filing is a far more manageable endeavor for entities with limited resources. Third, the complaint process is too confined. Resolution of formal complaints tends to be legalistic in nature, while the tariff review process allows for broader, more policy-driven analyses. Fourth, the relief provided by the complaint process is too limited. If a resale carrier's complaint is ultimately upheld, whatever relief is granted will at most make the complainant whole; conversely, the tariff review process will allow the public to benefit from the rates and services provided by resale carriers not otherwise hampered by unlawful tariff constraints.

In short, the Commission's formal complaint processes suffer from the same problems that plague virtually all adjudicatory mechanisms -- *i.e.*, they are cumbersome and costly and as a result, favor those entities which are possessed of greater resources and which coincidentally stand to benefit from maintenance of the status quo. Because complaint resolution often takes years and can require substantial investments in legal and other services, the process tends to work to the advantage of those parties who are not only able to spend considerable amounts on lawyers and experts, but who are able to act unilaterally to disadvantage others. Put differently, a party in a position to deny something of value, or to act in a manner injurious to another party and to defer through legal maneuvering regulatory intervention addressing such conduct will benefit from a cumbersome and costly complaint process while the party so denied or injured will suffer.

In disputes between resale carriers and their underlying network providers, the network provider is invariably better positioned to take advantage of and to derive benefit from a costly, cumbersome dispute resolution process. Major facilities-based carriers certainly have far more extensive financial and legal resources to dedicate to the complaint process than their much smaller resale carrier customers. And the facilities-based carrier, as the provider of services, is obviously the party in the position to either deny service to, or to provide service in such a way as to injure, the resale carrier and to benefit from any delay in resolution of the resale carrier's complaint seeking relief from such actions.[38]

It is important to bear in mind that the harm occasioned by a cumbersome process for resolving complaints lodged by resale carriers against their underlying network providers is not borne exclusively by the resale carriers. During the lag in time between the filing and ultimate resolution of a resale carrier's complaint, the consuming public is denied the full benefits of the resale carrier's services.

C. Tariff Provisions And Carrier Practices Which Have The Practical Effect Of Rendering Service Offerings Unavailable For Resale Should Be Prohibited

As noted previously, the Commission requires that "all common carriers . . . permit unlimited resale of their services,"[39] and prohibits restrictions on resale.[40] Not all restrictions on resale, however, are overt. If, as a practical matter, a requirement or a practice renders a service offering either unavailable to resale carriers or unresellable, the effect is no less pernicious than

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[38] By way of example, if a network provider were to discriminate against a resale carrier by denying it access to preferred price points or superior service capabilities, it is the resale carrier that would be disadvantaged competitively during any extended consideration of a complaint addressing such denial, while the network provider, having determined that it was in its interest to discriminate against the resale carrier, would benefit from such delay. Likewise, if a network provider were intentionally slowing the provisioning of service orders submitted by a resale carrier or abusing the resale carrier's proprietary network information, the network provider would continue to benefit from its conscious actions during any delay in resolving complaints targeting such activities, while the harm to the resale carrier would continue to mount. Indeed, if the delay in obtaining relief were extensive enough, the resale carrier could be driven into bankruptcy or forced to settle on unattractive terms to preserve its business, leaving the network provider as the undeserving victor.

[39] AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶2.

[40] Resale and Shared Use Order, 60 F.C.C.2d 261 at 298-99.

an express prohibition on resale. Commission action with regard to the former is thus no less important than it is with regard to the latter if the Commission's pro-competitive resale policies are to continue to have meaning.

Network providers have employed, and continue to employ, a number of stratagems to render particular service offerings effectively unavailable for resale. One common approach is to limit the manner in which a service offering may be used. Thus, for example, a limitation on the number of locations a service offering may serve renders that offering unavailable for resale. Obviously, a service offering which can only be utilized at twenty, or fifty, or even a hundred locations cannot be broadly resold. Capping discounts at a specified revenue level and thereafter charging a higher price has a like effect. If, for example, only the first hundred thousand minutes are discounted, the service offering will not be usable to serve a large number of entities. Similarly, limiting the percentage of switched, versus dedicated, access will generally prevent resale of a service offering, given that the preponderance of resale customers are small to mid-sized businesses which do not generate traffic volumes that justify use of dedicated access. All major network providers impose such limits and caps and all, despite their protestations to the contrary, do so to prevent resale of selected service offerings.

