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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In The Matter of )

POLICY AND RULES CONCERNING )  
THE INTERSTATE, INTEREXCHANGE )  
MARKETPLACE )

IMPLEMENTATION OF SECTION 254(g) )  
OF THE COMMUNICATIONS ACT OF )  
1934, AS AMENDED )

CC Docket No. 96-61

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COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS  
RESELLERS ASSOCIATION

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## SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, recommends that the Commission take the following actions in the captioned rulemaking proceeding:

- TRA strongly urges the Commission to continue to require non-dominant IXC's to file tariffs applicable to their domestic offerings, but to modify its current tariffing requirements in so doing to better reflect the "substantially competitive" interstate, interexchange telecommunication market. To this end, TRA recommends that the Commission adopt a bifurcated tariffing scheme for domestic non-dominant carriers which would substantially relax tariffing requirements for all but the largest carriers. With the exception of those IXC's that are affiliated with an incumbent LEC, TRA proposes that carriers which generate less than five percent of aggregate domestic interstate toll revenues should be permitted to specify "maximum" or a "reasonable range" of rates and file tariffs on a single day's notice. IXC's that generate five percent or more of aggregate domestic interstate toll revenues or who are affiliated with an incumbent LEC should continue to be required to include in their tariffs detailed price schedules for their domestic offerings and to provide fourteen days' notice of tariff revisions which impact long-term service arrangements.

Mandatory, or for that matter, permissive, detariffing would effectively negate the Commission's pro-competitive resale policies, rendering the Commission's current "general-availability" and nondiscrimination requirements virtually unenforceable. Moreover, mandatory, and possibly, permissive, detariffing would create an enormous administrative burden for IXC's, potentially requiring renegotiation of many existing long-term service arrangements and resulting in massive future contract and notice requirements.

- TRA urges the Commission to strengthen the "substantial cause" test so as to prohibit unilateral changes in long-term service arrangements in all but the most extreme circumstances and in those extreme circumstances to afford customers of long-term service arrangements which have been unilaterally altered a "fresh-look" opportunity to terminate the arrangement without liability.
- TRA urges the Commission to apply the Mobile-Sierra doctrine to all carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied.

- TRA strongly urges the Commission to declare unlawful tariff provisions and carrier practices which have the practical effect of rendering service offerings unavailable for resale.
- TRA endorses the Notice's proposal to remove the barrier against the "bundled" provision of customer premises equipment and basic telecommunications services. In order to minimize any resultant anticompetitive impact, however, TRA urges the Commission to require any carrier providing such a bundled offering to make available at the same component price the unbundled elements of the offering.

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TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-123, released by the Commission in the captioned docket on March 25, 1996 (the "Notice"). The Notice, and the rulemaking proceeding initiated thereby, represents the first major exercise by the Commission of the expanded "forbearance" authority granted to it in Section 401 of the Telecommunications Act of 1996 ("96 Act").<sup>1</sup> In this, the second phase of the proceeding, the Commission seeks comment on (i) its proposal to adopt a mandatory detariffing policy for domestic services of non-dominant, interexchange carriers; (ii) allegations regarding the existence of tacit price coordination among interexchange carriers ("IXCs"); and (iii) a variety of tariff-

<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56, § 401 (1996).

related matters, including the application of the "substantial cause" test and the Mobile-Sierra doctrine, the availability of "fresh-look" opportunities, appropriate notice periods for tariff revisions, and the lawfulness of terms and conditions of service and other carrier practices which have the practical effect of rendering service offerings unavailable for resale.

## I.

### **INTRODUCTION**

TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services. TRA's more than 450 members are all engaged in the resale of interexchange, international, local exchange, wireless and/or other services and/or in the provision of products and services associated with such resale. Employing the transmission, and often the switching and other, capabilities of underlying facilities-based carriers, TRA's resale carrier members create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

While TRA's resale carrier members range from emerging, high-growth companies to well-established, publicly-traded corporations, the bulk of these entities are not yet a decade old. Nonetheless, TRA's resale carrier members collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence

and dramatic growth of TRA's resale carrier members over the past five to ten years have produced thousands of new jobs and new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

