General Services Administration
Office of General Counsel
Washington, DC 20405

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April 25, 1996

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Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Subject 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

Dear Mr. Caton:

Enclosed please find the original and eleven copies of the General Services Administration's Comments for filing in the above-referenced proceeding.

Sincerely,

Michael J. Ettner
Senior Assistant General Counsel
Personal Property Division

Enclosures

cc: International Transcription Service
Janice Myles (Diskette)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
Implementation of Section 245(g) of the Communications Act of 1934, as amended	)	

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COMMENTS OF THE GENERAL SERVICES ADMINISTRATION

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April 25, 1996

Summary

GSA supports the Commission's proposal to detariff the interstate services of the nondominant interexchange carriers, but for very different reasons than those articulated in the NPRM. GSA does not agree with the Commission's view that detariffing will enhance competition (in theory carriers would then operate without knowledge of others' prices) because in fact most carriers can determine their competitors' prices through their sales and marketing forces. Instead, the principal effect of detariffing will be to deprive customers of knowledge of current prices.

GSA does not understand how the Commission will be able to confirm its belief that competitive forces will protect consumers from unreasonable and discriminatory rates if it has no mechanism for knowing what those rates are. Nor does GSA believe that self-certification, in the absence of supporting data on prices, will be sufficient to ensure that the 1996 Act's prohibition against higher interexchange rates to rural and high cost areas is being enforced. There are, however, two valid reasons to eliminate tariffing as currently practiced. One is to void the "filed rated doctrine" which allows tariffed rates to supersede contract rates. This doctrine, when combined with price deregulation, destroys the integrity of the contract process by which Federal agencies (as well as many other large users) must purchase their telecommunications services. The second reason for eliminating tariffs is to relieve the carriers and the Commission of the requirement to generate and process thousands of pieces of paper that are of very limited value to most parties.

GSA suggests that the Commission can fulfill its important rate monitoring functions by requiring each interexchange carrier to provide the information, currently contained in tariffs, on electronic bulletin boards that would be accessible through the public telecommunications network. The posted prices would not have the status of "filed rates," because they would not be filed with the Commission. However, the availability of price data would allow the Commission to monitor carrier prices, and it would enhance, not inhibit competition by providing customers with the bargaining leverage that comes from knowledge of current market prices and price trends.

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COMMENTS OF THE
GENERAL SERVICES ADMINISTRATION

The General Services Administration ("GSA"), on behalf of the customer interests of all of the Federal Executive Agencies, submits these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), FCC 96-123, released March 25, 1996.

I. Introduction

On April 19, 1996, GSA filed comments on Sections IV, V, and VI of the NPRM dealing with the definition of relevant product and geographic markets, the need to maintain separate subsidiaries to provide local and interexchange services, and the rate averaging and integration requirements of the Telecommunications Act of 1996 ("1996 Act").[1] These comments address the principal issue of the NPRM, which is the

[1] Telecommunications Act of 1996, Pub L. No 104-104, 110 Stat. 56 (1996).

Commission's proposal to forbear from enforcing the tariff filing requirements of Section 203 of the Communications Act and to adopt instead a mandatory detariffing policy for the domestic services of nondominant interexchange carriers.

II. The Commission Should Forbear From Requiring Interexchange Carriers To File Tariffs In The Traditional Manner.

In this NPRM, the Commission proposes to implement a policy it has pursued for several years, which is to eliminate the requirement for nondominant carriers to file tariffs. This policy was frustrated by Court findings that the Commission had no authority to forbear from the requirement in §203 of the Communications Act that carriers regulated by the Commission must file tariffs. The 1996 Act granted that authority, provided the Commission determines that detariffing (1) is not necessary to ensure that rates are reasonable and non-discriminatory, (2) is not needed to protect consumers and (3) is consistent with the public interest.

In its NPRM, the Commission tentatively concludes that its detariffing proposal passes all of these tests. Because the Commission had previously found that all of the carriers currently active in the interstate, interexchange telecommunications market, including AT&T, are nondominant,[2] the effect of this proposal would be to detariff all domestic interstate interexchange services offered to the public.

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[2] Motion of AT&T to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. Oct. 23, 1995) recon. pending.

As discussed in these comments, GSA supports the Commission's proposal, but for very different reasons than those espoused by the Commission.

