



Office of the  
Ohio Consumers' Counsel

Robert S. Tongren  
Consumers' Counsel

April 24, 1996

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Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

**Re: CC Docket No. 96-61; Regulatory Forbearance for Tariff Filing Requirements**

Dear Secretary:

Enclosed please find the original and eleven (11) copies of the Office of the Ohio Consumers' Counsel's Initial Comments to be filed in the above referenced proceeding.

Please date-stamp and return the additional copy in the pre-addressed, postage prepaid envelope to acknowledge receipt.

Sincerely,

David C. Bergmann  
Assistant Consumers' Counsel

DCB/pjm

Enclosure

77 S. High St., 15th Floor, Columbus, Ohio 43266-0550  
614-466-8574/1-800-282-9448 (Ohio only)  
Fax 614-466-9475

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**Before The  
FEDERAL COMMUNICATIONS COMMISSION**

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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**SUMMARY OF  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
INITIAL COMMENTS  
ON REGULATORY FORBEARANCE FOR  
TARIFF FILING REQUIREMENTS**

The Office of the Ohio Consumers' Counsel (OCC) submits that the Federal Communications Commission (Commission) is incorrect in its tentative conclusion that forbidding non-dominant interchange carriers from filing tariffs meets the standards for regulatory forbearance set forth in § 10(a) of the Telecommunications Act of 1996 (the Act). Doing away with the tariff filing requirement of 47 U.S.C. § 203 will not allow effective enforcement of the Act's provision requiring each carrier to charge uniform interexchange rates throughout the nation. Enforcement of the tariff filing provision is thus necessary to ensure non-discriminatory charges. 1996 Act, § 10(a)(1). Tariff filing is also required to protect consumers under the 1996 Act's requirements. Thus forbearance does not meet the standard of § 10(a)(2) of the 1996 Act. Given this, forbearance is not in the public interest (§ 10(a)(3)).

Looking at the potential problems which the Commission believes to be caused by the filing of tariffs (as set forth in earlier orders), OCC identifies many of those problems as resulting from the lag between tariff filing and the tariff's effective date. Thus OCC proposes a requirement that tariffs become effective the day they are filed. OCC also submits that the other harms identified from having public disclosure of rates and charges are inherent in a freely competitive market, and thus do not stand as a basis for eliminating tariff filing.

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**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
INITIAL COMMENTS  
ON REGULATORY FORBEARANCE FOR  
TARIFF FILING REQUIREMENTS**

The Office of the Ohio Consumers' Counsel (OCC), the statutory representative of Ohio's residential telecommunications consumers (*see* Ohio Rev. Code Chapter 4911), submits these comments in response to the Notice of Proposed Rulemaking (NPRM) issued in this docket on March 25, 1996. This NPRM is part of the range of activity undertaken by the Federal Communications Commission (Commission) subsequent to the passage of the Telecommunications Act of 1996 (Act).<sup>1</sup> The Commission has asked for comments on portions other than sections IV, V, and VI of this NPRM by April 25, 1996.<sup>2</sup> The focus of these comments is Section III, Regulatory Forbearance; however,

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *to be codified at* 47 U.S.C. §§ 151 *et seq.* In these Comments, OCC has adopted the Commission's convention for referring to the Act: *See* NPRM at ¶ 1, n. 3.

<sup>2</sup> OCC filed comments on Sections V and VI, per the NPRM's schedule, on April 19, 1996. OCC had no comment on Section IV.

OCC also has brief comments on Section VII, Pricing Issues, and Section VIII, Bundling of Customer Premises Equipment.

### **NPRM Section III. REGULATORY FORBEARANCE**

As stated by the Commission, “The 1996 Act builds upon the progress made to date in facilitating competition in the domestic long distance market, and provides a framework for raising competition to a higher plane.” NPRM at ¶ 3. In so doing, the 1996 Act gives the Commission the power to “forbear from applying any regulation or any provision of this Act,” but only upon the making of certain findings. 1996 Act at § 401 (adding § 10(a)). The NPRM at ¶ 17 sets forth the statutory conditions for forbearance: The Commission must find that 1) enforcement is not necessary to ensure just and reasonable and non-discriminatory charges; 2) enforcement is not necessary to protect consumers; and 3) forbearance is in the public interest.