TRA's interest in this proceeding is in protecting, preserving and promoting competition within the interstate, interexchange telecommunications services market, as well as in speeding the emergence and growth of facilities-based and resale competition in the local exchange/exchange access services market. In TRA's view, market forces are, all things being equal, generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services. TRA is well aware, however, that the emergence, growth and development of a vibrant telecommunications resale industry is a direct product of a series of pro-competitive initiatives undertaken, and pro-competitive policies adopted, by the Commission over the past decade. TRA thus understands that the market is an effective regulator only if market forces are adequate to discipline the behavior of all market participants. If one or more such participants retain vestiges of market power, regulatory intervention is essential to protect the public interest. TRA, accordingly, urges the Commission to exercise its newly-granted forbearance authority with caution, ensuring in so doing that it does not eliminate or reduce regulatory safeguards that are still necessary to protect, promote and enhance competition in the provision of telecommunications services.

The '96 Act directs the Commission to forbear from applying regulations and/or statutory provisions only if it first determines that enforcement of the requirements embodied therein is no longer necessary either to ensure the just, reasonable and nondiscriminatory provision of service or to protect consumers. Moreover, the '96 Act requires the Commission to predicate any act of forbearance upon a finding that such forbearance would further the public interest.<sup>2</sup> As acknowledged by the Notice (at ¶ 17), the '96 Act requires the Commission in exercising its newly-granted forbearance authority to determine "whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."<sup>3</sup> And as further acknowledged by the Notice (at ¶¶ 1, 4), the '96 Act not only provides for a "pro-competitive" as well as a "de-regulatory" national policy framework,<sup>4</sup> but recognizes that competition would be furthered by reducing or eliminating only those regulations "which may no longer be in the public interest."

Consistent with this theme, TRA strongly urges the Commission to continue to require non-dominant IXCs to file tariffs applicable to their domestic offerings, but to modify its current tariffing requirements in so doing to better reflect the "substantially competitive" interstate, interexchange telecommunication market.<sup>5</sup> To this end, TRA recommends that the Commission adopt a bifurcated tariffing scheme for domestic non-dominant carriers which would

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<sup>2</sup> 47 U.S.C. § 160(a).

<sup>3</sup> 47 U.S.C. § 160(b).

<sup>4</sup> H.R. Rep. No. 104-458, 104th Cong., 2nd Sess., p. 1 (Jan. 31, 1996)

<sup>5</sup> Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, 5887 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993) ("Second Interexchange Competition Order"), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("1995 Interexchange Reconsideration Order") (collectively, the "Interexchange Competition" proceeding).

substantially relax tariffing requirements for all but the largest carriers. With the exception of those IXCs that are affiliated with an incumbent local exchange carrier ("LEC"), TRA proposes that carriers which generate less than five percent of aggregate domestic interstate toll revenues should be permitted to specify "maximum" or a "reasonable range" of rates and file tariffs on a single day's notice. IXCs that generate five percent or more of aggregate domestic interstate toll revenues or who are affiliated with an incumbent LEC should continue to be required to include in their tariffs detailed price schedules for their domestic offerings and to provide fourteen days' notice of tariff revisions which impact long-term service arrangements.

Mandatory, or for that matter, permissive, detariffing would effectively negate the Commission's pro-competitive resale policies, rendering the Commission's current "general-availability" and nondiscrimination requirements virtually unenforceable. Moreover, mandatory, and possibly, permissive, detariffing would create an enormous administrative burden for IXCs, potentially requiring renegotiation of many existing long-term service arrangements and resulting in massive future contract and notice requirements.

TRA urges the Commission to strengthen the "substantial cause" test so as to prohibit unilateral changes in long-term service arrangements in all but the most extreme circumstances and in those extreme circumstances to afford customers of long-term service arrangements which have been unilaterally altered a "fresh-look" opportunity to terminate the arrangement without liability. TRA further urges the Commission to apply the Mobile-Sierra doctrine to all carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied. And TRA strongly urges the Commission to declare unlawful tariff provisions and carrier practices which have the practical effect of rendering service offerings unavailable for resale.

TRA endorses the Notice's proposal to remove the barrier against the "bundled" provision of customer premises equipment ("CPE") and basic telecommunications services. In order to minimize any resultant anticompetitive impact, however, TRA urges the Commission to require any carrier providing such a bundled offering to make available at the same component price the unbundled elements of the offering.