A. The Principal Reasons For Detariffing Presented By The Commission Are Invalid.

The first basis for the Commission's proposal is its belief that the Communications Act's objectives of just, reasonable, and non-discriminatory rates can be achieved effectively through market forces and the administration of the complaint process.[3] Additionally, the Commission finds that tariffing is not only unnecessary to protect consumers, but is harmful because it stifles price competition and service innovation.[4] Finally, the Commission concludes that detariffing is consistent with the public interest because it will promote competition and deter price coordination.[5]

1. Detariffing Will Not Enhance The Competitiveness Of The Interexchange Market.

The Commission believes that requiring non-dominant carriers to file tariffs can take away their ability to make rapid, efficient responses to changes in demand and cost, and it can inhibit their incentive to engage in competitive price discounting. The Commission has also concluded that the ability to ascertain competitors' rates and rate changes presents an opportunity for collusive pricing.[6]

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[3] NPRM, ¶28.

[4] Id., ¶29.

[5] Id., ¶30.

[6] Id.

GSA agrees with these findings insofar as they apply to advance notice tariffing. If a carrier is required to provide prior notice of every price change to its competitors, it is obviously inhibited from experimenting with promotional pricing or innovative price and service offerings. Advance notice simply invites all other carriers to match the price change.

But GSA submits that it is unrealistic to believe that the absence of filed tariffs significantly reduces the carriers' knowledge of each others' existing prices. The leading participants in the interexchange telecommunications markets are multi-billion dollar corporations with highly sophisticated marketing staffs. Each carrier has hundreds of sales representatives who daily call on customers to ascertain their willingness to use its services. These salesmen know immediately when a competitor has made a successful price or service initiative. Each sales loss, each unsuccessful bid -- and the reasons therefor -- is reported to the marketing staff for analysis, and as required, response. Elimination of tariffing has little impact on the competitive price information available to these carriers.

In the case of the Federal agencies, the ability of competitors to know each others' existing prices is explicit. The Federal Acquisition Regulation generally requires that the price offer of any successful bidder be disclosed as part of the debriefing of unsuccessful bidders.[7] This requirement does not inhibit competition. If anything, it enhances it by providing potential new competitors with knowledge of the framework for the next procurement.

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[7] Federal Acquisition Regulation, Part 15.1004.

GSA submits that the Commission's belief in the deleterious effects of tariffing is misplaced. So long as tariffing does not involve advance notice, it does not provide carriers with any significant knowledge that they cannot obtain anyway through their sales and marketing forces. Tariffing does not inhibit the responsiveness of the carriers to demand or cost influences, nor does it materially add to or detract from the carriers' propensity to engage in collusive pricing.

2. The Complaint Process Is Not Adequate Protection To The Public.

GSA strongly disagrees with the Commission's suggestion that the complaint procedures in Section 208 of the Communications Act are sufficient to ensure the enforcement of the mandates of the Act.[8] In the view of GSA, this approach amounts to an abrogation of the Commission's responsibility to protect consumers from unlawful rates and ratemaking practices. Effectively, the Commission proposes to rely on aggrieved consumers to initiate the regulation for which the Commission is responsible.

That regulation is likely to be highly ineffectual. First, without tariffing, consumers will have no ability to ascertain when they are subject to unreasonable or discriminatory rates. Nor will they have any factual basis to demonstrate discrimination when they believe it to exist. Moreover, the corrective action through the complaint process cannot be initiated until the damage is done. For large customers and for small customers with few resources, this is likely to be too late.

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[8] NPRM, ¶ 28 and n. 77.

3. Knowledge Of Carrier Rates And Charges Is Necessary To Protect The Public Interest.

Fundamental to the Commission's position is the belief that the markets for interstate interexchange telecommunications services are sufficiently competitive to ensure that rates, charges and pricing practices are reasonable and non-discriminatory. Hopefully the Commission is correct, but how it will be able to affirm this condition without knowledge of any rates and charges is nowhere stated in the NPRM.

For example, the Commission expects that the carriers will not engage in implicit price collusion. How will the Commission determine whether AT&T continues as the effective price leader in the message telephone service market (as it has been in the past) if it has no way of knowing the prices that AT&T and its competitors charge? The Commission hopes that competition will prevent unreasonable discrimination against certain customers by reason of size, location, activity or accessibility. Yet, by mandatorily detariffing, it blinds itself to the very data by which such discrimination could be demonstrated.

The 1996 Act adds to the Commission's public interest responsibilities. Specifically, Section 254(g) requires the Commission to adopt rules that require interexchange rates to subscribers in rural and high cost areas to be no higher than rates charged to urban subscribers. In the NPRM, the Commission concludes that it can adequately ensure compliance with this provision by requiring carriers to certify that they are in compliance.[9]

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[9] NPRM, ¶70.

