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BEFORE THE

Federal Communications Commission APR 25 1996

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter Of)

Policy and Rules Concerning)
The Interstate, Interexchange)
Marketplace)

CC Docket No. 96-61

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**COMMENTS OF CAPITAL CITIES/ABC, INC., CBS INC.,
NATIONAL BROADCASTING COMPANY, INC., and
TURNER BROADCASTING SYSTEM, INC.**

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April 25, 1996

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SUMMARY

The Networks support the Commission's tentative conclusion that new Section 10(a) of the Communications Act mandates that it forbear from requiring nondominant interexchange carriers to file tariffs for domestic services, at least for those services provided to business customers.

In implementing its forbearance obligations, the Commission should adopt its mandatory detariffing proposal and prohibit nondominant interexchange carriers from filing tariffs, at least for the services provided to business customers. A mandatory detariffing policy is consistent with statutory intent to the extent that it is the most pro-competitive, de-regulatory option available. Absent the filing of tariffs, the legal relationship between carriers and their business customers will be governed by ordinary commercial contract law principles. In particular, a mandatory detariffing policy will preclude carriers from relying upon the "filed rate doctrine" under which carrier tariff revisions which are allowed to become effective supersede any conflicting provision in an unfiled carrier-customer agreement. The Networks recommend that the Commission extend the mandatory detariffing policy to nondominant carriers that provide international service to business customers. Business customers are entitled to the assurance that they will receive the benefit of their negotiated bargain, regardless of whether they contract for domestic or international interexchange services.

If, however, the Commission adopts a permissive detariffing policy, the Commission at the same time should adopt stringent safeguards to prevent carriers from taking advantage of the filed rate doctrine. Any nondominant interexchange carrier filing a tariff should be required to identify in its transmittal letter whether the tariff proposal would alter in any way the terms and conditions of an existing service agreement. If the tariff would make such an alteration, the Commission should require that the tariff be filed on 45 days' public notice and that the carrier individually notify any business customers affected. The Commission also should change the "substantial cause for change test" adopted in the RCA Americom cases with a more stringent test that would allow superseding tariff revisions that are in conflict with an existing service agreement to become effective only upon a showing of extraordinary circumstances. The Commission should apply the recommended safeguards to all unilateral tariff filings that propose to change the terms and conditions of a carrier's service agreement with a business customer, regardless of the type of carrier (dominant or nondominant) or type of service involved (domestic, international or mixed) involved.

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To: The Commission

**COMMENTS OF CAPITAL CITIES/ABC, INC., CBS INC.,
NATIONAL BROADCASTING COMPANY, INC., and
TURNER BROADCASTING SYSTEM, INC.**

Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., and Turner Broadcasting System, Inc. (collectively, "the Networks"), by their attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submit these comments in response to the Notice of Proposed Rulemaking issued March 25, 1996, FCC 96-123, in the above-captioned proceeding initiated pursuant to the recently enacted Telecommunications Act of 1996 ("1996 Act").^{1/}

I. BACKGROUND

As major users of domestic and international television and audio program transmission services as well as voice and data communications services, the Networks have a significant interest in this proceeding in which the Commission is reexamining its regulatory policies governing the marketplace for interstate domestic interexchange telecommunications services.

^{1/} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

In the Notice, the Commission solicits comments concerning the implementation of Section 401 of the 1996 Act that adds new Section 10 to the Communications Act of 1934, as amended ("the Act"). Subsection 10(a) states that:

[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service . . . if the Commission determines that

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

Based in large part on its analyses and findings in prior proceedings, the Commission tentatively concludes that the statutory language requires it to forbear from applying the tariff filing requirements of Section 203 of the Act to the domestic services of nondominant interexchange carriers. The Commission solicits comments on this tentative conclusion as well as the issues: (1) whether it should adopt a mandatory detariffing policy for domestic interexchange services and (2) with respect to those interexchange carriers filing bundled tariffs that include both domestic and international services, whether it should forbear from requiring nondominant carriers to file tariffs for the

international portions of their offerings as well. Notice at paras. 32-34.

II. THE COMMISSION SHOULD ADOPT A MANDATORY DETARIFFING POLICY, AT LEAST FOR BUSINESS SERVICES, FOR THE INTERSTATE AND INTERNATIONAL SERVICES OF NONDOMINANT INTEREXCHANGE CARRIERS

The Networks support the Commission's tentative conclusion that new Section 10(a) mandates that it forbear from requiring nondominant interexchange carriers to file tariffs for domestic services, at least for those services provided to business customers. At present, tariff filings are not necessary to ensure that nondominant carriers' rates are just, reasonable and non-discriminatory or otherwise to protect business customers.^{2/}

In implementing its forbearance obligations based upon current marketplace conditions, the Commission should adopt its mandatory detariffing proposal and prohibit nondominant interexchange carriers from filing tariffs, at least for the services provided to business customers. The purpose of the 1996 Act, as described by Congress, is to establish "a pro-competitive, de-regulatory national policy framework."^{3/} A regulatory regime that does not allow nondominant interexchange carrier tariffs to be filed is the most pro-competitive, de-regulatory option available.

^{2/} The exercise of the Commission's forbearance authority is fact-dependent, of course, and if the competitive situation upon which the Commission bases its forbearance determination should change, the Commission remains free to revisit that determination.

^{3/} S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

Absent the filing of tariffs, the legal relationship between carriers and their business customers will be governed by ordinary commercial contract law principles and will closely resemble the relationships among businesses and customers in a completely unregulated environment.