Another approach is to erect obstacles to obtaining service which resale carriers generally cannot overcome. As noted previously, the Commission has sanctioned AT&T for conditioning the availability of VTNS Options on the submission of detailed location and network design information which resale carriers, because of the nature of their business, simply cannot provide. As the Commission explained:

> We also find that AT&T's insistence on the detailed advanced information at issue constitutes an unreasonable restriction on resale in violation of our resale orders and requirements, as specifically made applicable to Tariff 12 options by our Tariff 12 Orders. . . [T]he advance requirements pose substantial burdens on resale

> customers . . . because they often do not have and, therefore, cannot provide all the network design information in advance due to the nature of their operations. We have carefully considered AT&T's rationale for its advance information requirements but find no valid business purpose for the requirements, as applied to resale or non-resale customers, that would justify the substantial burdens this practice imposes. Requirements such as those at issue here have the effect of discouraging resale, thus undermining our pro-competitive policies enunciated in our resale orders.[41]

Other barriers are equally effective at preventing resale carriers from obtaining service offerings. For example, deposit requirements which are tied to the percentage of a customer's annualized commitment that will be generated initially or shortly after initiation of service adversely impact resale carriers alone because unlike other corporate users, resale carriers "ramp-up" usage over the course of their service terms. Ordering procedures which require resale carriers to disclose competitively-sensitive information before a service order is accepted or approved similarly deter resale carriers from seeking particular service offerings.

TRA urges the Commission to scrutinize closely "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements" and to view such actions as "inherently suspect."[42] The Commission must look beyond the superficial rationales offered by network providers to justify such actions and examine their impact on the availability of service offerings for resale.

D. The "Substantial Cause" Test Should Be Strengthened To Further Limit Unilateral Changes In Long-Term Service Arrangements And Expanded To Provide For "Fresh-Look" Opportunities

The "substantial cause" test seeks to "ascertain reasonableness where a carrier provides service under a comprehensive, contract-like tariff scheme, and later seeks to modify

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[41] Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390 at ¶ 19.

[42] AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶13.

material provisions during the term specified in the tariff"[43] The Commission has recognized that, in applying the test, its "statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the change."[44] Thus, the determination of reasonableness "involves considerations of fairness to carrier and customer alike."[45] More specifically, the test asks whether the business needs and objectives of the carrier (and/or the injury to the carrier which the tariff revision is designed to prevent) outweigh the customer's loss of its legitimate expectation of commercial certainty and stability.[46]

At the heart of the substantial cause test are notions of customer reliance, commercial stability, contract law, and fundamental fairness. The primary inquiry in applying the substantial cause test is whether the proposed revision would materially alter the stability of the contractual relationship and the legitimate expectations of the customer.

It is clear from Commission precedent that the significant issue in applying the substantial cause test is not the form of the arrangement between carrier and customer, but whether a long-term arrangement exists in which the customer has a reasonable expectation of stability. For example, in Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873, ¶ 474 (1989) (emphasis added), the Commission wrote that:

> we developed the substantial cause test as a tool for evaluating tariff changes in a circumstance in which customers had a legitimate expectation that the change would not occur. In RCA American Communications, the carrier created such an

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[43] RCA American Communications, Inc., 86 F.C.C.2d 1197, 1201 (1981) ("RCA Americom Suspension Order").

[44] Id. at 1201.

[45] RCA American Communications, Inc., 84 F.C.C.2d 353, 356 (1980) (RCA Americom Investigation Order).

[46] See AT&T Communications -- Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777, ¶¶ 16, 21 (Com. Car. Bur. 1990).

> expectation in a few identifiable customers when it offered service for a fixed term. The contract-like offering of a long term tariff is not, however, the only way in which legitimate expectations of rate stability can be created. In our price caps plan, it is this Commission that creates for ratepayers the legitimate expectation that, in general, rates will decrease in real terms from the levels they could expect under rate of return.

And in RCA American Communications, Inc. -- Revisions to Tariff F.C.C. Nos. 1 and 2, 2 FCC Rcd. 2363, ¶ 26 (1987), the Commission stated, with respect to a generally available tariff offering, that "customers are entitled to rely on stability in material provisions of tariffs that offer service for extended terms. . . ."