## I.

### ARGUMENT

#### **A. The Commission Should Not Adopt A Mandatory, Or For That Matter, A Permissive, Detariffing Policy For The Domestic Offerings Of Non-dominant Interexchange Carriers**

##### **1. Tariffs Are 'Utterly Central' To Enforcement Of The Non-discrimination Requirements Of The Act**

"The importance of tariffs and the requirement that common carriers -- all common carriers -- must offer all of their communications services to the public through published tariffs is well established."<sup>6</sup> Thus, the Commission has long held that "tariffs are essential to the entire administrative scheme of the Act," serving as "a kind of 'tripwire' enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act."<sup>7</sup>

The statutory scheme embodied in the Communications Act of 1934, as amended (the "Communications Act"), clearly contemplates publicly-filed rates as the essential predicate

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<sup>6</sup> The Western Union Telegraph Company, 75 F.C.C.2d 461, ¶ 47 (1979).

<sup>7</sup> Id.

for private, as well as Commission, enforcement of the requirement that service be provided without unreasonable discrimination.<sup>8</sup> Indeed, as the U.S. Supreme Court has recognized, tariffs are "utterly central" to this purpose.<sup>9</sup> As the Court explained, "[t]he duty to file rates with the Commission . . . and the obligation to charge only those rates, . . . have always been considered essential to preventing price discrimination and stabilizing rates."<sup>10</sup> And, the Court continued, "[w]ithout [tariffs] . . . it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates."<sup>11</sup>

Given the "enormous importance" of tariff filing to the statutory scheme,<sup>12</sup> TRA urges the Commission not only to refrain from eliminating tariff filing requirements for non-dominant IXCs, but to move cautiously in relaxing such requirements so as not to undermine its pro-competitive resale policies.

## **2. The Commission's Pro-competitive Resale Policies Have Generated "Numerous Public Benefits"**

As the Commission has repeatedly acknowledged, resale of telecommunications services generates "numerous public benefits." among which are the downward pressure resale

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<sup>8</sup> 47 U.S.C. § 201, 202.

<sup>9</sup> Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 132 (1989) (*quoting Regular Common Carrier Conference v. U.S.*, 793 F.2d 376, 379 (D.C. Cir. 1986)).

<sup>10</sup> MCI Telecommunications Corp. v. American Telephone and Telegraph Co., 114 S. Ct. 2223, 2231 (1994) (*quoting Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 at 126).

<sup>11</sup> Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 at 132 (*quoting Regular Common Carrier Conference v. U.S.*, 793 F.2d 376 at 379).

<sup>12</sup> MCI Telecommunications Corp. v. American Telephone and Telegraph Co., 114 S. Ct. 2223 at 2232.

exerts on rates and the enhancements resale produces in the diversity and quality of product and service offerings:<sup>13</sup>

Chief among the public benefits from unlimited resale is the incentive provided to carriers to offer services at rates that more closely reflect the underlying cost of providing the service. If a carrier's communications services and facilities can be resold, it is more likely to price them closer to costs. Further, because unrestricted resale and sharing of communications services will increase the number of parties offering the same types of services, undue discrimination in the marketplace is less likely to occur. Thus, the resale mechanism furthers the objectives of Sections 201(b) and 202(a) of the Act.<sup>14</sup>

Emphasizing this view, the Commission noted, in concluding that wireless resale had the "overall effect of promoting competition," that resale provides "a means of policing price discrimination," "some degree of secondary market competition," and "a source of marketplace innovation."<sup>15</sup>

The lower prices and service enhancements that resale generates redound primarily to the benefit of lower volume users. As discussed earlier, TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates and enhanced, value-added products and services and personalized customer support functions which are generally not provided to smaller users.

To obtain and preserve these public benefits for consumers, the Commission long ago adopted, and continues to enforce, policies which require that "all common carriers . . .

