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Before the
FEDERAL COMMUNICATIONS COMMISSION
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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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**COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
COMMENTS ON PROPOSED TARIFF FORBEARANCE POLICY**

Genevieve Morelli
Vice President and
General Counsel
Competitive Telecommunications
Association
1140 Connecticut Ave., N.W.
Suite 220
Washington, D.C. 20036
(202) 296-6650

Robert J. Aamoth
Jonathan E. Canis
Reed Smith Shaw & McClay
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
(202) 414-9210

Counsel for Competitive
Telecommunications Association

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SUMMARY

The Competitive Telecommunications Association (“CompTel”) urges the Commission to reject its tentative conclusion in favor of mandatory detariffing and to adopt a forbearance policy that will allow interexchange carriers (“IXCs”) to file tariffs on a voluntary basis. As part of this policy, the Commission should modify its current tariffing rules in order to provide IXCs with increased flexibility in designing and filing their tariffs. At a minimum, the Commission should permit nondominant IXCs to file Section 203 tariffs containing the terms and conditions of service.

Permissive detariffing will benefit the public by providing essential information to customers, thereby increasing customer choice and promoting price competition. Conversely, failure to allow voluntary tariffing will impose unnecessary and excessive costs upon the industry. Tariffs define the rights and responsibilities of the carrier and customer, thereby avoiding unnecessary litigation and limiting the need for extensive contract negotiations.

Permissive detariffing will not lead to price collusion among IXCs. Economic theory holds that collusion is highly unlikely in markets characterized by numerous sellers of varying sizes, highly diversified products, rapid technological change, sporadic and high volume orders for services, and a history of aggressive competition among sellers. In 1990 and 1991, the Commission applied these factors to the interexchange industry, and found that price collusion is highly unlikely. This same conclusion is even more appropriate today. In addition, permissive detariffing will not be an undue burden on Commission resources. Any administrative burdens can be

minimized or eliminated by requiring filing on computer disk, electronic filing, or by privatizing the tariff maintenance function.

The Commission also should reject its tentative conclusion to require IXCs to maintain service and rate information if mandatory detariffing is adopted. Such an approach would deny IXCs and the public the benefits of tariffing while imposing new and burdensome reporting obligations on carriers.

The filed rate doctrine would continue to apply if a permissive detariffing policy is adopted, but will not lead to any undesirable results. Just last year, the Commission found that the level of competition in the interexchange market ensured that market forces prevent carriers from using unilateral tariff revisions to change existing contracts to a customer's disadvantage. That conclusion is even more true since the signing of the Telecommunications Act of 1996 ("1996 Act").

In establishing its forbearance policy, the Commission should clarify that any interexchange services provided by the Bell Companies should be fully tarified, at least on an interim basis. The Commission does not have substantial experience with Bell Company provision of these services, and has yet to determine if measures must be taken to protect customers and competitors from unlawful cross-subsidization or other unreasonable practices.

Finally, the Commission lacks jurisdiction under the 1996 Act to mandate detariffing. Such a mandate imposes significant new regulatory obligations upon IXCs, in contravention of the Act's deregulatory goals. In addition, because mandatory detariffing would impose excessive costs on the industry, it cannot pass the public interest test mandated by the 1996 Act.

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To: The Commission

**COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
COMMENTS ON PROPOSED TARIFF FORBEARANCE POLICY**

The Competitive Telecommunications Association ("CompTel"),¹ by its attorneys, and pursuant to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned docketed proceeding,² hereby comments on the Commission's proposal to forbear from tariff regulation of nondominant interexchange carriers ("IXCs"). CompTel strongly supports the Commission's proposal to forbear from requiring the filing of tariffs by nondominant IXCs; such action is fully compliant with the

¹ CompTel is a nationwide industry association of the nation's competitive telecommunications carriers, with over 175 members including large nationwide carriers and scores of smaller regional carriers.

² *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, FCC 96-123 (March 25, 1996) ("Notice").

Telecommunications Act of 1996³ and with the public interest. However, the reinstatement of the Commission's forbearance policy should be permissive, not mandatory. Prohibiting IXCs from filing tariffs on a voluntary basis would impose excessive and unnecessary costs on carriers and customers alike, disrupt interexchange competition, and exceed the Commission's authority under the 1996 Act. At a minimum, should the Commission decide to adopt mandatory detariffing, -- and CompTel demonstrates in these comments that it should not -- it should apply that policy only for the filing of rates, while permitting nondominant IXCs to continue tariffing the terms and conditions of service on a voluntary basis.