In the RCA Americom Investigation Order, the Commission articulated the hallmarks of long-term service arrangements to which application of the substantial cause test is appropriate:

> The long term service arrangements found in RCA Americom's current tariff bear similarities to service contracts often entered into by unregulated firms. The carrier offers definite terms for a fixed period, most likely after negotiations with potential customers; the customers then decide whether to accept the offer based upon whether the offering meets their needs at a price they are willing to pay. The rates and the length of service term would of course be among the most important terms for customers. In this case, the question is raised as to whether customers have chosen RCA Americom's service because of those terms, and relied upon its terms in contracting with their own customer, as well as in making investments and other business decisions.[47]

Significantly, the Commission did not state that negotiation between the carrier and the customer was a prerequisite to application of the test. What is key is that the carrier has offered definite terms for a fixed term and that the customer has relied on those terms in deciding to commit to the arrangement. These factors trigger application of the test whether the customer has committed to a long-term arrangement contained in a Contract Tariff (either as the original customer or otherwise) or a term plan under a more generic tariff offering.

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[47] 84 F.C.C.2d 353 at 357 (emphasis added).

The substantial cause test is premised on the Commission's recognition that stability and predictability are critical to long-term carrier/customer relationships, as explained in the RCA Americom Investigation Order:

> [A] carrier's proposal to modify extensively a long term service tariff may present significant issues of reasonableness under Section 201(b) of the Act which are not ordinarily raised in other tariff filings. In our judgment, the right of a carrier to change its tariff unilaterally should be viewed in a different light when the tariff itself represents, in large measure, a quasi-contractual agreement between the carrier and the customer. We have recognized in the Competitive Carrier Rulemaking the benefits which contracts bring to the carrier-customer relationship. The private negotiation process will generally, in the absence of market power, conclude in a more efficient bargain than that which our regulatory process would artificially impose. Contracts also lend certainty to the process. In contrast, any commitment reflected in a tariff would be fully binding on the customer as a matter of law (Section 203, 47 U.S.C. §203) yet the carrier would remain free to change the terms of the service offering at any time. It strikes us as anomalous that a carrier could use the tariff filing process to prevent any of its service terms from being enforced against it by customers, while at the same time bind customers to all the tariff provisions for as long as the carrier wishes until expiration of the terms by operation of the tariff itself. In effect, then, the result would be an agreement that only one of the contracting parties could enforce.[48]

The Commission discusses the Competitive Carrier Rulemaking, which streamlined regulation of nondominant carriers, yet it does not suggest that the substantial cause test would not apply to offerings subject to streamlined regulation. On the contrary, the Commission implicitly affirms the applicability of the substantial cause test to offerings that are subject to streamlined regulation, including contracted-for terms that are contained in filed tariffs.

The Commission expressly endorsed application of the substantial cause test to Contract Tariffs when it stated:

> In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff

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[48] Id. at 358-59 (emphasis added).

> should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and [interexchange carriers] through greater availability of long-term commitments and price protection. This benefit would be reduced if AT&T was unilaterally able to alter material terms of their contracts.[49]

Even if a customer did not negotiate the original terms of a Contract Tariff, the fact that it "chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences," to borrow the Commission's words. In such circumstances, as long as the customer has committed to a definite term, it should be entitled to rely on the stability of the rates and other terms and conditions it agreed to during the term. Indeed, the Commission has previously applied the substantial cause test to generic tariff offerings under which customers and carriers committed to long-term service relationships, even though the customers of those arrangements did not negotiate the original tariffed terms.[50]

Customers of long-term service arrangements, particularly resale carriers, rely on the stability and predictability of the terms of their long-term arrangements in entering into agreements, many of them long-term, with *their* customers and with other parties with which they do business. Because they have relied on the terms of their arrangements with a carrier in negotiating terms with their customers and other parties with which they do business, their businesses can be severely disrupted (or worse) if the carrier is permitted to change the terms of their long-term arrangements without their consent. Regardless of the nature of the change, a

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[49] Competition in the Interstate Interexchange Marketplace, Order on Reconsideration, 7 F.C.C. Rcd. 2677, ¶ 25 (1992) (footnote omitted) (emphasis added).

[50] *E.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 (Com. Car. Bur. 1990) (even though long-term arrangements were not contained in individually negotiated contract tariffs, but in generally available tariffs, proposed revisions to those arrangements were rejected because AT&T failed to show substantial cause).

material change itself requires resale carrier customers to adjust their projected expenses, revenues, profits, and often their customer contracts. and it results in their incurring unexpected administrative costs, and potentially losing customers. Resale carrier customers therefore rely on the substantial cause test as a litmus test to evaluate the necessity of tariff revisions and to enforce the stability and predictability of long-term service arrangements.