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<sup>13</sup> AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶12 (1995), *pet. for rev. pending AT&T Corp. v. FCC*, Case No. 95-1339 (filed July 5, 1995) ("AT&T Forfeiture Order") (*citing Resale and Shared Use of Common Carrier Services*, 60 F.C.C.2d 261 (1976) ("Resale and Shared Use Order"), *recon.* 62 F.C.C.2d 588 (1977), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), *recon.* 86 F.C.C.2d 820 (1981)); *see also U S West Tariff Nos. 3 and 5*, 10 FCC Rcd. 13708, ¶11 (1995) (*citing the Resale and Shared Use Order and the AT&T Forfeiture Order*).

<sup>14</sup> AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 12.

<sup>15</sup> Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services (Second Notice of Proposed Rulemaking), 10 FCC Rcd. 10666, ¶ 84 (1995).

permit unlimited resale of their services."<sup>16</sup> To this end, the Commission affirmatively deems unjust and unreasonable, and prohibits restrictions on, resale.<sup>17</sup> Indeed, the Commission has declared that any "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect."<sup>18</sup>

The Commission's resale policies have produced their intended effect. The resale sector has long been the fastest growing segment of the long distance industry.<sup>19</sup> Resale of international telecommunications services is exploding.<sup>20</sup> Wireless resale, including resale of cellular telephone and paging services, continues to expand.<sup>21</sup> And resale carriers are already entering the local exchange/exchange access market now that the '96 Act has eliminated legal barriers to entry.<sup>22</sup>

As noted above, the bulk of TRA's resale carrier members are small to mid-sized businesses serving other small to mid-sized businesses. At a time when the nation is looking to small business to create jobs and stimulate economic growth and the Commission is looking to

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<sup>16</sup> AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶2.

<sup>17</sup> Resale and Shared Use Order, 60 F.C.C.2d 261 at 298-99.

<sup>18</sup> AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶13.

<sup>19</sup> Long Distance Market Shares (Fourth Quarter 1995), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (March 1996).

<sup>20</sup> Trends in the International Telecommunications Industry, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, p. 37 (June 1995). See VIA USA, Ltd., 9 FCC Rcd. 2288, ¶ 11 (1994), *aff'd* 10 FCC Rcd. 9540 (1995) ("The Commission has long recognized that increased competition in the international marketplace benefits U.S. ratepayers, and has routinely granted applications for Section 214 authorizations for the resale of international switched voice service to further that goal.").

<sup>21</sup> "From a Resale Point of View," Mobile Phone News, Vol. 14, No. 1 (Jan. 1, 1996); "MCI Buys SHL Systemhouse; Closes Nationwide Purchase," Communications Today (Sept. 20, 1995).

<sup>22</sup> 47 U.S.C. § 253.

resale carriers to drive costs lower and enhance service diversity and quality, TRA submits that it would make little sense to adopt policies which would have a material adverse impact on resale carriers generally.

**3. In A Less Than Perfectly Competitive Market, The Continued Growth And Development Of A Vibrant Telecommunications Resale Industry Is Dependent Upon The Non-discriminatory 'General Availability' Of Service Offerings**

The relationship between resale carriers and their underlying network providers is generally an awkward one, given that resale carriers are not just large customers, but aggressive competitors, of their network providers. While resale carriers, like large corporate and other major users of telecommunications services, do provide large quantities of revenues to their network providers, they use whatever "price breaks" they secure from these network providers as a result of their commitments to generate substantial traffic volumes to compete for the small and mid-sized accounts that would otherwise provide the network providers with their highest "margins." The degree of awkwardness tends to increase with the size of the network provider. The odds are that one out of every two customers secured by a resale carrier would be taken from a network provider with a fifty percent market share, while only one out every ten customers obtained by a resale carrier would be taken from a network provider with a ten percent market share. While the latter network provider might view resale carriers as a necessary evil, the former would likely try mightily to avoid providing resale carriers with service at prices that would allow for viable resale.

In a perfectly competitive market, this "awkwardness" would not present a problem -- either all rates would be driven to cost and hence no resale opportunities would exist. or network providers would be compelled by market forces to provide resale carriers with service

offerings and price points commensurate with their traffic volumes. Indeed, this is what the Commission apparently contemplated when it remarked in the Interexchange Proceeding that:

[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates.<sup>23</sup>

This has not proven to be the case on far too many occasions.