I. INTRODUCTION

The Commission successfully implemented a permissive detariffing policy for many years, to the benefit of both carriers and customers, until judicial interpretations of the Communications Act led to the enforcement of a mandatory tariffing policy.⁴ Even with mandatory tariffing, the Commission adopted effective regulations -- known as "maximum streamlined regulation" -- designed to minimize the regulatory burden on nondominant carriers. Under those rules, nondominant carriers were allowed to file tariffs on 24 hours' notice, were given discretion in describing their services and rate structures, and were relieved of the obligation to file cost support data. In addition, as

³ Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

⁴ *AT&T v. F.C.C.*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied MCI Telecommunications Corp. v. AT&T*, ___ U.S. ___, 113 S. Ct. 3020 (1993).

a means of enhancing the pricing flexibility of nondominant carriers, the Commission permitted such carriers to identify ranges of minimum and maximum rates for their services, as opposed to identifying specific rates.⁵ While this latter decision was found to be inconsistent with mandatory tariffing as defined in Section 203 of the Communications Act, the Commission's judgment that such policies promoted the public interest was never questioned.⁶

The Telecommunications Act of 1996 expressly affirms the Commission's forbearance authority, and effectively nullifies the judicial decisions imposing a mandatory tariffing regime under Section 203. In so doing, the 1996 Act empowers the Commission to forbear from the active regulation of nondominant carriers' services and rates. As the Commission has found repeatedly in the past, the public interest would be served by eliminating mandatory tariffing rules for nondominant carriers; and as the Commission has stated in the instant Notice, both carriers and the public would benefit by eliminating unnecessary tariffing obligations for nondominant IXCs. Therefore, CompTel submits that the Commission should use its forbearance authority under the 1996 Act to reinstitute permissive detariffing along with maximum streamlined regulation.

CompTel opposes the Commission's proposal to go one step further by imposing mandatory detariffing upon the industry. As CompTel notes in more detail below,

⁵ *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 6752 (1993).

⁶ *Southwestern Bell Corp. v. F.C.C.*, 43 F.3d 1515 (D.C. Cir. 1995).

mandatory detariffing would eliminate an important contractual tool for IXC's and customers that may wish to use it, disrupt rather than facilitate maximum interexchange competition, and remove an important source of information from the public domain. By implementing maximum streamlined regulation for nondominant IXC's, the Commission would guarantee the benefits of permissive detariffing while fully protecting against any theoretical abuses of the tariffing mechanism. For those reasons, CompTel submits that the Commission should not, and indeed cannot, implement mandatory detariffing pursuant to its forbearance authority in the 1996 Act.

II. PERMISSIVE DETARIFFING -- AND NOT THE COMMISSION'S MANDATORY DETARIFFING PROPOSAL -- WOULD BEST SERVE THE INTERESTS OF THE PUBLIC AND NONDOMINANT IXC'S

While correctly recognizing the benefits of removing the obligation to file tariffs, the Notice overstates the regulatory burdens associated with tariffing and ignores the substantial benefits that voluntary tariffing offers to both customers and carriers. The Commission should revise its rules governing nondominant carrier tariffs to accord IXC's maximum flexibility, and should allow IXC's to maintain Section 203 tariffs on file with the Commission or another designated entity on a voluntary basis.

A. The Commission May Eliminate The Burdensome Aspects Of Tariffing By Modifying Its "Maximum Streamlined" Tariffing Rules To Provide IXC's With Additional Flexibility

The Commission premises its mandatory detariffing proposal on the assumption that tariffing inhibits a carrier's ability to respond quickly to market demand, eliminates incentives to provide discounted prices, and imposes excessive costs on new service

introductions.⁷ However, to the extent those problems exist, they are fully addressed by tariff filing rules, such as maximum streamlined regulation, which eliminate unnecessary burdens on carriers and customers. With minor modifications of the Commission's existing rules, IXCs would be able to realize the substantial benefits associated with tariffing, while retaining maximum flexibility and avoiding unnecessary costs. CompTel therefore urges the Commission to apply its maximum streamlined regulations under a permissive detariffing regime in the following manner.