In a streamlined environment, application of the substantial cause test is more, not less, critical to ensuring fairness in carrier/customer relationships, since Commission scrutiny of offerings subject to streamlined regulation is less than that of fully regulated services. Although it is critical to application of the substantial cause test that the customer invoking the test have a legitimate expectation of stability of the terms of the arrangement, it is irrelevant whether that expectation arose from the tariff or from some other source. Indeed, customer reliance can be presumed.[51]

1. The Substantial Cause Test Should Include Considerations Of Contract Law Principles And Balancing Of Carrier And Customer Interests

a. Contract Law Principles.

The substantial cause test is applied on a case-by-case basis. While considerations of customer fairness and reliance have long been the touchstone of the test, recently the Commission has recognized that contract law principles, which themselves are based on considerations of fairness for both contracting parties, are instructive in applying the test. Thus, when it recently explained how it would apply the substantial cause test to evaluate unilateral revisions by AT&T of Contract Tariff terms, the Commission wrote:

[51] Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873 (1989).

> Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assessment of whether a contract-based tariff revision is just and reasonable under the substantial cause test. We are not prepared, however, to say at this time that these principles provide definitive parameters for a substantial cause showing. Instead, we will consider on a case-by-case basis in light of all relevant circumstances whether a substantial cause showing has been made.[52]

Examples of contract law principles which would seem to be applicable to unilateral carrier attempts to change material terms of long-term service arrangements include the doctrines of impossibility of performance, frustration of purpose, and commercial impracticability, all of which require the party asserting them as a defense to non-performance of its contractual obligations to show that extreme unforeseeable circumstances arose which prevented the party from performing under the original terms of the agreement.[53]

b. Carrier Interests.

As noted previously, application of the substantial cause test involves considerations of carrier interests as well as customer interests. With respect to carrier interests, it is well established that mere loss by the carrier of anticipated revenues is generally insufficient to satisfy the substantial cause test. Indeed, when AT&T attempted to assert such a justification for tariff revisions restricting customers' ability to switch from costly long-term plans to less expensive long-term plans, the Common Carrier Bureau rejected the proffered explanation, stating:

> AT&T's second assertion in support of its substantial cause claim is a conclusory statement that it will lose revenues if the transmittal does not take effect. We note that AT&T is claiming that its revenues will be reduced; it is *not* claiming that it will fail to recover its costs or that net revenues will be negative. . . . To the

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[52] 1995 Interexchange Reconsideration Order, 10 FCC Rcd 4562 at ¶ 25 (footnote omitted).

[53] See 18 S. Williston & W. Jaeger, Williston on Contracts (3d ed. 1978) at 1, et seq.; Restatement (Second) of Contracts (1979) §§ 261, et seq ("Williston").

> extent that AT&T is arguing that it will make less money when customers take advantage of the lower tariffed rate in the plan to which they convert, it has failed to identify some injury to AT&T that outweighs the existing customers' legitimate expectation of stability . . . .[54]

Thus, a carrier will be required to demonstrate significantly greater harm or difficulty performing its obligations under the original terms of the arrangement to sustain a showing of substantial cause. Common law contract law principles, to which the Commission now looks for assistance in applying the substantial cause test, are consistent with this approach. For example, the common law rule of impossibility of performance excuses a party's performance of its contractual obligations only if

> the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved . . . . [or to] an unanticipated circumstance [that] has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.[55]

Not only has the Commission observed with respect to AT&T and other carriers that a carrier cannot justify terminating or altering a long-term arrangement solely on the basis of a reduced expectation of return, but such a rule is consistent with common law contract principles:

> The fact that by supervening circumstances, performance of a promise is made more difficult and expensive, or the counterperformance of less value than the parties anticipated when the contract was made, will ordinarily not excuse the promisor.[56]

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[54] <u>AT&T Communications -- Revisions to Tariff F.C.C. No. 2</u>, 5 F.C.C. Rcd. 6777 ¶ 21 (Com. Car. Bur. 1990). The Bureau rejected AT&T's claim that the tariff revisions were "clarifications" rather than revisions, explaining that "restrictions on termination of existing plans and initiation of new plans are significant aspects of a long term service plan and cannot be changed without impact on the customer." <u>Id</u>. at ¶ 15.

[55] Williston at 6-8.

[56] Williston at 176.