The Commission has faulted AT&T (and could have faulted other facilities-based carriers) for discriminating against resale carriers in denying them particular service offerings and price points. For example, less than eighteen months ago, the Commission issued a Notice of Apparent Liability for Forfeiture in the amount of One Million dollars against AT&T based upon the carrier's failure to honor service orders for Contract Tariff No. 383 submitted by three resale carriers. The Commission concluded that "AT&T's failure to provide the requested communications service constitute[d] an apparent breach of its common carrier obligation to provide a tariffed service upon reasonable request as set forth in Section 201(a) of the Act."<sup>24</sup> The Commission further faulted AT&T under Section 201(a) for failing to accept a resale carrier's order for Virtual Telecommunications Network Services ("VTNS") Option 24, ruling at the same time that an AT&T requirement that resale carriers provide detailed location and network design information as a precondition to receipt of service constituted "an unjust and unreasonable practice within the meaning of Section 201(b) of the Act" and "an unreasonable restriction on resale in violation of [the Commission's] resale orders and requirements."<sup>25</sup> The

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<sup>23</sup> First Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶ 115.

<sup>24</sup> AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 10.

<sup>25</sup> Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390, ¶¶ 12, 17, 19 (1995), *pet. for rev.* Civ. No. 95-1339 (D.C.Cir. July 5, 1995).

Commission has also initiated two investigations of AT&T during the past twelve months which address efforts by the carrier to unilaterally alter material terms and conditions of Contract Tariff Nos. 360 and 374 following receipt of applications for service thereunder by resale carriers.<sup>26</sup> And, of course, there are the numerous formal complaints lodged by resale carriers with the Commission alleging failure by AT&T to provide service under additional service offerings, including, among others, VTNS Options 27, 58 and 126 and Contract Tariff Nos. 120 and 516.<sup>27</sup>

The Commission, in order to avoid such discrimination, among other reasons, required AT&T to make VTNS Options and Contract Tariffs "generally available."<sup>28</sup> Thus, in responding to arguments that "contract carriage [would] have an adverse effect on resellers," the Commission noted that "the terms of AT&T's contracts must be filed with the Commission and made available to all similarly situated customers."<sup>29</sup> Moreover, the Commission declared, with respect to VTNS Options, that it would "scrutinize closely any restrictive eligibility requirements to ensure that they are not pretexts for unreasonably discriminating among customers."<sup>30</sup>

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<sup>26</sup> AT&T Communications Contract Tariff No. 360, Transmittal No. CT 3076, CC Docket No. 95-80, DA 95-1244 (released June 5, 1995); AT&T Communications Contract Tariff No. 374, Transmittal Nos. 2952 and 3441, DA 95-1061 (released May 10, 1995).

<sup>27</sup> With respect to Option 58, AT&T, following receipt of service orders from a number of resale carriers, initially proposed to impose a \$1,000,000 installation fee on new option holders. After this amendment was denied by the Commission (AT&T Communications Tariff F.C.C. No. 12, 7 FCC Rcd. 535 (1992)), AT&T effectively limited (through imposition of substantial financial penalties) the amount of off-net switched traffic that could be carried under the option, thereby rendering the option financially unattractive to most resale carriers. AT&T Tariff Transmittal No. 4212 (filed June 21, 1993).

<sup>28</sup> First Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶ 112; AT&T Communications, Revisions to Tariff F.C.C. No. 12, 4 FCC Rcd. 4932, 4938-39 (1989) ("Tariff 12 Order"), *recon.* 4 FCC Rcd. 7928 (1989) ("Tariff 12 Reconsideration Order") *remanded* MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C.Cir. 1990), *on remand* 6 FCC Rcd. 7039, 7050-52 (1991) ("Tariff 12 Remand Order").

<sup>29</sup> First Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶ 115.

<sup>30</sup> Tariff 12 Order, 4 FCC Rcd. 4932 at ¶ 64. In so noting, the Commission also declared that carriers would be required to demonstrate compliance with its prohibition against unreasonable restrictions on resale.