GSA submits that self-certification amounts to self-regulation, which may be acceptable if there are no economic reasons to violate the terms of the certification. But economics do not favor geographic rate averaging. To the contrary, it is to the carriers' self-interest to depress prices in urban areas where competition is most severe and to recapture the reduced margins from rural service where the competition is likely to be the least threatening. For carriers to certify that they average rates geographically amounts to a confession that they are acting against their own economic interests.

It is not necessary for a certifying carrier to misrepresent data in order to violate the spirit of geographic rate averaging. A carrier might, for example, simply forbear from offering service to customers in certain high-cost and rural areas. Or it might provide a geographically deaveraged base rate schedule but routinely discount service to urban customers. It might impose surcharges to customers, urban or rural, who happen to be located more than a prescribed distance from the serving switching office. There are probably dozens of artifices by which a carrier could discriminate against rural customers and still certify that it has geographically averaged rates.

On the other hand, the Commission may be correct that self- certification is fully adequate to ensure geographic rate averaging. The important point is that in a totally detariffed environment the Commission will never know one way or another. The Commission will be operating completely in the dark. It will not know, and it will have no basis for knowing what the carriers are charging for their services.

B. There Are Good Reasons To Forbear From Imposing The Traditional Tariffing Requirements.

Although GSA questions the Commission's rationale for eliminating tariffs and depriving itself and the public of all knowledge of carrier rates, GSA emphatically does not endorse the status quo. GSA submits that there are valid and important reasons for changing the present tariffing regime, but they are not those emphasized in the NPRM.

1. The Filed Rate Doctrine Has The Effect Of Invalidating Contract Services.

GSA submits that the present tariffing regime represents the worst combination of elements from both regulation and free market pricing. From regulation comes the "filed rate doctrine" which allows carriers unilaterally to abrogate customer-specific contract rates when they differ from the tariffed rate.[10] From the free market comes the right of nondominant carriers to change tariffed rates without notice, without cost support, and with a presumption that any tariff is lawful.

Federal procurement policies generally favor the acquisition of telecommunications services under contracts covering extended periods time, up to ten years. The presumed benefit of this practice is that these contracts allow the agencies to "lock in" volume and term discounts that would not be available if the services were acquired on a unit-by-unit, month-to-month basis. Federal agencies compare the discounted rates of a number of competing carriers and accept the bids that offer the most favorable combinations of rates and services.

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[10] See NPRM, ¶94.

The filed rate doctrine undermines the integrity of this process. No rates are "locked in" if the carrier, by filing a change in its tariff, can supersede the contract rate to which the Federal agency agreed. Comparisons of bid rates are meaningless if the tariff process allows carriers, at will, to substitute new and higher rates once the Federal contract has been signed.

When AT&T was classified as a dominant carrier, the Federal agencies had some degree of protection, in their contracts with all long distance carriers. AT&T could not change its tariff at will, AT&T had to demonstrate a cost justification for the change, or at least it had to hold the change within the limits imposed by the price cap regime. With AT&T thus constrained, the other nondominant interexchange carriers were prevented by AT&T's price leadership from imposing uncompetitive price increases. It was not free market pricing, but at least it limited Federal agencies' exposure to arbitrary, unilateral price increases.

Now, there is no protection, not even that provided by conventional contract law. Carriers are free to use the tariff process to abrogate contract prices at will, assured that they are protected by the filed rate doctrine. GSA submits that is an intolerable situation. Telecommunications carriers should be required to abide by the same contractual limitations as any other form of business in the economy.

2. Current Tariff Filing Rules Are Burdensome To Carriers, The Commission, And Consumers.

Another good reason to change the status quo, scarcely mentioned in the NPRM, is the enormous burden of paperwork that it imposes on carriers and on the Commission.

Every time a price is changed, a term or condition modified, or a service altered, another piece of paper must be served on the Commission. The result is flow of thousands of pieces of paper each month from each of the larger carriers, and tens of thousands from all carriers combined.

This system is inefficient and costly to all involved. The carriers must maintain extensive staffs to prepare and file the continuous tariff revisions, and the Commission must expend its extremely limited resources to process this avalanche of paper once it is received.