Similarly, the Restatement (Second) of Contracts states that "mere market shifts or financial inability do not usually effect discharge under the [rule of impossibility of performance]."[57]

Thus, while the substantial cause test is a fluid device to be applied on a case-by-case basis in considering the interests of the carrier seeking to modify existing terms of a long-term arrangement, the Commission should demand significantly more than a mere showing that the terms the carrier seeks to change would not be as lucrative to the carrier as the proposed revised terms. Instead, the Commission should require proof of unforeseen circumstances that would make the carrier's performance of its original obligations impracticable or extremely or unreasonably difficult as the threshold for substantial cause.

c. Customer Interests.

Although customer reliance on the stability of long-term arrangements is a prerequisite for application of the substantial cause test, traditionally it has not been necessary for customers to demonstrate detrimental reliance as part of the substantial cause balancing test of carrier and customer interests. Thus, in RCA American Communications, Inc. -- Revisions to Tariff F.C.C. Nos. 1 and 2, 2 F.C.C. Rcd. 2363, n. 23 (1987) (emphasis added), the Commission stated:

> RCA Americom appears to believe that its customers must prove detrimental reliance in order for the carrier to be, in effect, estopped from altering its tariff terms in midstream. We have never so held. Rather, the basis of the substantial cause test is the apparent unfairness of allowing a carrier to alter material provisions of a long-term tariff when customers have agreed to take service under the understanding that, by offering such terms, the carrier has sacrificed some of its traditional flexibility to revise its tariff at any time.

Similarly, in Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873, ¶ 475 (1989), the Commission wrote that

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[57] Restatement (Second) of Contracts (1979) ("Restatement 2d") § 261, note b.

> there is nothing inherent in a substantial cause requirement that demands that we be able to individually analyze the reliance interests of identifiable customers. Indeed, since we are intentionally creating [in price caps], for ratepayers as a general class, the general expectation of rates that do not exceed the upper bands, we may presume that they rely on that general expectation. We do not expect the nature and extent of customer reliance typically to be at issue in investigations of above-band rates.

Thus, while some demonstration of customer reliance on stable terms and conditions of service is required for the substantial cause balancing of interests, a showing of detrimental customer reliance is not a prerequisite.

2. If A Carrier Can Demonstrate Substantial Cause For Proposed Tariff Revisions, Affected Customers Should Be Afforded A Fresh Look Opportunity To Terminate Their Long-Term Service Arrangement Without Liability

If a carrier is able to demonstrate substantial cause for its attempted unilateral alteration of a long-term service arrangement. and the proposed revisions would result in a material readjustment of the relative rights, obligations. and expectations of the customer and carrier to which the customer has not consented, it would be fundamentally unfair to require the customer to remain bound to long-range terms and conditions to which it did not agree. Furthermore, if the revisions are permitted. the carrier would be encouraged to make future material alterations to its arrangement with the customer that could be very detrimental to the customer and its relationships with its own customers.

For these reasons, if a carrier is permitted to alter unilaterally a long-term service arrangement with a customer. the carrier should either "grandfather" the customer, *i.e.*, exempt it from the revisions, or permit the customer to terminate its commitment to the carrier without liability. Either alternative would be consistent with Commission precedent.

The Commission suggested in CC Docket 90-132 that, under some circumstances, customers of AT&T long-term service arrangements might be permitted to terminate those arrangements if AT&T attempted to alter material terms of those arrangements without their consent, even if AT&T were able to demonstrate substantial cause for the alteration.[58] The Commission explained:

> In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and IXCs through greater availability of long-term commitments and price protection. This benefit would be reduced if AT&T was unilaterally able to alter the material terms of their contracts. Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assess of whether a contract-based tariff revision is just and reasonable under the substantial cause test. . . . <u>In the unlikely event that a material change to a contract-based tariff meets the substantial cause test, we will . . . consider on a case-by-case basis whether to permit customers taking service under that contract-based tariff to terminate their contract.</u>[59]

Moreover, there is ample precedent simply to grandfather a customer and exempt it from the proposed tariff revisions.[60]

Either approach -- grandfathering or permissive termination without liability -- would be consistent with principles of economic theory, contract law, and fundamental fairness. The stability of long-term contractual terms and conditions is an important element of the bargain which long-term customers expect when they commit to extended service plans. If that element

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[58] <u>1995 Interexchange Reconsideration Order</u>, 10 F.C.C. Rcd. 4562 at 4574, ¶ 25.

[59] <u>Id</u>. at 4574, ¶ 25 (emphasis added; footnotes omitted).

