

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In The Matter of)
)
Policy and Rules Concerning the) CC Docket No. 96-61
Interstate, Interexchange Marketplace)
)
) DOCKET FILE COPY ORIGINAL
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

COMMENTS OF
**AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION
("ACTA")
SECTIONS III, VII, VIII AND IX**

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Dated: April 25, 1996

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SUMMARY

America's Carriers Telecommunication Association ("ACTA"), on behalf of its members and the public it serves, urges the Commission to eschew its predilection for mandatory detariffing and adopt a modified permissive tariffing scheme in its stead. To counterbalance the Commission's concerns over the cost to it in administering a continued filed tariff regime, ACTA urges the Commission to outsource such management to a private "tariff administrator," an independent entity free from any direct or indirect ties to any local, interexchange or international carrier. ACTA urges further that the degree of independence be pronounced.

ACTA supports the concept of lifting the restrictions on offering bundled services as potentially pro-competitive and a potential boon for end user customers. However, the Commission must help bring this new opportunity to the marketplace in a manner that will, to the largest extent possible, ensure that the benefits of bundling are not limited to the large user community, are not used in an anti-competitive fashion and do not result in predatory practices.

In addition, should the Commission lift the bundling restriction, serious consideration must be given to reclassifying AT&T as a dominant carrier. No other entity will have the size, resources and manufacturing capability to exploit the bundling of telecommunications services and equipment to all segments of the marketplace, from residential to small and large businesses and institutions.

ACTA opposes, at this time, any reduction or elimination of the separation requirements for non-dominant treatment of local exchange carriers in their provision of interstate, interexchange services. Such relaxation is, once again, jumping the gun of reality. Significant

time remains before the local markets will possess effective competition sufficient to protect against the misuse of the bottle-neck power of local telephone exchanges.

The Commission's consideration of redefining relevant product and geographic markets is encouraged. However, ACTA submits that realistic appraisal of today's competitive environment will lead to different definitions than those proposed in the NPRM.

ACTA believes the Commission's concerns over "tacit price coordination" is overstated and mis-focused. For example, the concern is overstated in that it rests on the assumption that by mandating detariffing, the Commission will eliminate the potential for tacit coordination. It has not been shown that published tariffs produce such coordination or that such coordination actually exists. Moreover, given the existence of over 4,000 contract tariffs filed by AT&T, its continued use of VTNS offerings, its multitude of pricing plans and its infinite capacity to provide promotional offerings, pricing options also available to all other carriers, it is difficult to see how today's "tariffed" environment has not made such coordination impossible.

The Commission should exercise caution in promoting additional facilities-based competition. Excessive duplication of plant in certain segments of the industry may be counterproductive to advancing competition. At the same time, ACTA has witnessed a growing concern and need for non-facilities-based carriers, which have achieved some success in the marketplace to install, at least some of their own facilities, in order to better master their continuing competitive destinies. ACTA urges the Commission not to become too enamored of facilities-based expansion, except where such expansion clearly provides the best avenue for increasing competitive alternatives, such as in the local loop. The Commission's resale policy

has served the nation well and should continue to receive the Commission's pro-active support at all levels of operations.

ACTA supports some form of limited geographic rate averaging rules, narrowly tailored to produce defined public policy goals. ACTA reserves further comment on this issue until it has the opportunity to understand what others in the industry perceive this mandate to entail.¹

¹ ACTA submitted its initial comments on sections IV, V and VI on April 19, 1996 and noted at that time that certain of its comments, in that Summary, summarized issues for which comments are now due this April 25, 1996 (NPRM ¶ 113). However, ACTA's detailed comments, submitted herewith, will be limited to the issues raised by Sections III, VII, VIII and IX.

DETAILED COMMENTS FOR APRIL 25, 1996 FOR CC DOCKET NO. 96-61 SECTIONS III, VII, VIII and IX

INTRODUCTION

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits its initial comments in response to the Notice of Proposed Rulemaking, released March 25, 1996, in CC Docket No. 96-61 ("NPRM").² ACTA is a national trade organization whose membership consists primarily of interexchange carriers, and also includes operator service providers, payphone vendors, competitive local service providers, equipment vendors, consultants and others interested in, and dependent upon, the advancement and maintenance of fair and equal competitive conditions in the present and future telecommunications marketplace.