Even with the public filing of Contract Tariffs and VTNS Options, resale carriers have often been unable to secure service offerings to which they were lawfully entitled. The question then is to what extent this situation would be exacerbated by a mandatory, or even permissive, detariffing regime. The answer is that the problem would become markedly worse. It is difficult enough today for resale carriers to identify, and actually secure, from among the many Contract Tariffs filed with the Commission "off-the-shelf" service offerings which as a practical matter can be viably resold. Without publicly-filed tariffs, this task would be insurmountable. Similarly, enforcement by the Commission of statutory protections against discriminatory treatment of resale carriers has been sporadic at best. Without publicly-filed tariffs, it will likely cease altogether.

As noted earlier, the emergence, growth and development of a vibrant telecommunications resale industry is a direct product of a series of pro-competitive initiatives undertaken, and pro-competitive policies adopted, by the Commission over the past decade. As further discussed above, resale can survive and thrive only in a market characterized by less than perfect competition. In a less than perfectly competitive market, however, the major providers will have the power to discriminate among customers and it is those customers that are also competitors that will be the most likely target of such discrimination. Hence, resale generally will only flourish when regulation provides meaningful protection against unreasonable discrimination by network providers.

Without publicly-filed tariffs, there will be no meaningful protection against unreasonable discrimination. Certainly, the Commission can retain its pro-competitive resale policies, as well as its general availability and non-discrimination requirements, but these measures will have little, if any, practical effect. And mandating that carriers maintain at their

premises price and service information regarding their domestic offerings will not provide an adequate substitute for publicly-filed, publicly-available tariffs. Detariffing is a license to discriminate against resale carriers and a "substantially competitive" market simply does not provide the market discipline to prevent such conduct.

**4. Mandatory, And Potentially, Permissive, Detariffing Would Impose Substantial Administrative And Cost Burdens On Interexchange Carriers**

At first blush, it would appear that relieving IXCs of the obligation to file tariffs would result in a net reduction in the administrative burdens associated with the provision of interstate, interexchange telecommunications services. Certainly, detariffing -- mandatory or permissive -- would reduce a carrier's regulatory burden, freeing it of the obligation to file, maintain and update federal tariffs. That reduction in regulatory burden would pale in comparison, however, to the substantial increase IXCs would experience in general administrative burdens due to the absence of tariffs, or the reduced force of tariffs.

Even small IXCs generally serve thousands of customers. Larger IXCs have customer bases in the tens or hundreds of thousands, or even millions. In a tariffed environment, service contracts between IXCs and their customers can be, and have traditionally been, relatively short and simple documents: indeed, service orders for residential and small commercial users are often oral. Such an approach is possible because the terms and conditions of service are set forth in detailed tariffs on file with the Commission. Detariffing would therefore necessarily entail a dramatic change in the manner in which service arrangements are memorialized.

Existing contracts, to the extent they reference tariffs that would no longer be maintained on file with the Commission, would need to be redone, particularly if such contracts did not contain some of the basic terms and conditions of service. For example, AT&T's

Contract Tariffs generally list discounts, but not actual rates, referencing other tariffs for the dollar amounts to which the discounts will be applied. Indeed, it is questionable in a detariffed environment whether the contracts underlying AT&T's Contract Tariffs would still be valid and, if they were deemed effective, what rates would apply. Even service contracts which contain all of the fundamental terms and conditions of service would need to be reworked to fill in the details previously provided by reference to tariffs, for the protection of both the carrier and the customer. Obviously such efforts would consume resources and generate costs which ultimately would be borne by consumers.

Future contracts would certainly have to be more substantial. More critical, with respect to the additional burdens to which IXCs would be subject on a going-forward basis in a detariffed environment, however, would be the notice requirements that would arise in the absence of tariffs. Currently, rates and other terms and conditions of service can be changed simply by revising pertinent tariff pages, thereby providing customers with constructive notice of such changes. Without tariffs, customers would have to be provided with actual notice of any and all changes in their service arrangements. Particularly for IXCs employing LEC billing, such a notification requirement could be very substantial, as well as extremely costly.