[60] *E.g.*, <u>AT&T Communications -- Revisions to Tariff F.C.C. No. 1</u>, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); <u>AT&T Communications -- Revisions to Tariff F.C.C. No. 2</u>, Transmittal No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991).

is removed without their consent, optional termination of their arrangements without liability (or grandfathering) is an appropriate remedy for customers that believe that the benefits of the bargain no longer outweigh the risks.

As a matter of economic theory, the economic benefits of contracts derive from the stability and predictability that they bring to the market, but such benefits require that the contracts are equally binding on both parties. If a carrier is free to alter materially the terms of its long-term arrangements, then its existing customers should be free to terminate those arrangements without liability or be exempted from the revised terms.

E. The Mobile-Sierra Doctrine Should Be Applied To All Carrier-To-Carrier Service Arrangements Irrespective Of The Form Or Context In Which Such Arrangements Are Embodied

Since at least the middle of this century, it has been settled law that a carrier -- whether it be a communications carrier, a gas pipeline provider, or an electrical utility -- may not use a tariff to revise unilaterally the terms of a legitimate contractual service arrangement.[61] In Bell System Tariff Offerings (Docket 19896), 46 F.C.C.2d 413, 432 (1974), aff'd, Bell Telephone, supra, the Commission itself endorsed this fundamental principal, stating:

> Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In light of the court decisions interpreting comparable legislation, it appears that, except as expressly modified by statute, Bell's contractual obligations with Western Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act. . . . [I]t is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.

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[61] United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956) (construing Natural Gas Act); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (construing Federal Power Act); MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 n.27 (D.C. Cir. 1983); Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1282 (3d Cir. 1974) ("Bell Telephone"), *cert. denied,* 422 U.S. 1026, *reh. den.*, 423 U.S. 886 (1975) (construing Communications Act).

In other words, the Mobile-Sierra doctrine "restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts."[62]

Notwithstanding a recent Common Carrier Bureau ruling to the contrary,[63] Midwestern Relay Co., 69 F.C.C.2d 409 (1978), and American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) ("ABC"), actually bolster the proposition that individually negotiated long-term arrangements whose terms are filed as contract tariffs should be subject to the Mobile-Sierra doctrine. Most fundamentally, the contractual arrangements at issue in Midwestern Relay and ABC were between a carrier and non-carrier customers, and were not filed with the Commission and made generally available to similarly situated customers.[64] In refusing to consider the argument that subsequently filed tariff revisions unlawfully conflicted with the terms of the carrier/non-carrier contracts,[65] the Commission wrote, in words no longer applicable:

> Even if we were to agree with Petitioners that carrier-customer contracts should be allowed to definitively establish rates in some limited areas, we are prevented from so finding as the Communications Act . . . does not provide for rates to be set in this manner.[66]

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[62] MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981) ("MCI").

[63] AT&T Communications - Contract Tariff No. 360, Transmittal Nos. 2952 and 3441, CC Docket No. 95-133, DA 95-1061, ¶ 11 (released May 10, 1995) ("CT No. 360").

[64] ABC and CBS had entered into separate contracts with Midwestern Relay Company ("Midwestern") for microwave video transmission service. The contracts both provided that Midwestern would not "of its own volition" file any tariff inconsistent with the terms of the agreements during the terms thereof, but both contracts specifically contemplated that Midwestern would file a tariff for the service provided under contract, and that the tariff, once filed, would be incorporated in both agreements. Midwestern filed its tariff -- after contracting with CBS, but before contracting with ABC. Later, while the contracts were still in effect, Midwestern amended its tariff to increase the rates set forth therein, and CBS and ABC appealed to the Commission to deny the tariff revisions. 643 F.2d 818 at 819-20.

[65] Midwestern Relay, 69 F.C.C.2d 409 at 413.

[66] Id. at 418 (*quoted in* ABC, 643 F.2d 818 at 820).