Nor is this paper of much benefit to consumers. GSA has found that paper tariffs are of very limited value. It is costly and time-consuming to use them, and it is even more costly to maintain them in current state. If an historical record of rates and charges is sought, the task becomes almost impossible: no one can feasibly keep both the present and the past tariff pages for all carriers for more than a very limited number of services.

Unless changed, the situation is likely to become much worse. The 1996 Act opens all telecommunications markets to any entrants, and it authorizes the Regional Bell Operating Companies ("RBOCs") to enter the interLATA markets once they have reached certain interconnection thresholds.[11] If these carriers must file tariffs, their volume will be equal to or greater than that of the major incumbent interexchange carriers. The deluge of paper will overwhelm the Commission's tariff processing staff.

To summarize, GSA believes that the Commission is correct to propose the elimination of tariffs in their traditional form, but it has cited the wrong reasons. Tariffs that

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[11] 1996 Act, §271.

are filed contemporaneously with their effectiveness are not anti-competitive, and they provide information needed by the Commission to fulfill is statutory obligations. However, the filed tariff doctrine destroys the integrity of telecommunications contracts. The current procedure of filing tariffs is burdensome and likely to become more so.

III. In Lieu Of Filing Tariffs, The Interexchange Carriers Should Be Required To Post Prices On Electronic Bulletin Boards.

The foregoing comments have suggested several seemingly contradictory requirements. On the one hand, the Commission's regulatory obligations require it to monitor the rates charged by the carriers -- even nondominant carriers -- subject to its regulation. On the other hand, tariffed rates can no longer be allowed to supersede contractual agreements between carriers and their customers. On the one hand, the Commission and the public need to have access to carrier pricing information. On the other hand, the filing of tariffs is an intolerable burden.

GSA submits that there is a resolution to these conflicting objectives. It is for the Commission to require each carrier to post on an "electronic bulletin board" the terms, conditions and prices it is charging its customers. The information would correspond to that now provided by the tariffs, but the rates would no longer have "filed rate" status, that is, they would not supersede customer-specific contract rates.

In fact, the posted price information would not be "filed" with the Commission at all. The only information the carriers would be required to provide to the Commission would be their electronic address(es) and any codes, routines, or formats necessary to provide

easy access by the public to the carrier's pricing data. Carriers would be obliged to maintain the pricing data on a current basis -- as presumably they would in any case in the normal course of business. The benefits of this proposal are many.

A. Posted Prices Will Enhance Competition.

As noted earlier, it is unrealistic to believe that detariffing would have much impact on the knowledge that each carrier has of its competitors' prices. On the other hand, detariffing will have a dramatic effect on the level of pricing knowledge available to customers. It is customers, not carriers, who have no alternative source of pricing information other than tariffs. The Commission's proposed mandatory removal of all pricing data from the public domain significantly weakens customers' bargaining power relative to carriers. This is particularly true of small customers who do not have the resources to solicit competitive bids individually from a spectrum of potential carriers.

A requirement for carriers to post their prices thus enhances the information base of customers. It strengthens their ability to negotiate for the lowest prices consistent with the terms and conditions of their services. It also provides new competitors with intelligence that is critical to their decisions whether to enter new markets, to offer new services, or to engage in more aggressive competition.

In other markets, the availability of competitive price information is not considered a hinderance to competition. To the contrary, the extensive (and expensive) advertising of prices for all manner of goods and services in daily newspapers, on the airwaves, in direct mailings, and now over the Internet is demonstrative of vibrant, active price competition. There is absolutely no reason why such pricing information would not also

stimulate competition in the telecommunications markets.

B. Posted Prices Will Permit The Commission To Fulfill Its Statutory Responsibilities.

The forbearance provisions of the 1996 Act are permissive and conditional. The Commission has no obligation to forbear from regulating rates, but if it wishes to, it must make affirmative findings that the forborne regulation is not necessary to ensure reasonable and nondiscriminatory rates or to protect consumers, and that the forbearance is in the public interest.[12]

There is nothing either explicit or implicit to suggest that a forbearance decision, once made, is permanent and irreversible. To the contrary, the Commission has an obligation to monitor the markets from which it has forborne regulation to ensure that the justification for that forbearance continues to be valid.

The proposed electronic bulletin boards will allow the Commission to monitor rates without regulating them. By this mechanism, the Commission can confirm whether its assumptions concerning the efficacy of market pricing as a protection against undue discrimination and unreasonable prices are indeed valid. Without interfering in the carriers' pricing decisions (indeed, without the carriers' knowledge), the Commission can test whether the structure of rates and charges among customer classes, sizes and locations display any patterns of discrimination, preference or prejudice.