In this NPRM, regulatory forbearance is discussed with regard to the filing of tariffs by non-dominant interexchange carriers, as currently required by 47 U.S.C. § 203(a). NPRM at ¶¶ 21-30. The Commission tentatively finds, NPRM at ¶ 19, that mandatory forbearance on tariff filing meets the statutory test. OCC disagrees, for the reasons set forth below.

This is an issue with a long history. As the Commission acknowledges, its previous rulings attempting to do away with the § 203(a) tariff filing requirement have been the subject of significant litigation. NPRM at ¶¶ 21-24. That litigation led to the Supreme Court’s ruling in *MCI Telecomm. Corp. v. American Tel. and Tel. Co.*, 114 S.Ct. 2223,

129 L. Ed.2d 182, 62 U.S.L.W. 4527 (1994) (“*MCP*”), which found that the Commission lacked the authority to dispense with § 203.

The history of this issue demonstrates the reason for the Commission’s proposed use of forbearance on the tariffing issue. But it does not provide an adequate rationale for why, among all the provisions of 47 U.S.C. § 151 *et seq.*, the Commission has selected detariffing as one of the first to undergo forbearance scrutiny. The Supreme Court has described “the enormous importance to the statutory scheme of the tariff-filing provision....” *MCI*, 62 U.S.L.W. 4531.

The current situation for non-dominant interexchange carriers, as set forth in NPRM ¶ 9, is that they are not subject to price cap regulation. Their tariff filings are presumed to be lawful. No cost support has been required for the tariffs since 1980 (*see* NPRM ¶9, n. 19 and ¶ 2, n. 6). The tariffs are effective on one day’s notice (since 1993; *see* NPRM at ¶ 9, n. 18). All of these procedural policies are Commission-mandated, rather than dictated by statute.

The essentially procedural nature of these requirements can be compared to the statutory requirements that remain in effect for all carriers (dominant and non-dominant), as set forth in NPRM ¶ 13: rates must be just and reasonable and not unduly discriminatory (47 U.S.C. §§ 201, 202); carriers must file tariffs (47 U.S.C. § 203); and there must be notice prior to discontinuance, reduction, or impairment of service. 47 U.S.C. § 214. All carriers are subject to the complaint process. 47 U.S.C. §§ 206-209.<sup>3</sup>

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<sup>3</sup> As the NPRM notes (¶ 37), given the recent reclassification of AT&T, there are currently no nationwide dominant, interstate, domestic interexchange carriers.

It is clear that the Commission's proposed findings here accepting forbearance are entirely based on its "prior analyses and findings..." in the numerous previous cases leading to the *MCI* decision. NPRM at ¶ 27. Therefore it is necessary to review those prior findings to determine if the Commission's present conclusion is correct.

The Commission previously found that tariffing could harm consumers due to 1) slowing the introduction of new services; 2) dampening competitive responses; and 3) encouraging price collusion. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 FCC 2d 59 (1982) [Second Report and Order]; *see also id.*, Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, 453-455. The Second Report and Order yielded a permissive forbearance policy. The Sixth Report and Order in the CC 79-252 docket, 99 F.C.C. 2d 1020, 1027 (1985), made detariffing mandatory. In the Sixth Report and Order, the Commission found that tariffing was not vital to preventing discrimination and that there were other means available to enforce the 1934 Act's mandates. 99 F.C.C. 2d 1029. The potential harms from tariff filing set out in the Sixth Report and Order were essentially the same as those in the Second Report and Order (99 F.C.C. 2d 1030).<sup>4</sup> *See also* NPRM at ¶ 30.

These findings actually seem to be principally directed not at the concept of filing tariffs, but at the requirement that tariffs be filed some time before they become effective.