III. REGULATORY FORBEARANCE

A. Introduction

1. *In General.* The long distance market is an oligopolistic market at present. The local exchange market is monopolistic.³ Other telecommunications market segments, such as international, 800, 800 directory assistance, lie somewhere along these major competitive "fault" lines, with any shift in environment having the potential to dramatically affect their future competitive character. In addition, the environment of all telecommunications market segments will undergo unpredictable changes and evolutions, as a result of the implementation of the Telecommunications Act of 1996 and the actions of industry participants which have already

² References to the NPRM will be by paragraph number.

³ See Notice of Proposed Rulemaking in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, FCC 96-182, at ¶ 5 and n.13 (Rel. April 19, 1996).

taken steps to change the face of the competitive landscape.⁴ The telecom landscape will, therefore, undergo even further redesign by the advent of the drive to provide “one stop shopping” for all communications services. Once again, the largest provider of interexchange services has been able to position itself to seize control of vast segments of the marketplace.⁵ Would-be interexchange providers, the RBOCs, have adopted similar strategies by announcing mega-mergers, mirroring offerings for Internet access, declaring compliance with the 1996 Act’s competitive checklist for entry into in-region interLATA services, while taking considered actions to frustrate meaningful loosening of their grip on the local loop market.

ACTA urges the Commission to bear these facts, and others like them, in mind as it evaluates whether, how and when to “” existing regulations on interexchange carriers or services.

⁴ These developments are demonstrated by recent mega-merger announcements, corporate reorganizations, diversification of traditional roles and opportunistic venturing into widely popular, but economically unchartered services. Two RBOCs have announced mega mergers; AT&T has undertaken a corporate reorganization which has produced the largest IPO in history; MCI has announced major expansion plans into entertainment services; and AT&T, followed by some RBOCs, has spoiled the future of Internet providers by announcing a subsidized version of access to the Internet.

⁵ AT&T has achieved the regulatory and legislative alchemy of being declared non-dominant despite the following facts. AT&T continues to control, by a factor of 5, the largest share of the long distance market, including 1+, 800 and international; rid itself of its wireless equal access obligations, imposed as a lynch pin for its acquisition of McCaw Cellular Communications; rid itself of most of the resale and aggregation of its services, while now embracing resale of local service as the critical element for introducing competition in the local loop; deaveraged its high profit business rates through over 4,000 contract tariffs and made any determination of potential discrimination as between such tariff offerings, next to impossible; denied access to contract tariffs for resale in violation of Commission policy; will soon be able to maximize its singular manufacturing capabilities by being allowed to “bundle” equipment and services; hedged its bets on the future value of the content segment of the telecom market by buying into a satellite service; and with one announcement, usurped the leadership positions of Internet access providers, driving down their stock value and inserting itself as the dominant player for Internet access for the future.

In addition, as ACTA urged in its April 19th Comments on relevant markets, it appears critical that, at least for the foreseeable future, forbearance of regulation by tariff, or otherwise, should not be applied to RBOC in-region or out-of-region interLATA services. The reasons are clear as to why forbearance is not wise for in-region services. But the recent merger announcements make a telling point about being too quick to conclude there would be no problems if the Commission were to forbear as to out-of-region interexchange services. While the RBOCs lack direct control over the local loop outside their territories, this does not eliminate their ability to use their long-time associations to gain competitive advantage, designed to eliminate competition with an eye on ultimate merger in the future.

The motivation to follow such a strategy should be obvious. The future competitive battles of importance to such huge companies will be those waged against other huge companies. In such a war, the expendable companies will be the small competitors, whose quick elimination by collusive actions will be seen as necessary for the major battles with the big competitors for the big high-profit users down the road.

Section 401 of the 1996 Act imposes on the Commission the duty to make affirmative findings that forbearance will meet the statutory criteria. Given the historical anti-competitive conduct of the participants in the old monopoly-based Bell System (AT&T and today's RBOCs), the new resources AT&T has amassed in its competitive arsenal and the mounting evidence of the RBOCs having resorted to tactics designed to frustrate competitive entry into the local loop,

some of which have been cited by the Commission itself,⁶ forbearance of existing regulations of interexchange carriers will need to be circumscribed and focused.

To meet the statutory requirement for affirmative findings on which to base the proper exercise of the Commission's forbearance authority, ACTA submits that the Commission must adopt and apply meaningful standards of evaluation. These standards should include the specific identity, characteristics and market share of each carrier or group of carriers, in relation to specifically identified relevant product markets and relevant geographic markets, and measure these factors against the regulation or type of regulation for which forbearance is being considered.