Neither is it clear that these concerns would not likewise arise in a permissive detariffing regime. Tariffs have traditionally been said to have the "force of law,"<sup>31</sup> but that assessment is predicated on a statutory scheme in which tariffs are mandatory and "off-tariff" pricing is unlawful. The Commission has recently ruled that tariffs continue to represent "the law' between customers and carriers" even when the carriers are subject to "streamlined

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<sup>31</sup> Richman Bros. Records, Inc. v. U.S. Sprint Communications, Inc., 10 FCC Rcd. 13639, ¶ 17 (1995).

regulation" as non-dominant carriers, but that holding was predicated on the conclusion that "[s]treamlined regulatory treatment of non-dominant carriers 'does not relieve non-dominant carriers from complying with Sections 201-205 of the Act, but merely modifies the method by which the Commission assures compliance with these requirements.'"<sup>32</sup> In a detariffed regime, non-dominant carriers would be relieved of complying with at least Section 203 of the Act.

**5. Detariffing Will Not Accomplish, And Indeed, Will Impede, The Objectives Identified By The Commission**

In the Notice (at ¶ 31), the Commission tentatively concludes that "forbearing from requiring non-dominant carriers to file tariffs for interexchange services promotes competitive market conditions, and therefore is in the public interest." The Commission explains that it "believe[s] that forbearance from tariff filing requirements will promote competition by enabling non-dominant carriers to respond quickly to changes in the market, and reducing administrative costs on carriers making new offerings." Moreover, the Commission notes that it "believe[s] that, without pricing and other material information available from the public tariffs of their rivals, non-dominant interexchange carriers are more likely to initiate price reductions and other competitive programs." While the Commission is correct as a theoretical matter, it is mistaken as a practical matter.

With respect to residential, small business and other broadly advertised offerings, carriers do not need to look at one another's tariffs to obtain "pricing and other material information." They need only look at the television or print advertisements of their competitors. As to the ability of carriers to "respond quickly to changes in the market," detariffing may actually slow a carrier's ability to initiate rate and service changes for residential and small

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<sup>32</sup> Id. at ¶ 17.

business offerings. With streamlined regulation, tariff revisions can be filed on relatively short notice -- *i.e.*, under TRA's recommended approach, one day for most IXCs and fourteen days for the largest providers. Without tariffs, customers would have to be provided with actual, rather than constructive, notice of changes in the terms and conditions of their service and such notification would certainly take more than one, and likely more than fourteen, days. Clearly, such notice obligations would not reduce administrative costs for carriers making new offerings.

Competition among the major IXCs is most intense with respect to large corporate users. At this market level, concerns regarding "collusive pricing" are thus minimal. Indeed, for every deal struck which might have contained more aggressive pricing but for public tariffing requirements, many more will contain lower rates because users will know that others have obtained such pricing either from the carrier with whom they are dealing or from one of its competitors. Mid-sized users will benefit from knowledge of pricing provided to larger users. The largest users have the economic muscle to ensure that the services and pricing they obtain are "cutting edge." Given their traffic volumes, resale carriers should be able to "piggy-back" on these major service arrangements and use the rates they obtain to put further downward pressure on pricing for small and mid-sized commercial, as well as residential, users.

Ensuring the availability to the consuming public of knowledge of the price and service offerings of major providers through publicly-filed tariffs, accordingly, fosters, rather than impedes, competition while reducing transaction costs for carriers and ultimately for customers.

**6. The Commission Should Retain, But Modify, Its Tariff Filing Requirements For The Domestic Offerings Of Non-dominant Interexchange Carriers**

As noted at the outset, forbearance from enforcement of statutory requirements is permitted under the '96 Act only if such enforcement is not necessary to ensure the just,

reasonable and non-discriminatory availability of service or to protect consumers. Moreover, such forbearance must further the public interest and not adversely impact competition. As is readily apparent from the above discussion, detariffing would satisfy none of these criteria.

Detariffing would provide a vehicle for discrimination against resale carriers and other non-preferred customers. By limiting the service offerings available for resale and artificially inflating the price of resold service, detariffing would adversely impact competition and deny consumers, particularly residential and small and mid-sized commercial users, the benefit of lower prices and a broader availability of products and services. Moreover, detariffing would increase the transactional costs of providing long distance services -- costs which ultimately would be borne by consumers. Certainly, none of these impacts is in the public interest.