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<sup>4</sup> The Commission also noted the costs imposed by tariff filings both on the carriers and on the Commission itself. The costs of a tariff filing requirement for all carriers would be competitively neutral. The costs for the Commission of maintaining a tariff "registry" should be reasonable, and are a cost of ensuring that the public interest is met.

In the 1980 *First Report and Order* in the CC 79-252 docket, the Commission established a fourteen day lag. Only in 1993 was the lag between filing and effective date reduced to one day. *Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993).

OCC submits that the next logical step from tariffs filed with a fourteen day lag, to a one day lag, is *not* dispensing with tariff filing altogether. Rather, the next logical step is to allow tariffs to become effective on the day they are filed.

A zero-day lag does not delay the introduction of new services. Also, tariffs effective on filing neither dampen competitive response nor encourage price collusion any more than in a perfectly, or close to perfectly, competitive market. One condition of a perfect market is total information, consumers and producers having full access to the prices of all participants in the market. Thus requiring publicly filed tariffs gives no more information than would be available in a free market. The three “harms” of tariffs identified by the Commission in the Second Report and Order do not occur with a zero-day lag.<sup>5</sup>

The Act imposes many new duties on carriers, and concomitant responsibility on the Commission. Among those responsibilities is to ensure that interexchange carriers (dominant or non-dominant) charge the same rates in rural and high cost areas as in urban areas and charge the same interstate rates in every state. 1996 Act at § 101 (adding § 254(g)). As pointed out by OCC in its comments on Section VI of the NPRM filed April

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<sup>5</sup> The Commission fails to re-evaluate these conclusions, arrived at in 1982, in light of the ensuing fourteen years. This is a serious flaw in the Commission’s forbearance proposal.

19, 1996, neither the Commission, nor consumers, nor competitors, will have adequate tools to enforce that statutory mandate without the § 203 requirement of filed tariffs. The Supreme Court stated in *MCI* that “[t]he provisions allowing customers and competitors to challenge rates as unreasonable or discriminatory, see 47 U.S.C. §§ 204, 206-208, 406, would not be susceptible of effective enforcement if rates were not publicly filed.” 62 U.S.L.W. 4531. If this were true under the law at the time of the Court’s decision, it must be even more true under the 1996 Act’s new specific prohibition against variances in interexchange rates.

Thus the Commission should determine that tariff filing is necessary to prevent unjustly or unreasonably discriminatory rates. 1996 Act at § 401 (adding § 10(a)(1)). The Commission should also find that tariffing is necessary for the protections of consumers. *Id.* (adding § 10(a)(2)). Finally, the Commission should find that total forbearance from filing tariffs is not in the public interest. *Id.* (adding § 10(a)(3)).

The need for tariff filings is clearly shown by lawsuits recently filed against a number of major communications providers:

Long-distance telephone companies AT&T Corp., MCI Communications Corp., and Sprint Corp., on-line service provider America Online, Inc., and cable television and cellular phone company ComCast Corp. are accused in lawsuits of taking billions of dollars from customers through a billing practice that adds seconds to a phone call or an on-line computer session.

“Suits Ask Reversal of Phone Charges,” *Akron Beacon Journal* (April 7, 1996) at C1. (A copy of this article is attached to these Comments.) Yet how are the affected carriers defending their billing practices?

AT&T says it’s not deceiving customers. The company’s billing methods might not be described on the bills, but they’re spelled out in

publicly available filings with regulators in Washington, said Harold Spierer, an AT&T attorney.

*Id.* at C12. Thus having tariffs on file protects not only consumers, but the carriers as well. This incident also points out that it is not only the prices of services, but the terms and conditions of the services, which must be on file in a central publicly-accessible repository. Merely having the conditions available to the Commission upon its request (NPRM at ¶ 22) would give the Commission an unnecessary bottleneck function for that information. Further, tariff filing for this purpose must be mandatory.

Under the Supreme Court's holding in *MCI*, the Commission may modify or relax its procedures for tariffs, but may not dispense with them altogether. 62 U.S.L.W. 4532. OCC submits that even without the 1996 Act's provision on forbearance, the Commission's powers would include allowing tariffs to be effective upon filing.