Under this approach, the Commission would separately consider whether or not to from regulation of AT&T based on: the totality of its 60% to 80% market shares of 1+/800/international service revenues; its 71% share of pre-subscribed lines; its control of wireless facilities and its denial of equal access to those facilities; its record of anti-competitive conduct and deliberate violations of the resale policies; its unique ability to maximize its bundling of equipment with services with its the premiere manufacturing unit of Lucent Technologies (Bell Labs); its economic clout over the RBOCs and other LECs through the present access charge structure; its ability to promote its services through national advertising, give aways, cash pay outs to buy back customers, tailored contracts and specialized network offerings; its unique relationships with foreign PTTs; its continued dominance of complimentary service offerings such as 800 Directory assistance and so forth.

⁶*In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96- 182, ¶ 47 (rel. April 19, 1996).

Such an approach, of necessity, precludes the application of a generalized approach to defining relevant markets. For AT&T, forbearance cannot be predicated on a product market defined simply as interexchange services. On the other hand, defining the geographic market for AT&T as a national market would appear to be accurate.

For the RBOCs, the evaluation of forbearance must (other than for services for which the 1996 Act forbids forbearance) be predicated on such factors as defining the geographic markets as their in-region and their out-of-region markets, and their product markets in relationship to their wireless and wireline services. The Commission should, likewise, consider the RBOCs entrenched opposition to local loop competition; their overcharging for access; their determination not to permit any inroads into the local loop until they have total freedom to use their in-region advantages to “compete” in the interLATA market; their history of mouthing support for competition while working to delay or destroy it; the huge financial resources to fund mergers, acquisitions, to bundle equipment and services; their tactics at the state levels and their powers to manipulate the states to their advantage; and similar unique tools by which the RBOCs can stifle competition without appropriate regulatory oversight.

As to other interexchange carriers, there is, in ACTA’s view, a similar, if not the same need to evaluate specific marketplace facts about certain other carriers. Forbearance of any interexchange carrier which owns, or is owned by, local exchange carriers should be evaluated based upon application of proper product and geographic market definitions. Forbearance of any underlying carriers should be based on its compliance with the Commission’s resale policies. Forbearance of any interexchange carriers’ owning, or owned by, competitive access providers,

should be evaluated on their treatment of other interexchange carriers seeking access services for competitive provision of interexchange services.

Surprisingly perhaps, but nonetheless true, ACTA does not support the tentative conclusion that the Commission is required by the 1996 Act to forbear from applying Section 203's tariffing requirement to non-dominant carriers. While this will be addressed in more detail later, ACTA submits that forbearance from the tariffing requirements cannot be based on the assertion that tariffs impede competition. Such an assertion is defied by experience. Tariffs have been a fact of life for most carriers over the past 20 years, and the Commission has extolled the fact that competition not only has developed, but flourished.

Moreover, detariffing should no more be based on generalizations, without regard to specific circumstances, than any decision to forbear from other types of regulation. For example, a carrier's record for engaging in unreasonable practices, discriminatory pricing, use of tariffs to discourage, impede and/or destroy resale,⁷ misuse of marketplace power to affect deaveraging through the use of contract tariffs, promotions, cash offers, etc., must all be considered on whether the statutory standard underpinning a decision to allow detariffing is possible.

B. Forbearance from Tariff Filing Requirements for Non-Dominant Interexchange Carriers

2. Discussion of Commission

⁷ Asserting that detariffing should be precluded where tariffs have been used to impede resale may seem contradictory. But, the opposite is true. Anti-resale provisions, when required to be tariffed, provide public notice of their anti-resale potential and unlawfulness. Without such filings, the anti-resale carrier can effect its unlawful policy outside the scrutiny or potential scrutiny of the Commission. Indeed, anti-resale practices may be hidden and their damage done before any notice of them is obtained. Eliminating tariffs will not eliminate anti-resale practices, it will only make their discovery more difficult.

ACTA disagrees with the Commission's reasoning, and its asserted reliance on prior analyses and findings, leading to its determination to forbear from enforcing Section 203's tariffing requirements, with respect to non-dominant interexchange carriers. First, the Commission's analysis is far too narrow in relying, as it does, on whether tariffs are needed to prevent anti-competitive behavior and/or irrational pricing behavior.