On review, the D.C. Circuit upheld the Commission. The basis for the Court's reasoning, however, was the fact that, although Section 211(a) of the Communications Act requires carriers to file inter-carrier agreements, no provision of the Act requires carrier-customer agreements to be filed.[67] The Court specifically declined to interpret the breadth of Section 211(b) of the Act, which permits the Commission to require carriers to file their agreements with customers.[68] Instead, the Court reasoned that,

> while Section 211(b) arguably may authorize the Commission to provide for the filing of contracts such as those here at issue, the Commission has not yet exercised such authority, if any, as it may have in this respect. . . . The difficulty here is precisely that, because no such provision [as Section 211(a)] applied to this contract, the clause in dispute was made available neither to the public nor the Commission. Hence, the disputed clause is just the kind of unpublished contractual alteration of a tariff which the Act condemns.[69]

The seminal case on which the D.C. Circuit relied in ABC was Armour Packing Co. v. United States, 209 U.S. 56 (1908) ("Armour"), which held that a freight carrier could not alter the terms of a filed tariff with an unfiled contract. The Third Circuit in the earlier Bell Telephone case, supra, refused to apply Armour and instead applied Mobile-Sierra to the carrier-carrier contracts before it; but the ABC Court distinguished the Third Circuit's reasoning by noting that, unlike ABC, Bell Telephone concerned carrier-carrier contracts, for which filing was required by Section 211(a) of the Act.[70] The D.C. Circuit in ABC quoted from the Bell Telephone opinion:

> "We conclude that section 211(a) requires the filing of contracts such as the AT&T-Western Union contracts at issue. It follows

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[67] ABC, 643 F.2d 818 at 823.

[68] Id at 823 n.5.

[69] Id at 823, 826 (emphasis added).

[70] Id at 825.

> from this conclusion that the Act permits AT&T and Western Union to provide for the leasing of facilities by contract, as well as by tariff. See United Gas v. Mobile Gas Corp., 350 U.S. at 338 . . . ("by requiring contracts to be filed with the Commission, the [Natural Gas] Act expressly recognized that rates to particular customers may be set by individual contracts."). Armour is therefore distinguishable."[71]

The fundamental premise underlying ABC, Midwestern Relay, and Bell Telephone -- that carriers may establish the terms of service to customers only by filed tariffs, and not by unfiled contracts -- is inapplicable to contractually-set rates and terms filed with the Commission in a Contract Tariff. Although Section 211(b) of the Communications Act vests the Commission with the authority to require the filing by carriers of tariffs based on carrier/non-carrier contracts, at the time Bell Telephone and ABC were decided, the Commission had not developed a procedure for carriers to file such tariffs. In contrast, Section 211(a) of the Act required carriers to file their contracts with other carriers. Accordingly, while Bell Telephone dealt with filed contracts, and applied the Mobile-Sierra doctrine, ABC dealt with contracts that were not filed with the Commission, and the ABC Court therefore applied Armour. Things have changed.

Since carriers and non-carrier customers are now permitted to negotiate individual terms and conditions and enter into contracts, provided that the terms and conditions are filed with the Commission and made generally available to similarly situated customers, there is no legal or logical basis for distinguishing such contractually determined relationships from contractually determined carrier-carrier relationships, which have always been subject to filing with the Commission, and to which the Mobile-Sierra doctrine has traditionally been applied. Indeed, the fact that carrier-customer contractual arrangements are now required to be filed with the Commission and made generally available eliminates the sole reason that the Mobile-Sierra

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[71] Bell Telephone, 503 F.2d 1250 at 1278 (*cited in* ABC, 643 F.2d 818 at 825).

doctrine was not applied to such arrangements under earlier precedent; it should not provide a basis for rejecting the doctrine, as the Common Carrier Bureau did (without citation to authority) in Contract Tariff No. 360.

Precedent under the Interstate Commerce Act, on which the Communications Act was modeled, supports the interpretation that the filing of individually negotiated rates should trigger application of the Mobile-Sierra doctrine, not provide grounds for rejecting it. In Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984) ("Sea-Land"), the Court of Appeals explained that once a procedure was established for filing with the Interstate Commerce Commission contractually established rates and terms of freight carrier services, there was no longer any impediment to carriers' establishing rates and terms of service through contract, provided that such rates and terms were made available to all shippers ready, willing, and able to meet the terms and pay the rates -- the fundamental obligation of every common carrier.[72]

The Court elaborated:

> [C]urrent law no longer considers contract rates to be per se violations of the common carrier duty of nondiscrimination. To be sure, there was a time when one might have drawn the opposite conclusion, and the case law cited by petitioners is illustrative of that earlier period [specifically citing Armour]. . . . Since 1978, however, the Interstate Commerce Commission has held that contract rates are not inherently discriminatory, provided that the carrier offering them makes them available to all similarly situated shippers of like commodities. . . .
>
> The uncertain legal status of private contracts prior to 1978 stemmed largely from the ambiguity of the Supreme Court's holding in Armour Packing. There the Court reviewed the criminal convictions under the Elkins Act which prohibits common carriage of property at less than the applicable published rate on file with the Interstate Commerce Commission. . . .
>
> In light of . . . intervening developments, we find the inference unjustified that the Supreme Court in Armour Packing intended to condemn contact rates as