In particular, a mandatory detariffing policy will preclude carriers from relying upon the "filed rate doctrine" discussed in the Notice under which tariff revisions which are allowed to become effective for a service supersede any conflicting provision in an unfiled carrier-customer agreement governing that same service.^{4/} As long as the Commission allows a carrier to file tariffs, it is possible that a carrier may file a tariff revision which supersedes a then-effective tariff embodying an unfiled contractual agreement.^{5/}

As the Networks have discussed in several previous proceedings, negotiating agreements for service under a tariff regime makes long-range planning more difficult for large users, given that negotiated contractual rights and obligations can be changed unilaterally by the carrier through the filing of a superseding inconsistent tariff revision.^{6/} An important benefit

^{4/} Notice at paras 94-98.

^{5/} See American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980).

^{6/} See, e.g., Comments of Capital Cities/ABC, CBS and NBC, CC Docket No. 86-421, March 6, 1987; Comments of Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc., CC Docket No. 90-132, July 3, 1990; Petition For Clarification Of
(continued...)

of a mandatory detariffing policy for business customers, therefore, is their ability to negotiate mutually enforceable contractual commitments with nondominant carriers to ensure that they will receive the benefits of their bargain for the full term of the contract period.

The Networks recommend that the Commission extend the mandatory detariffing policy to nondominant carriers that provide international service, regardless of whether the international services are bundled with domestic services in a single contract. The benefits to business customers of mandatory detariffing of nondominant carrier services apply to international services as well as to domestic services. In both instances, business customers are entitled to the assurance that they will receive the benefit of their negotiated bargain.

III. ALTERNATIVELY, IF THE COMMISSION ADOPTS PERMISSIVE DETARIFFING FOR BUSINESS CUSTOMER SERVICES, IT AT LEAST SHOULD ADOPT STRINGENT SAFEGUARDS TO PREVENT CARRIERS FROM MODIFYING CUSTOMER AGREEMENTS UNILATERALLY THROUGH SUPERSEDING TARIFF REVISIONS

As discussed above, because mandatory detariffing enables business customers to obtain mutual enforceability of their contractual service agreements with nondominant carriers, such an action most closely conforms with the 1996 Act's objective to implement a pro-competitive, de-regulatory national policy framework.

^{6/} (...continued)

Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc., CC Docket No. 90-132, November 25, 1991.

On the other hand, a permissive detariffing policy under which nondominant interexchange carriers are provided the option of filing tariffs if they so choose places such mutual enforceability of carrier-customer agreements in jeopardy. In fact, absent adoption of the safeguards discussed below, the problems related to mutual enforceability are exacerbated. Under a permissive detariffing policy, a carrier unilaterally may try to revise a customer service agreement that initially was negotiated on a non-tariffed basis with a subsequent inconsistent tariff filing.

Therefore, assuming for the sake of argument that the Commission adopts a permissive detariffing policy for nondominant domestic interexchange carriers, the Commission at least should adopt stringent safeguards to prevent carriers from taking advantage of the filed rate doctrine. First, any nondominant interexchange carrier filing a tariff should be required to identify in its transmittal letter whether the tariff would alter in any way the terms and conditions of an existing service agreement. If so, the carrier should be required to file the tariff on 45 days' public notice.

Second, the Commission should revise Section 61.58(a)(4) of its rules, 47 C.F.R. 61.58(a)(4), (which currently requires dominant carriers to provide notification to affected customers when tariff revisions propose to increase any rate or charge or would effectuate an impairment of service) to require any carrier, dominant or nondominant, to notify individually on or before the date of the tariff filing any customer whose agreement would be

modified by the tariff filing and to identify specifically the tariff provision which would modify a particular provision of the service agreement.

Third, the Commission should apply only traditional contract law principles, such as impossibility of performance or force majeure, in determining whether a nondominant carrier tariff filing that unilaterally changes the terms and conditions of a negotiated service agreement is just and reasonable within the meaning of Section 201(b) of the Act. In effect, the Commission should replace the "substantial cause for change" test established in the RCA Americom decisions^{7/} with a more stringent test that would allow superseding tariff revisions that are in conflict with an existing carrier-customer agreement to become effective only upon a showing of "extraordinary circumstances."

Finally, as the communications industry moves into the more competitive, marketplace-driven environment fostered by the enactment of the Telecommunications Act of 1996, the Commission should not limit its concern for the mutual enforceability of carrier-customer service agreements to those involving nondominant interstate interexchange carriers. The Commission should apply the three safeguards enumerated above to all unilateral tariff filings that propose to change the terms and conditions of a carrier-customer service agreement, regardless of the type of carrier

^{7/} RCA American Communications Inc., 84 F.C.C. 2d 353 (1980); 86 F.C.C. 2d 1197 (1981); recon. 2 FCC Rcd 236 (1987) ("RCA Americom").

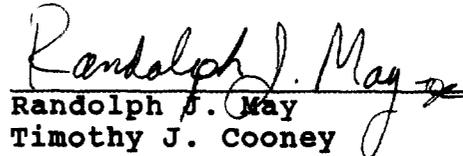
(dominant or nondominant) or type of service (domestic, international or mixed) involved. The Networks urge the Commission both to adopt a mandatory detariffing policy for nondominant domestic and international carriers and to apply the safeguards described above to all carrier tariff filings which propose to alter long-term carrier-customer agreements.

IV. CONCLUSION

For the foregoing reasons, the Commission should adopt policies consistent with the views expressed herein.

Respectfully submitted,

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