First, the Commission should retain the 24-hour notice period that currently applies to nondominant tariff filings. This abbreviated notice period permits IXCs to respond immediately to customer requests for new services and effectively eliminates any regulatory delay associated with the tariffing process.⁸

Second, the Commission should retain the current rules that allow nondominant carriers maximum discretion in defining their services and rate structures; eliminate the need to file cost support materials; and establish a presumption of reasonableness for rates proposed by nondominant carriers. These rules would eliminate the most objectionable paperwork burdens associated with tariffing, and provide nondominant carriers with maximum flexibility in defining their services and rate structures.

⁷ Notice at ¶ 30.

⁸ The 24-hour notice period also has the benefit of insulating nondominant carriers from meritless objections and abuses of the tariff review process.

Third, the 1996 Act frees the Commission to re-adopt its previous decision permitting nondominant IXC's to tariff ranges of minimum and maximum rates for their services, as opposed to identifying a specific rate, on a voluntary basis. The Commission should amend its rules to give nondominant IXC's the discretion to: tariff full rate schedules; establish individual case basis (or ICB) pricing structures; establish customer-contract pricing arrangements; list minimum-maximum rate ranges; establish limited-duration promotional offerings; or eliminate rates altogether and file tariffs with only terms and conditions and/or service descriptions. Such action would provide IXC's sufficient discretion to establish rate structures that best suit their business plans and respond to customer needs.

Taking these actions would fully address the Commission's stated concerns regarding the impact of tariffing on nondominant carriers. The 24-hour notice period would eliminate any concern that tariffing would delay the introduction of new services. The pricing flexibility that would be provided by granting IXC's full discretion to design their rate structures, and the ability to establish ICB pricing, customer-specific contract arrangements, or promotional offerings would promote price discounting.⁹ Finally, permissive detariffing would ensure that carriers would only file tariffs if they determined that the process was cost effective; carriers who felt that the tariffing process was inhibiting their ability to compete effectively would not have to file any

⁹ Moreover, as discussed *infra*, the publication of rates will stimulate rate discounting by allowing customers to compare pricing among multiple vendors. Placing comparative rate data in the hands of the public will increase price competition among all carriers, including those that maintain tariffs and those that choose not to.

tariffs at all. Thus, a carrier's decision to file a tariff would indicate that tariffing does not impose unreasonable costs on that carrier. Therefore, the Commission's stated concerns that tariffing may be overly restrictive cannot support a policy of mandatory, rather than permissive, detariffing.

B. Voluntary Tariffing Will Provide The Public With An Essential Source Of Information That Will Maximize Customer Choice And Promote Price Competition

In proposing mandatory detariffing, the Commission overlooks the benefits that tariffs offer to customers and carriers as sources of information. It is commonplace in the market for carriers and customers to establish the terms and conditions of service arrangements by reference to tariffs on file with the Commission. Mandatory detariffing would needlessly complicate and lengthen such negotiations, and indeed require numerous existing contracts to be re-written or even re-negotiated. Tariffs facilitate the negotiation process and promote the ability of carriers to market their services quickly and effectively to potential new customers.

In addition, publicly-available tariff filings give carriers and customers access to reliable information about services and rates in the marketplace. To the extent individual customers may not have the sophistication or resources to access those tariffs by themselves, telecommunications consulting firms can assemble and package such information for the benefit of telecommunications users. Without tariffs, carriers and users would be handicapped in finding publicly available, up-to-date data on services and rates. Customers will be better able to evaluate the reasonableness of

proposed contract-specific offerings if they know what is generally available through the tariffed offerings of other carriers.