Assuming that a carrier without the ability to control price for all products or offerings in a market, cannot overtly price services in an unreasonable and unjust or unduly discriminatory manner, such a supposed limitation presupposes certain conditions. First, in order for customers and/or regulatory authorities to determine that prices are unreasonable or discriminatory, presupposes perfect knowledge of all prices for all services or the perfect ability of customers and regulatory authorities to compare prices for like-kinded services. While the multitude of prices and variety of services which exist today make price comparisons difficult, and do not effectively prevent price manipulations, the public at least has access to information from which to attempt to make better informed choices. If tariffing is no longer required no information will exist by which to even begin a possible comparison or evaluation of whether a non-dominant firm is engaging in unreasonable and discriminatory pricing.

The Commission's second rationale, that non-dominant carriers are unlikely to behave anti-competitively because they recognize that such behavior would result in loss of customers, is equally simplistic and without foundation. Anti-competitive pricing is seldom perceived by customers because, in today's market, most customers will actually benefit from such pricing over the short term. The Commission's analysis of this issue places the emphasis on a firm acting anti-competitively by over-pricing services in such a way that such over-pricing is immediately apparent

to customers. Once again, such a situation must presuppose consumer knowledge and ability to make rational comparison. But the pricing practices in today's marketplace, even with tariffing, often does not provide sufficient knowledge or allow meaningful comparisons without some inquiry. Without tariffs no inquiry is even possible.

For example, with 71% of the presubscribed lines and the ability to "buy back" customers for \$25 to \$100, AT&T is in the position to attract and keep residential customers, despite maintaining the highest prices in the industry. Moreover, studies demonstrate that most residential users do not make perfect knowledge of prices a matter of direct concern in making their buying decisions.⁸

AT&T's huge base of "loyal" residential users makes it possible for AT&T to continue its subsidization of its favored large volume business customers. Indeed, the practice of charging more, whether by way of applying actual higher per minute rates, or by charging in larger billing increments (such as full minute billing versus 6 or even 1 second increments for business customers), is endemic to the industry. In all likelihood, most industries use a similar pricing technique of passing along most costs to the lowest common denominator in order to provide pricing breaks to larger users of that industry's products or services.

The existence of such pricing techniques, and the fact they go unchallenged by customers and regulatory authorities even with tariffing presents a contradiction. On the one hand the theory advanced by the Commission to roll back a tariffing requirement is that tariffs aren't needed because

⁸ In Consumers Reports Magazine (September 1995, p. 570 et seq.), a report was made which indicates that, despite widespread availability that the lowest charges for long distance service are contained in optional calling plans, only one-third of those eligible for such plans take advantage of them to obtain the least costly service.

there's no ability to control price and because carriers won't risk losing customers by engaging in price gouging or manipulation. On the other hand, ACTA points to experience that indicates that price manipulation and other questionable pricing practices are followed even with tariffs, so why retain a tariffing requirement that fails to prevent such practices. The answer is information. Information at least permits questionable practices to be aired and addressed.

Posted speed limits do not prevent speeding; nor are they intended to. Rather they are meant to limit or control speeding and by posting speed limits enforcement of laws against speeding are made possible. Similarly, tariffs may not prevent price manipulation, but without them there is no way to determine if such manipulation is occurring. Moreover, the failure to prevent speeding is not an argument to repeal the laws against speeding, but to beef up enforcement. Similarly, as with speeding, the failure to prevent price manipulation with tariffing is not as argument against tariffing, its an argument for beefing up review and enforcement of tariffing principles.

ACTA also challenges the Commission's reliance on its determinations about pricing practices and their affect on competitive pricing, and the influence of tariffs thereon, in the mobile services segment of the telecom market. There is no evidence that the characteristics of that much smaller market niche, its makeup (which is not oligopolistic at all or at least not in the same manner as the interexchange marketplace) or pricing practices, bear any rational relationship to the interexchange marketplace. The closest parallel market to the interexchange market is, of course, the intraexchange and local loop marketplaces, where monopolies still reign supreme and where there is no question that tariffing procedures remain not only useful, but essential.