Among the patterns that the Commission must monitor is the relationship between charges to urban and rural subscribers. Such monitoring will allow the Commission to

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[12] 1996 Act at § 401 (adding § 10(a))

verify the certification of the respective carriers that their rates are geographically averaged and integrated. GSA submits that such monitoring is incumbent on the Commission in the fulfillment of its statutory obligation to protect consumers in rural and high-cost areas.[13]

Moreover, the continuing nature of the electronic bulletin boards will allow the Commission to follow important changes in rates. This will allow the Commission to test whether structural developments such as, for example, the consolidation of the RBOCs have any effect on pricing power or price coordination. Such tests are necessary to ensure that the initial findings that supported regulatory forbearance continue to be appropriate.

C. Posted Prices Will Ease The Transition From Tariffed Rates.

There are also some very practical reasons for maintaining publicly available price schedules that do not have the filed rate status of tariffs. Many of the contract services used by Federal agencies (and we believe other large subscribers) are priced according to varying levels of discount from the tariffed rates. In effect, the tariffed rates are integral to the contract service. Without tariffs, or at least without public published rate schedules, the contracts become meaningless: their reference points cease to exist.

Additionally, tariffs contain more than just rates. They define the carrier's services, describe the terms and conditions of those services, and set forth the carrier's service quality commitments. They also prescribe the responsibilities of the carrier and the customer, thereby limiting the liabilities of each

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[13] 1996 Act, § 254(g).

Arguably, all of these tariff conditions could be incorporated into the specific contracts that each carrier signs with its individual customers. To amend every contract in this manner is costly, burdensome, time-consuming and an invitation to hidden preferences or penalties. It is also unnecessary if there are generalized public documents to which the customer-specific contracts can refer. These documents do not need to have the status of tariffs, but they do need to be publicly available and easily accessible to the affected customers. GSA's proposal would allow existing contracts to remain in effect with only a reference change from the carriers' tariffs to their electronically posted pricing plans.

D. Posted Prices Will Encourage Long-term Service Arrangements.

Long-term service commitments provide important benefits to both carriers and consumers. To the carriers, they offer the assurance of large volumes of service over an extended period of time. This guarantee of traffic can then justify the investment of substantial funds in costly, high-capacity facilities. To consumers, long-term commitments offer the opportunity to lock in reduced rates for a defined level of service over an extended term. Not only does this practice lower overall communications costs, but it allows the consumer to budget telecommunications costs over a multi-year planning horizon with some degree of confidence.

There is a risk, however. In an industry as volatile as telecommunications, it is possible -- indeed likely -- that rates which appear highly beneficial today can become totally out of scale with the market by next year. Not only the level but the structure of charges can change dramatically from year to year. As a consequence, a contract that fixes rates for five years will probably become obsolete; one that fixes rates for ten years

will become an anachronism.

To deal with this problem, GSA and other Federal agencies have included in many of their long-term contracts a Publicly Available Price Cap or "PAPCAP" mechanism. Under this procedure, the contractor commits to adjust its rates annually to a level no higher than the lowest publicly available rates for the corresponding service. The publicly available rates are identified through a study of the tariffs of the major incumbent carriers, as well as bids by all competitors for new Government contract services.

These indexing arrangements protect both consumers and carriers by allowing each to enter into long-term service commitments without the risk that the prices initially negotiated will become outdated and uneconomic. To date, the indexing of prices has benefitted consumers because of the general decline in telecommunications prices, but it could benefit carriers if prices begin to inflate.

Obviously, this sort of indexing arrangement relies on the public availability of price information. The information does not need to be in the form of tariffs, and the prices do not need to be regulated. They only need to be publicly available. The electronic bulletin board approach suggested by GSA would fill this important need.

IV. Conclusion

As the agency vested with the responsibility for acquiring telecommunications services on a competitive basis for use of the Federal Executive Agencies, GSA urges the Commission to forbear from requiring carriers to tariff domestic interstate interexchange services and to require instead that carriers post their detariffed prices on electronic bulletin boards that will be available to the Commission and the general public.

Respectfully submitted,

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April 25, 1996

CERTIFICATE OF SERVICE

I MICHAEL J. ETTNER, do hereby certify that copies of the foregoing "Reply Comments of the General Services Administration" were served this 25th day of April, 1996, by hand delivery or postage paid to the following parties:

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