To address these concerns, TRA recommends that the Commission retain tariffing requirements for the domestic offerings of non-dominant carriers, but modify these requirements to better reflect the "substantially competitive" interstate, interexchange telecommunications market. To this end, TRA recommends that the Commission adopt highly relaxed tariffing requirements for all but the largest IXCs, allowing small and mid-sized carriers to specify "maximum" or "reasonable ranges" of rates in their tariffs and to file tariff revisions on a single day's notice. Relaxing, without eliminating, tariff requirements would avoid the substantial increase in transactional costs attendant to detariffing, while minimizing the regulatory burden of tariff filing requirements. Moreover, these relaxed tariffing rules would achieve for the vast bulk of carriers the goals the Commission sought to achieve through its detariffing proposal -- i.e., allowing carriers to react quickly and effectively to market conditions.

For those IXCs which generate five percent or more of the aggregate domestic toll revenues, as well as for carriers that are affiliated with an incumbent LEC, TRA recommends that

the Commission retain its requirement that tariffs contain detailed price schedules and permit tariff revisions on fourteen days' notice. Imposing these somewhat more stringent requirements on the dozen or so largest IXCs would alleviate discrimination concerns, allow for meaningful enforcement of the Commission's resale and general availability policies, and ensure the availability of the pricing information necessary to fuel competition. The fourteen days' notice requirement for tariff revisions, in conjunction with TRA's recommended expansion of the "substantial cause" test and the Mobile-Sierra doctrine, would ensure the integrity of long-term service arrangements within the tariffed environment.

**B. Fourteen Days' Notice Of Proposed Tariff Revisions Submitted By The Largest Interexchange Carriers Is Necessary To Protect Resale Carrier And Other Customers**

A fourteen-day notice requirement for tariff revisions proposed by the largest IXCs (and those affiliated with incumbent LECs) is of critical importance to the resale community, as well as to other customers of long-term service arrangements, because it affords such customers, and the Commission on its own motion, an opportunity to prevent unjust and unreasonable, and hence unlawful, terms and conditions of service from becoming effective. Obviously, a one day notice period does not allow adequate time to review and challenge proposed tariff revisions. And once tariff revisions become effective, the potential for any form of expedited relief evaporates. The Commission is thereafter no longer able to suspend unlawful provisions and lengthy hearings are required to secure relief. In an industry where change is rapid and constant, the damage will have been done long before the remedial processes have run their course.

The Commission long ago recognized that a one-day notice period "could result in the introduction of rate changes having significant impact on customers and competitors

without any prior review by the Commission."<sup>33</sup> As the Commission has previously explained, a threshold period of days is required to assess whether tariff revisions "raise[] issues of anticompetitive or discriminatory behavior or unjust and unreasonable rates;"<sup>34</sup> indeed, when it adopted a 45-day notice period for tariffed rate restructuring in the price cap context, the Commission noted that "[t]he more serious concerns about discrimination and rate levels . . . cannot be addressed adequately in 14 days."<sup>35</sup> And as the U.S. Supreme Court has recognized, the tariffing scheme embodied in the Act was intended to provide the Commission with a full opportunity to review tariffs "before" they become effective.<sup>36</sup>

Timing is critical. Once tariff revisions become effective, it is extremely difficult, time-consuming and expensive to eliminate unjust and unreasonable rates, terms or conditions contained therein. And as noted above, the Commission's ability to suspend the tariff changes is lost once they become effective. If the tariff revisions are onerous enough, aggrieved parties can initiate a complaint proceeding at the Commission pursuant to Section 208 of the Act.<sup>37</sup> The complaint process, however, is not a viable substitute for the tariff review process.

First, the complaint process is cumbersome; simply put, it takes too long to resolve issues. In contrast, the tariff review process provides for immediate determinations. Second, the complaint process is too expensive. Smaller resale carriers simply do not have the resources to battle network providers in extended proceedings. Filing a petition to suspend or reject a tariff

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<sup>33</sup> Amendment of Parts 1 and 61, 98 F.C.C.2d 855, 872 (1984).

<sup>34</sup> Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd. 2873, 3128 (1989).

<sup>35</sup> Id. at 3130.

<sup>36</sup> U.S. v. Chesapeake and Ohio Railway Company, 426 U.S. 500, 513 (1976) (emphasis in original).

<sup>37</sup> 47 U.S.C. § 208(b)(1).