Carriers also use tariffs as an important means of disseminating information to potential customers. Service descriptions and the tariffed rates themselves are frequently used as a supplement to carriers' marketing efforts: carriers use tariffs to announce limited-term promotional offerings; to differentiate their services from those of other carriers; and to make public service terms or rate levels that are superior to their competitors'. The importance of tariff filings to a nondominant carrier's marketing efforts is shown by the consistent willingness of nondominant carriers to file tariffs voluntarily under the Commission's prior permissive detariffing policy. The United States Court of Appeals for the District of Columbia Circuit has recognized:

Under the [Commission's] previous [forbearance] orders, "forborne" carriers could elect to continue offering service pursuant to filed tariffs, or to cancel their filed tariffs and convert to private contracts. Many new entrants apparently chose not to file tariffs, but the *vast majority* of existing forborne carriers opted to maintain their services under the tariff system.¹⁰

Finally, information contained in tariffs is used by competitors as well as customers to facilitate competition. Carriers can be expected to lower their own rates, or to offer superior performance guarantees or more favorable terms of service, in

¹⁰ *MCI Communications Corp. v. F.C.C.*, 765 F.2d 1186, 1189 (D.C. Cir. 1985) (emphasis added). Similarly, prior to the Court of Appeals decision that invalidated the use of "minimum/maximum" rate ranges instead of specific rates in nondominant carrier tariffs, numerous carriers voluntarily chose to file specific rates because they and their customers derived benefit from that practice.

direct response to the offerings of their competitors. As a result, the publication of service information in tariffs can promote competitive conditions in the long distance industry. As Professor Richard Posner observes: "The direct or indirect exchange of price information by competitors can serve procompetitive, pro-efficiency purposes even in markets with only a few sellers."¹¹ In the case of interstate interexchange services, where the market is populated by several hundreds of carriers, the dissemination of rate and other information through tariff filings promotes competition and efficiency in the marketplace. For all of these reasons, the publication of tariffs by IXC's on a voluntary basis will increase customer choice and promote price competition and service innovation.

C. Failure To Allow Voluntary Tariffing Will Unreasonably Expose IXC's To Liability And Will Impose Excessive Transaction Costs Upon The Industry

Carriers realize substantial benefits from tariffing, and will be heavily penalized if the Commission adopts its mandatory detariffing proposal. Tariffs are instrumental in defining the respective duties and obligations of the carrier and customer. By clearly delineating the scope of the carrier's and customer's liability to each other, tariffs provide legal certainty and minimize the likelihood of litigation. Tariffs promote uniformity and minimize the ad hoc modifications that individual contract negotiations may permit. As a result, tariffs help to define the legal obligations of the parties with

¹¹ Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 Georgetown L.J. 1187, 1203 (1979) (Posner Article).

predictability and consistency, thereby reducing the overall cost of doing business and permitting lower rates to consumers.

Equally important, tariffs allow carriers to minimize the transaction costs associated with providing service. In cases where a carrier provides a fairly uniform service to a large customer base -- such as business or residential switched service -- it would be inefficient to provide service pursuant to individual contracts. Tariffs allow carriers to avoid the costs of extensive one-on-one negotiations, and may be a critical factor in determining whether a carrier will even seek to provide a high-volume, low-margin service. Similarly, the use of tariffs simplifies the carrier's order processing and billing functions. The uniformity provided by tariffs allows the use of mechanized processes to handle these functions, and provides a significant source of cost savings to the carrier.

Finally, tariffs provide an important educational function for a carrier's sales force. The establishment of uniform, standardized service descriptions and terms and conditions inform marketing personnel and ensure consistency among service orders. Reliance on individual contracts would force a carrier to expend substantially more resources on the training and oversight of marketing personnel. For all of these reasons, voluntary tariffing provides a reasonable mechanism for carriers to conduct business efficiently and to establish uniform standards governing liability and other terms and conditions of providing service.

D. Voluntary Tariffing Will Not Lead To Price Collusion Among IXCs

The Commission has stated its concern that IXCs might possibly use tariff information to collude in the setting of prices at supracompetitive levels as a justification for its mandatory pricing proposal.¹² In crafting its forbearance policy, however, the Commission must determine whether the possibility of collusion is real enough to offset the significant transactional and legal costs that mandatory detariffing would impose upon carriers and customers alike.¹³ This tradeoff has been stated succinctly by Professor George Hay:

One important note of caution must be sounded on the competitive significance of information exchanges. Where market structure and other complicating factors are not conducive to oligopoly pricing, each firm's knowledge of the others' prices can improve the market. Perfect information on behalf of sellers as well as buyers is a condition for the economist's ideal of perfect competition; thus, information exchanges are not necessarily undesirable.¹⁴

In seeking to balance the threat of price collusion versus the costs of mandatory detariffing, the Commission must be guided by sound economic theory and by its own

¹² Notice at ¶¶ 30-31.