And finally, ACTA finds the Commission's usual fall-back position, that it may rely on its complaint process to handle any problems, should its assumptions about the lack of impact of

detariffing prove erroneous in some cases, an untenable position. The lack of resources makes the Commission's complaint process a regulatory black hole, from which few return, particularly smaller competitors and users, when litigating against the entrenched carrier or carriers. Recently, it required 19 months for the Commission to issue a decision on a complaint matter instituted by federal court referral.⁹ In 1988, Congress had to pass a specific statutory amendment requiring the Commission to act within set timeframes on complaints filed, involving issues arising under tariffs.¹⁰ A GAO and other studies were roundly critical of the Commission's complaint process.¹¹ When a group of small resale carriers opposed AT&T's acquisition of McCaw Cellular, citing the anti-resale practices of AT&T, the Commission dismissed their concerns with the typical assertion that the issues raised by such complaints were more properly handled in those proceedings, and refused to consider the impact on the determination of whether to grant AT&T the authorization to acquire McCaw's cellular properties¹² Not surprisingly, those issues never received a hearing because the complaints were dismissed due to settlement of other litigation, and due to the complainants' inability to afford to continue to prosecute their complaints. The ineffectiveness of the complaint process, based on the inequality of resources necessary to exploit it effectively by smaller customers and competitors, should give the Commission serious pause in relying on that process, irrespective of the failure of the process for other reasons.

⁹ Omni Transport, Inc. v. Group Long Distance (USA), Inc., Civil Action No. 93-CV-3816 (D.C.E.D. Pa., March 31, 1994).

¹⁰ Section 208(b)(1)-(3), 47 U.S.C. § 208(b)(1)-(3) (1988).

¹¹ Telecommunications - FCC's Handling of Formal Complaints Filed Against Common Carriers, U.S. General Accounting Office (March 1993)..

¹² In the Matter of Applications of Craig O McCaw and American Telephone & Telegraph Company, 75 Pike & Fisher RR 2d, 1345, 1380, ¶¶ 152-154 (1994).

Given the poor record on the use of the Commission's complaint process,¹³ in controlling carrier misbehavior, it is incumbent on the Commission to document, on the record, that either these experiences demonstrating the ineffectiveness of its complaint process are isolated aberrations of an otherwise solid record of effective performance, or to identify and adopt new rules and policies, by which its complaint process will, in fact, be improved. If the latter route is chosen, then no detariffing should occur until after the new rules, policies and procedures, are in place and have been shown, through application in real cases, to be effective.

The Commission's concern that the tariffing process constitutes a bar to more effective pricing competition lacks persuasive force. Nothing is cited in the record other than the Commission's own previous expressions of a similar concern to support what can only be described as a vague suspicion that tariffs have led to tacit price collusion. Indeed, the principle advocate of this idea have been the RBOCs, premised on their own self-serving agenda that without their entry into the interexchange market, "true" competition will never occur. And, once again, there are critical facts which contradict the reality of the existence of a tacit price collusion.

Today, with streamlined procedures, even AT&T may tariff price changes in one day's time. AT&T has published over 4,000 contract tariffs for business customers, continues to use its Tariff 12 specialized network offerings, and has multiple optional pricing plans for business and residential offerings in its standard tariffs. The plain fact is that there are hundreds, if not thousands of pricing plans available for both business and residential customers from AT&T and its major and minor

¹³ Ironically, the two times in 1995 that AT&T's anti-resale practices were called to account by the Commission, arose not in the complaint process, through action by the Common Carrier Bureau's Enforcement Division, but through the Bureau's Tariff Division. AT&T Comm., Inc., 10 FCC Rcd 1664 (1995); see also, PSE of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390 (1995).

rivals. In most industries, the largest player usually is the price leader, with the rest of the players, quite rationally, following its pricing leads. That this is so to some degree on the most widely-used services should be no surprise, particularly in an oligopolistic marketplace. In short, smaller competitors following the pricing lead of the largest company in the market is no indication of tacit price collusion, but normal economics. In any event, detariffing has not been shown to have any realistic capability to deter this normal market practice, to the extent it exists in the interexchange marketplace.

Given the lack of a public interest basis to justify detariffing generally, the proposal to mandate detariffing is very wide of the public interest mark. Indeed, rather than gaining any public interest benefits, as the Commission suggests by eliminating the filed tariff doctrine and the limitation of liabilities provisions of today's tariffing regime, mandatory detariffing will produce serious legal and related hardships for both customers and carriers. Mandating detariffing will create a legal void, potentially wreak economic havoc on small carriers, create massive confusion in the marketplace, which will be exploited by the carriers with huge advertising budgets, and leave carriers and customers without legal recourse to determine their respective rights and obligations, as between themselves or as to third parties. ACTA sees little merit in supporting mandated detariffing because it more closely approximates contractual relationships in an unregulated environment. Such an approach ignores the unique multitudinous customers with common requirements that characterizes the telecom industry. And while AT&T may be able to afford to offer and negotiate and then tariff over 4,000 contracts, the Commission should recognize that even

AT&T required over nearly four years to accomplish this.¹⁴ And even AT&T must shudder at the thought of having to create contractual privity with the millions of customers AT&T serves. As the entity controlling 71% of all presubscribed lines for interexchange services means that AT&T will have to come up with about 66 million replacement contracts. 71% of 139 million total lines represents approximately 99 million lines at 1.5 customers per line on average.

