveloping" other industries where contracts

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<sup>3</sup> Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 95 F.C.C.2d 554 (1983).

<sup>4</sup> ARINC recognizes that service providers had the ability to abrogate contracts even before the adoption of the Commission's Memorandum Opinion and Order. American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980); see also Maislin Industries v. Primary Steel, Inc., 497 U.S. 116 (1990). But, the FCC's then existing forbearance policies rendered this possibility less of a concern.

<sup>5</sup> Ad Hoc Petition at 10-11.

may be superseded by tariff.<sup>6</sup> Otherwise, the competitive market forces the FCC seeks to foster cannot operate properly.

Specifically, the FCC should afford stability to users in their negotiated long-term contracts with common carriers, just as users would enjoy in a traditional competitive marketplace. Indeed, emulation of the free market is the objective of all enlightened regulation. To that end, ARINC supports Ad Hoc's suggestion that the agency adopt rules that (1) provide customers with adequate notice to protest any tariff changes; (2) require service providers to identify the changes they seek to make to contractual arrangements; and (3) allow for customers to terminate their abrogated agreements without liability.<sup>7</sup>

Most importantly, carriers filing tariffs seeking to alter long term agreements should face a heightened level of scrutiny and justification. In this regard, ARINC supports FCC adoption of Ad Hoc's proposal for standards derived from the common law governing excuses for performance of contracts.<sup>8</sup>

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<sup>6</sup> Id. at 9; see also Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, "Comments of Aeronautical Radio, Inc.," filed March 29, 1993.

<sup>7</sup> Ad Hoc Petition at 9.

<sup>8</sup> Id. at 10. Under this proposal, carriers would be excused from contractual obligations only where performance has become impossible for reasons beyond their control or for

For the foregoing reasons, ARINC urges the Commission to grant Ad Hoc's petition and adopt specific rules to permit legitimate reliance by users on service arrangements made by contract notwithstanding any contrary tariff filings.

Respectfully submitted,  
AERONAUTICAL RADIO, INC.

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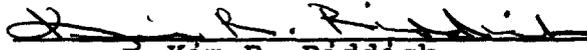
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mutual material mistake. See, e.g., 18 S. Williston and W. Jaeger, Williston on Contracts, §§ 1938 et. seq. (3d Ed. 1978); 17 Am.Jur.2d Contracts §§ 403-410 (1985); 17A C.J.S. Contracts §§ 463 et. seq. (1963).

CERTIFICATE OF SERVICE

I Kim R. Riddick, hereby certify that on this 29th day of October, 1993, I caused copies of the foregoing "Comments of Aeronautical Radio, Inc." to be mailed via first-class postage prepaid mail to the following:

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