¹³ Professor Richard Posner has acknowledged the critical importance of price information to competitive markets: "The direct or indirect exchange of price information by competitors can serve procompetitive, pro-efficiency purposes even in markets with only a few sellers. I no longer believe that there is any satisfactory rule of thumb or shortcut for determining when such exchanges should be suppressed." Posner Article, 67 *Georgetown L.J.* at 1203.

¹⁴ Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 *Cornell L. Rev.* 439, 454 (1982-83) (citations omitted) ("Hay Article").

recent public interest findings. As CompTel discusses below, both of these factors demonstrate that the FCC should adopt permissive, not mandatory, detariffing.

In analyzing the likelihood that competitors may collude to maintain prices at levels higher than those dictated by a competitive market, the Commission must consider a number of factors:

There is a large body of economic literature on the various factors that facilitate or inhibit tacit price collusion. . . . Those factors most relevant to the interstate telecommunications marketplace include: (1) the number and size of sellers (a small number of equally sized sellers generally makes collusion easier, while a large number of sellers or size disparity among sellers makes it more difficult); (2) product heterogeneity (differentiated products or rapid technological change tend to make collusion more difficult); (3) the ratio of fixed to total costs (when the ratio is high, the incentive to shade price is stronger); (4) the size and frequency of orders (sporadically placed, high volume orders create incentives to cheat and make collusion less likely); (5) the relative openness or secrecy of sales (members of a group are more likely to reduce prices if those price concessions can be kept secret for a significant period of time); and (6) the “social structure” of the industry, *i.e.*, whether there are bonds of friendship and mutual respect that facilitate cooperation).¹⁵

The Commission applied these factors to the interstate interexchange service market in CC Docket No. 90-132 regarding the extent of competition in the long distance industry.¹⁶ In that proceeding, the Commission reasoned that numerous factors -- the intense rivalry among the largest IXCs, the presence of hundreds of smaller IXC competitors, the increasingly heterogeneous nature of long distance

¹⁵ *Competition in the Interstate Interexchange Market*, 5 FCC Rcd 2627, 2656 n.148 (1990) (“*Competition NPRM*”) (citing, *inter alia*, Hay Article).

¹⁶ *Id.*

services, the amount of competitive alternatives available to customers, and the cost structure of the industry -- militated against tacit price collusion. The Commission concluded that "it is unlikely that there will be tacit collusion in the pricing of interstate business services" ¹⁷ and later affirmed that conclusion in its final order. ¹⁸

Since making these findings, the Commission has reaffirmed its view that the long distance market is characterized by substantial competition for all categories of service, culminating in its recent order classifying AT&T as a nondominant carrier for domestic services. ¹⁹ In the Notice, the Commission does not identify any change in the interstate interexchange market indicating that any IXCs have gained the market power to force their customers to accept supracompetitive rates, either through price collusion or any other means. Further, the Commission's maximum streamlined regulations limit the ability of IXCs to use the tariffing process as a means of sending and receiving signals for the purpose of coordinating pricing decisions. In an increasingly competitive market characterized by hundreds of competing suppliers, the Commission should not throw away the benefits of voluntary tariffing by prohibiting nondominant long distance

¹⁷ *Id.* at 2640.

¹⁸ *Competition in the Interstate Interexchange Market*, 6 FCC Rcd 5880 (1991) ("*Competition Final Order*").

¹⁹ *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995). Further, the increasing use of ICB pricing and customer-contract arrangements also constitutes a development within the industry that militates against collusion. The Commission has found that the ability of an IXC to establish customer-specific pricing arrangements makes collusion highly unlikely. *Competition Final Order*, 6 FCC Rcd at 5900.

carriers from filing tariffs in a needless effort to prevent highly unlikely tacit price collusion.

E. Voluntary Tariffing Will Not Strain Commission Resources

CompTel recognizes that logging in and maintaining tariffs requires some commitment of agency resources, and that resource allocation is a legitimate Commission concern. However, there are several alternatives short of mandatory detariffing that the Commission could consider to ensure that voluntary tariffing will not overburden its resources. For example, the Commission could seek to privatize the tariff maintenance function, ceding responsibility to its copy contractor or another organization. In addition, a requirement that tariffs be filed electronically, or on computer disk (as is done now with nondominant carrier tariffs), would eliminate the paperwork burden and the requirement for physical space. Given the substantial past and likely future demand for tariff data in the future, the Commission should fully explore these alternatives rather than permit the past burdens of tariff maintenance and review influence its decision on whether to adopt permissive or mandatory detariffing.