A small carrier with only 25,000 customers, based on AT&T's 4 year experience of creating 4,000 contract tariffs, would theoretically require 25 years to replace its customer base with private contractual arrangements at an estimated cost (based on average costs of sales) of \$15,000,000. And while each carrier may have written LOAs, those LOAs contain none of the terms and conditions of service set forth in the carrier's tariff.

There is nothing in the record to demonstrate that the public will benefit by removal of the filed tariff doctrine, the excision of the limitation on liability clauses, or any other standard tariff provision. On the contrary, other carrier comments in this proceeding are expected to present facts and arguments demonstrating the inadvisability and counter-productive effects of a mandatory detariffing ruling. Moreover, ACTA's comments in the preceding section are incorporated herein. Consideration of those arguments further demonstrates that adoption of mandatory detariffing is wrong and untenable.

ACTA understands that the Commission is being pulled in different directions on some of the implementation issues following passage of the Telecommunications Act of 1996 ("1996 Act"). Congress imposed unprecedented responsibilities on the Commission to enact rules to implement

¹⁴ AT&T was granted rights to deal in contract tariffs in August, 1992 in In the Matter of Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880 (1992).

the 1996 Act and, at the same time, balks at providing additional funding to financially support the task.¹⁵ It is understandable that the Commission wishes to eliminate any burdens of management and administration it can, particularly one so "volume intensive," like tariff filings.

ACTA believes that there may be a way to accomplish both objectives of reducing the Commission's overhead and management burdens, yet preserve for the public and the industry the benefits of certainty and disclosure embodied in the continued use of, and reliance on, filed tariffs. The Commission should adopt a permissive detariffing policy only for all carriers with a 5% or less market share, based on revenues. It should require carriers with more than 5% of market revenues to continue to file tariffs, permitting detariffing only if a showing is made that such detariffing meets the statutory criteria for forbearance.

The Commission should adopt a policy of outsourcing its administration and management of tariff filings. That is, the commission should, by regulation, adopt a policy that those carriers which choose to file tariffs, do so with an independent tariff clearinghouse, chosen by competitive bid and meeting certain basic eligibility criteria. Carriers would pay a transaction fee to this clearinghouse in the same manner as FCC filing fees are now paid to the Commission. As part of this new outsourced clearinghouse for tariff filings, the Commission would establish the continued viability of all existing tariff laws, precedents, and policies.

The clearinghouse would be required to publish notice of tariff filings and to make copies available at charges for doing so. Protests of tariffs would continue to be filed with the Tariff

¹⁵ At ACTA's recently concluded Spring Conference "ACTA XXIII" in Phoenix, the ACTA membership unanimously approved a resolution urging Congress to properly fund the Commissions' duties to implement the 1996 Act (a copy of the resolution is attached). ACTA is in the process of circulating a copy of that resolution to appropriate Congressional members and their staffs.

Division, but with the removal of the necessity to handle tariff filings themselves, the Commission could use its staff for more substantive matters. In addition, the Commission should adopt its policy requiring carriers to maintain a copy of their tariffs at their principle place of business.

VII. PRICING ISSUES

A. Allegations of Tacit Price Coordination

ACTA has addressed the issues of tacit price coordination above. Its arguments need not be repeated here. However, ACTA submits that the Commission's own discussion of its earlier examination of allegations on this practice (NPRM @ 81 et seq.) support ACTA's position as earlier presented. Detariffing is not a remedy that can be applied effectively to address a practice, the proof of the existence of which the Commission found "inconclusive and conflicting." (Id.)