[72] Id. at 1318; *accord*, Iowa Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 807-808 & n.18 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

> inherently discriminatory. The more likely explanation for the Court's observation that private contracts could not be filed, 209 U.S. at 81, 28 S. Ct. at 435, was the absence of any procedural mechanism for doing so in 1908. Other decisions considering this aspect of the Armour opinion have reached the same conclusion. See, e.g., United Gas Pipeline v. Mobile Gas Service Corp., 350 U.S. 332, 345, 76 S. Ct. 373, 381, 100 L. Ed. 373 (1956); American Broadcasting Cos. v. FCC, 643 F.2d 818, 822-26 (D.C. Cir. 1980). To the extent that such procedural concerns underlay the Court's observation, the Interstate Commerce Commission laid them to rest in its 1978 Change of Policy by specifically providing for the filing of contract rates under normal Commission procedures. . . . Contract rates duly filed with and approved by the Commission, of course, satisfy the central concern of the Armour Court that prices charged for transportation accord with applicable rates on file with the ICC. . . . Because the rate applicable to a contract shipper is the rate specified in its contract on file at the Commission, and not that set forth in the carrier's general noncontract tariffs, . . . Armour Packing properly read provides no support for the proposition that contract rates approved under appropriate Commission procedures inherently conflict with a common carrier's duty of nondiscrimination.[73]

Applying this logic, there is no reasonable basis not to apply the Mobile-Sierra doctrine to carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied.

F. Unbundled Availability of Piece Parts Should Accompany Bundling Of Customer Premises Equipment And Telecommunications Services

The Notice (¶ 88) also requested comment on the tentative conclusion that "allowing non-dominant interexchange carriers to bundle CPE with interstate, interexchange services would promote competition by allowing such carriers to create attractive service/equipment packages for customers." TRA supports the Commission's conclusion to amend Section 64.702(e) to permit the provision of CPE in tandem with telecommunications transmission services because the ability to pursue full-service telecommunications arrangements

[73] Id. at 1316-18 (footnotes and most citations omitted).

would present numerous benefits which, under the current structure of Section 64.702(e), remain unavailable to consumers.

As the Commission points out, the national telecommunications environment has changed dramatically since the Commission imposed the "unbundling" requirement of Section 64.702(e) as part of the Agency's decision in Second Computer Inquiry.[74] At that time, the Commission concluded that, "[i]n regulated markets characterized by dominant firms, there may be an incentive, however, to use bundling as an anti-competitive marketing strategy, e.g., to cross-subsidize competitive by monopoly services, that restricts both consumer freedom of choice as well as the evolution of a competitive marketplace. Reducing bundling practices in such markets reduces these impediments to improve consumer welfare."[75] In light of the Commission's conclusion that the "business services market [is] 'substantially competitive'",[76] modification of the strict unbundling requirement of Section 64.702(e) represents a timely advance which will permit telecommunications carriers to increase customer convenience and economic efficiency by providing greatly expanded service arrangement options to those customers.

While TRA believes that the flexibility to bundle CPE with interstate, interexchange services will afford its resale carrier members the opportunity to offer their customers a fuller range of service/equipment packages, it is nonetheless concerned that bundling not be used by network providers to restrict resale of selected offerings. As the Commission noted in its Report and Order on the propriety of bundling restriction in the cellular market,

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[74] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C. 2d 384 (1980) (Second Computer Inquiry).

[75] Id. at 443, n. 52.

[76] Notice at ¶ 86, *quoting* First Interexchange Competition Order, 6 FCC Rcd. at 5887.

despite the vigorous competition evidence by the cellular CPE market, the cellular market itself "is not fully competitive, thus leaving open the possibility that bundling may be used for anticompetitive purposes."[77] Accordingly, TRA urges the Commission to require all carriers who wish to provide bundled service arrangements to offer each service component to all customers on an unbundled basis as well, at the same terms, conditions and rates as offered in bundled packages.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with the comments set forth herein.

Respectfully submitted,

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[77] Bundlng of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, FCC 92-207, 7 FCC Rcd. 4028, June 10, 1992 ("Report and Order") at ¶ 7.