F. The Commission Should Not Adopt Its Proposal To Mandate Detariffing But Require IXCs to Maintain Service And Rate Information For Submission Upon Demand

The Notice seeks comment on the tentative conclusion that, under either mandatory or permissive detariffing, the Commission should require IXCs to maintain

“price and service information . . . that they can submit to the Commission upon request.”²⁰ CompTel strongly opposes any such requirement.

Adopting a mandatory detariffing regime while requiring carriers to maintain price and service information concerning all of their service offerings would provide IXC's with the worst of both worlds -- denying them the cost and efficiency savings associated with maintaining tariffs, while imposing a new and burdensome record-keeping obligation. This outcome would be wholly inconsistent with the purposes of the 1996 Act and the Commission's forbearance authority under that legislation. Further, a permissive detariffing policy, resulting in numerous tariffs filed at the FCC, is a more effective way of maintaining and distributing information on rates and services to interested parties. If the Commission is correct (as CompTel believes it is) that there is significant value in keeping this information and making it publicly-available in an efficient manner, the best solution is voluntary tariffing so that carriers, customers and Commission personnel will have access to comprehensive data in a single location with minimum effort and expense. At the very least, the Commission should give carriers the choice of filing Section 203 tariffs voluntarily, or keeping similar information on file in their offices if they choose not to file tariffs. In CompTel's view, the adoption of a permissive detariffing policy is the least intrusive and most efficient alternative for ensuring reasonable access to information regarding rates and services.

²⁰ Notice at ¶ 36.

III. THE FILED RATE DOCTRINE WILL NOT LEAD TO UNDESIRABLE RESULTS UNDER A VOLUNTARY DETARIFFING POLICY

The Commission posits that mandatory detariffing may be desirable because it “would eliminate possible invocation of the filed rate doctrine, which allows carriers certain rights unilaterally to change rates, terms, and conditions of contract tariffs and other long-term service arrangements, and to limit their liability for damages.”²¹ While CompTel agrees that permissive detariffing would result in the continued application of the filed rate doctrine, CompTel does not believe the filed rate doctrine has posed significant problems in the past or that its continued application in the future justifies mandatory detariffing.

The filed rate doctrine derives from the tariffing obligations in Section 203 of the Communications Act, not from common law or principles of equity.²² Therefore, because permissive detariffing would enable nondominant IXCs to file Section 203 tariffs with the Commission, those tariffs would be governed by legal principles, such as the filed rate doctrine, that flow from Section 203. However, the Commission’s tentative conclusion that such an outcome would harm the public interest cannot be sustained. While the Commission correctly notes that application of the filed rate doctrine theoretically could result in unilateral changes to long term contracts, the Commission has already found that the likelihood of such changes is *de minimis*. The Commission

²¹ Notice at ¶ 34.

²² *E.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990).

addressed the filed rate doctrine in the context of AT&T's contract carriage tariff, where it stated:

Given the substantial competition that exists for the services in contract-based tariffs, there should be few incidents, if any, of unilateral, material tariff revisions to a contract deal. If a carrier attempts making such changes, it risks losing the future business of the affected customers and damaging its own reputation in the marketplace. Thus, it is not clear that, as a practical matter, a carrier would ever seek to make such unilateral material changes to contract-based tariffs.²³

The Notice identified no grounds for reversing this finding, which was made 15 months ago.