ACTA takes issue with other aspects of the Commission's reasoning on these issues. While it may be true, in theory, that additional facilities-based competition would make it more difficult to engage in tacit price coordination, in and of itself, such a theory is not a sufficient basis to warrant mandating detariffing and ignoring the far more certain adverse affects on the public interest such action entails. Moreover, the Commission is not permitted to simply assume that untariffed facilities-based competition is likely to produce a hedge against price coordination. The opposite is more likely to happen. The motivations for such coordination would appear to be greater among facilities-based competitors because their sunk costs and investment are more likely to produce parallel pricing models. Moreover, facilities-based competitors are more likely to have superior intelligence on costs of service with which to price closer to the prices of other facilities-based competitors. Such a potential would seem all the more certain here in that the "new" facilities-based competitors (the BOCs), were once part of the same monopoly structure and have retained

institutional knowledge of costing and pricing approaches used by the major facilities-based competitor with which they are supposed to compete (AT&T). The irony then is that the BOCs and AT&T are likely to possess superior resources and intelligence about each other's costing and pricing practices to use for tacit price collusion or other purposes equally dangerous to the rest of their competitors. But without tariffs those other competitors, the public and the regulatory authorities, will have no information by which to judge what is happening to prices in the marketplace.

VIII. BUNDLING OF CUSTOMER PREMISES EQUIPMENT

The comments of ACTA, filed April 19, 1996, concerning redefining the relevant product markets (pp.1-3) are relevant to the issues posed in this section of the NPRM.

The concerns on which the Commission banned the bundling of CPE with transmission services remain valid (NPRM @ ¶ 84). While there have been changes since the ban was adopted (Id. @ ¶¶ 85-86), ACTA is concerned that those changes do not affect the future potential that anti-competitive consequences, which the ban was designed to prevent, will recur.

The key factual basis for the Commission's desire to lift the bundling ban is misplaced. The issue should not be addressed from the legal definition of an illegal tying or bundling arrangement as suggested by the analysis of the NPRM (¶ 87). The issue must be addressed from today's (and tomorrow's likely) marketplace facts.

AT&T is uniquely positioned to exploit the ability to bundle services and equipment, and has been found guilty of doing so by the Commission at least once before. Importantly, what is wrong with the Commission's analysis here is its focus on the precise legalistic definition of illegal bundling -- that is, on the seller's ability to "force the buyer into the purchase of a [second] product

that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms.” In many cases, AT&T will be able to package extremely attractive service and equipment offerings. The element of “coercion” is likely not to exist. Hence, no unlawful tying or bundling is, legalistically speaking, present.

ACTA submits that the Commission’s inquiry cannot end at this point, however. Beyond the specific concerns for applying the tenets of the antitrust laws to its administration of the telecommunications laws and regulations, the Commission must also be assured that regardless of what passes muster under the precise requirements of the antitrust laws, does not, nevertheless, violate other public interests. In addition to protecting customers from having to make forced buys of CPE, the other prongs of concern were to avoid “retarding the development of a competitive CPE market.” (NPRM @ ¶ 84).

ACTA submits that in evaluating this proposal, the Commission must take into account the unique powers of AT&T to parlay its equipment manufacturing with its transmission services with such success (and without overt coercion) as to erode the ability to sustain a competitive equipment market and thereby, eventually, to limit customer choice not only as to equipment, but as to transmission services and as to packages of such equipment and transmission services. AT&T’s ability to manipulate the marketplace by its unique market position was recently demonstrated with its announcement of free Internet access causing, in but one such action, the diminution of the leadership role of Internet access providers having spent years of effort to achieve their successful position. Such “market clout” cannot be ignored if competition is to prevail.

Rather than continue the ban on bundling, an unattractive regulatory choice to be avoided, if possible, ACTA suggests an alternative. That alternative is to make all such package of services

available for resale. However, to do this, potential resellers will have to gain knowledge of the existence and terms of such packages of services. The most efficient manner to do this is to require AT&T, as a dominant supplier of packaged services to tariff all such offerings and to make them available to resellers on the same terms and conditions as AT&T makes them available to its commercial customers. In the future, should the entry of the BOCs, or the acquisition of manufacturing capability by other major transmission suppliers create effective alternatives to AT&T's dominant position, the Commission may remove AT&T's classification of dominance, and retain only the requirement for resale of all packaged service offerings.

Given ACTA's position on the need for resale of bundled service, ACTA believes the public interest requires that unbundled interexchange transmission services must remain available for resale.

As ACTA has previously argued, the entry of the BOCs may eventually provide alternative sources for bundled resale and direct offering of bundled service packages. But the time is long off in the future before the BOCs will reach comparative manufacturing capability with AT&T's present capabilities. Therefore, consideration of the manufacturing capabilities of the BOCs on this issue is not warranted for at least 5 years.