The court decisions rejecting the FCC's prior decisions to allow (or to require) carriers not to file tariffs were procedural only. *See, e.g., American Tel. and Tel. v. Federal Communications Comm'n*, 978 F.2d 727, 733 (DC Cir. 1992). No court has reached the policy issue other than in dicta. OCC submits that the Commission should re-examine those findings in the light of the 1996 Act.

## **NPRM Section VII. PRICING ISSUES**

OCC agrees that a uniform advance notice tariff filing (now in effect due to AT&T's reclassification) reduces the opportunity for price coordination. NPRM at ¶ 81. A zero-day filing requirement further diminishes that opportunity, as

discussed above. OCC further agrees that increasing the number of facilities-based interexchange carriers -- such as by allowing the Bell Operating Companies (BOCs) into the interstate interexchange market once they meet the terms of the competitive checklist (1996 Act at § 151 (adding § 271)) -- will also make price coordination more difficult. NPRM at ¶ 81.

However, OCC disagrees that the Commission's mandatory detariffing regime will have a significant impact on price coordination, whether that coordination be tacit or explicit. A competitor seeking to coordinate prices will merely have to contact the competition pretending to be a customer, or look at the competition's advertising, in order to keep in lock step with the competition's prices. Real customers, however, will have no way of determining whether they are being charged the correct price without recourse to tariffs on file with the Commission. Lack of tariffs will also prevent a customer in rural Ohio from discovering whether he is being charged the same rate as a customer in Cleveland, and a customer in Ohio from determining whether his rates are the same as a customer in California.

#### **NPRM Section VIII. BUNDLING OF CONSUMER PREMISES EQUIPMENT**

OCC agrees that the Commission should amend Section 64.702(e) of its rules to allow non-dominant interexchange carriers to bundle consumer premises equipment (CPE) with interstate, interexchange services. NPRM at ¶ 89. The CPE market is fully competitive: One can purchase CPE practically on every street corner, including a dazzling array of features, for prices ranging from under ten dollars to thousands of dollars. (Basic

telephones are even given away as promotions with magazine subscriptions and the like.) Although OCC has doubts about the true effectiveness of competition in the interexchange market (particularly for small users), the market power of the largest providers has significantly diminished. Thus there should be little opportunity for anticompetitive efforts arising from bundling. Any doubts about this can be resolved by requiring carriers who bundle to also offer the unbundled components. NPRM at ¶ 89.

The CPE situation underscores the need for tariff filings discussed above. With CPE, when a unit is purchased, it can be removed from the box and examined to determine what the unit's features are compared to the advertisement by which the CPE was offered. And the unit can be returned if it is unsatisfactory. By contrast, with almost all interexchange service, the customer does not know the cost until after the service is consumed; and minutes used are gone and cannot be returned. The ephemeral nature of interexchange usage demands a central repository for prices and terms and conditions.

## **CONCLUSION**

For the reasons set forth above, the Commission should find that the proposal in the NPRM to eliminate tariff filing does not meet the standard in the Act for regulatory forbearance. The Commission should *not* mandate that carriers forbear from filing tariffs. Instead, the Commission should establish a uniform zero-day tariffing requirement.

Respectfully submitted,

ROBERT S. TONGREN  
CONSUMERS' COUNSEL

  
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David C. Bergmann  
Assistant Consumers' Counsel

**The Office of the Ohio Consumers'  
Counsel**  
77 South High Street, 15th Floor  
Columbus, OH 43266-0550  
(614) 466-8574

**CERTIFICATE OF SERVICE**

I hereby certify that the Initial Comments of the Office of the Ohio Consumers' Counsel on Regulatory Forbearance for Tariff Filing Requirements have been served by overnight mail to the International Transcription Service, and, in diskette form to Janice Myles on this 24th day of April, 1996.

  
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David C. Bergmann  
Assistant Consumers' Counsel