Regarding the Commission's observation that the filed rate doctrine allows carriers "to limit their liability for damages," CompTel submits that it is a benefit of tariffing, not a drawback, that carriers can use tariff provisions to reasonably limit their liability for damages. It is the function of tariffs and contracts alike to define the respective rights and obligations of the carrier and customer, including limitations on liability. This is by no means undesirable; strict definition of the carrier's liability informs the customer of the terms of service and eliminates the possibility of unnecessary litigation. If a carrier's limitation of liability provision is too restrictive, the customer is free to seek out another carrier with preferable terms. Further, when all

²³ *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4573 (1995). The Commission went on to note, that "in the unlikely event" that a carrier attempts such unilateral changes to long-term contracts, the Commission would apply a "substantial cause" test to ensure that any such changes are justified. *Id.* at 4573-74. The substantial cause test provides further protection to customers against unilateral changes to long-term contracts.

carriers tariff their provisions regarding limitations on liability, a customer can more easily compare the liability provisions of different carriers. Through a similar process of comparison, a carrier may discover that its liability provisions are more restrictive than those of other carriers, and adapt them if necessary to compete more effectively. The tariff filing process works well with marketplace forces to ensure that the terms and conditions of service, including provisions on the limitation of liability, are subject to maximum competition among rival carriers.

Further, permissive detariffing permits carriers and customers to decide whether to proceed solely by contract, or solely by tariff, or by some combination of the two. As the Commission's experience with AT&T's customer-contract tariffs makes clear, a carrier may combine customer-contract offerings with a traditional tariff structure. Moreover, under permissive detariffing, an IXC may choose not to tariff a particular category of service, and so would retain full discretion to proceed by contract for some services, and by tariff for others. The net result is to increase the range of service options available to carriers and customers, and to remove any limits on a carrier's ability to employ innovative pricing structures to meet the needs of an increasingly diverse customer base.

At a minimum, the Commission should permit nondominant IXCs to tariff the terms and conditions of service. To the extent the filed rate doctrine is a problem, it concerns the putative ability of carriers to alter rates for service without the consent of the customer. Although the Commission has adopted other policies, such as the substantial cause test, to address any such problems effectively, CompTel submits that

concern about unilateral rate changes should not result in a policy preventing carriers from tariffing the terms and conditions of service in order to promote uniformity and minimize the burden of negotiating service arrangements with customers.

IV. THE COMMISSION SHOULD NOT EXEMPT DOMINANT LOCAL EXCHANGE CARRIERS FROM FILING TARIFFS FOR SERVICES PROVIDED OUT-OF-REGION

In establishing its forbearance policy, the Commission should clarify that any interexchange services provided by the Bell Companies must be fully tariffed, at least for some interim period. Neither the Commission nor the public has significant experience with the full-scale provision of interexchange service by the Bell Companies. The Commission has yet to determine the extent to which safeguards may be necessary to ensure against unlawful cross-subsidization between in-region monopoly services and competitive out-of-region services, or other unlawful practices. Until the Commission gains experience with the provision of interexchange services by the Bell Companies, they should be required to fully tariff all common carrier offerings.

V. THE COMMISSION LACKS THE AUTHORITY TO ADOPT A MANDATORY DETARIFFING POLICY

The Telecommunications Act of 1996 directs the Commission "to forbear from applying any regulation or any provision of this Act" upon a determination that: 1) enforcement is not necessary to ensure just and reasonable rates and practices; 2) enforcement is not necessary to protect consumers; and 3) such forbearance is in the

public interest.²⁴ The Commission's proposed mandatory detariffing policy fails to meet this statutory standard for several reasons.

First, unlike permissive detariffing, mandatory detariffing does not simply relieve a carrier of the requirement to file tariffs under Section 203 and comply with the Commission's tariffing regulations. Rather, mandatory detariffing imposes upon carriers an affirmative obligation to "cancel their tariffs and to convert to a carrier-customer individual contract system."²⁵ The Commission has acknowledged that such an obligation may impose "some increased administrative burdens, at least initially" upon carriers.²⁶ Mandatory detariffing therefore would effect the perverse result of increasing the administrative and cost burden on carriers -- a result that clearly was not envisioned by Congress when it established the forbearance provision of the Act. Indeed, the Act defines forbearance as eliminating the burden of industry compliance with "any regulation or any provision of this Act." Yet the Commission's mandatory detariffing proposal would constitute a new regulation that imposes upon IXCs an obligation to which they are not now subject -- the obligation to terminate their existing tariffs and to replace them with individually negotiated contracts. If the Commission were to impose such a new, costly and burdensome regulation under the guise of

²⁴ 1996 Act at § 401.

²⁵ *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 11186, 11189 (D.C. Cir. 1985).

²⁶ *Id.*