IX. OTHER ISSUES - (CONTRACT TARIFFS)

ACTA submits that, were the Commission to investigate AT&T's use of its contract tariff rights, it would find numerous instances of additional violations of its resale policies, potential unjustified discrimination and unreasonable practices affecting both direct and resale customers, such as the use of "walls" to limit the reuse of specific contract tariffs, refusals to deal with potential customers, and inexplicable conflicts between AT&T's specific contract tariff offers and its offers

under its general tariffs. Since it is unlikely that the Commission will undertake anytime soon, such an investigation, ACTA submits that its comments must be considered against this backdrop of its members and others experiences with AT&T's administration and use of its contract tariff regime.

ACTA supports, as necessary, in the furtherance of the Commission's resale policies and as essential to maintaining competition from smaller carriers for the direct and necessary benefit of smaller users, the following principles.

The Commission is without authority to abandon its public interest obligations by relying solely on commercial contract law principles in applying its substantial cause test or in any case in which it is confronted with a unilateral change to a long-term contract tariff or a carrier-to-carrier agreement. Despite the fact that commercial contract law is based on very valid and valuable principles, long ingrained into American jurisprudence, contract tariffs unavoidably involve other interests, rights and obligations which are not reached by such commercial law principles. The duties under Sections 201, 202 and 203 immediately come to mind, as does the Commission's resale policy and the fact that each service situation also invokes broader public interests than the specific rights and obligations of the parties to the contract.

One example can illustrate these points. While it may be perfectly permissible under commercial contract law to grant a favored large user additional contractual benefits not directly related or arguably unrelated to the rendering of communications services, while deciding not to provide those same benefits to other users, such action would not be tolerated under the anti-discrimination provisions of the Communications Act.

Few factors (other than fraud, misrepresentation, failure of consideration such as the financial inability to pay for services due to bankruptcy, in other words, causes for which one of the

parties is legitimately culpable and which prevent performance or so alter it that common sense and fundamental justice require changes) are valid reasons to allow unilateral changes to contract tariffs. Moreover, the Commission must require positive proof that such causes exist and have not been produced as a result of AT&T's own conduct designed to produce the basis for seeking to unilaterally change the tariff's terms.

The substantial cause test must apply to all customers - original and each reuse customer. This is required to ensure the tariffs are not used to engage in undue discrimination and to prevent resale.

If substantial cause is shown to change a contract tariff, the inquiry should be whether the specific circumstances require a wholesale restructuring of the contract tariff or simply a restructuring as to a particular customer because of the development of unique circumstances affecting continued performance under the contract tariff, whether by customer or carrier. If no wholesale restructuring is involved, there is no reason to abrogate the contract tariff as to any other customer or as to potential new customers.

Notice periods should be reasonable, but not less than 90 days with a 30-day timeframe to file objections against any changes. Notice should include all facts and circumstances on which the unilateral changes are proposed. Clear identification of any tariff filing unilaterally altering existing long-term service or contract tariffs is fundamental. There should be no issue here whatsoever.

ACTA commented that an investigation of AT&T practices in dealing with resellers' requests for contract tariffs would reveal repeated violations of the duties to permit resale of these tariffs and repeated violations of Section 201, 202 and 203 of the Act. Consequently, the Commission must establish uniform standards which eliminate the ability to use contract tariffs to

avoid resale and to deny such offerings to any user which wishes to take advantage of the existence of such offerings. In doing so, it should prohibit all ordering procedures which require more than is needed to know to identify the customer and its billing address and the locations for service, in short, no more than an LOA requires. For resale, nothing further is required.

The Commission should outlaw placing artificial “walls” in these tariffs, unnecessary conditions whose only purpose is to prevent their resale (or their reuse by other commercial customers). As any unreasonable or discriminatory condition is already outlawed, the Commission’s inquiry on “extremely large upfront deposits” (NPRM @ ¶ 100) is odd. The test should not be primarily focused on the relative size of a deposit or other equally onerous conditions. The test should first be based on truthful disclosure by the carrier of the commercial customers against which similar conditions have been applied and the presentation of facts thought to justify any specific condition to obtaining service. The starting question should always be, simply, “Why isn’t only a LOA sufficient?.”

ACTA perceives no unique bases on which to permit a carrier to supersede a carrier-to-carrier contract through a tariff revision. Absent reasons like those set forth above, such as fraud, intervening events which makes continuation of the contract unquestionably contrary to identifiable public and overriding public interests, etc., there is no basis on which to allow one party to unilaterally modify a contract with a tariff filing.

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