

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED

APR 25 1996

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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

DOCKET FILE COPY ORIGINAL

COMMENTS OF BUSINESS TELECOM, INC.

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Dated: April 25, 1996

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EXECUTIVE SUMMARY

BTI's initial comments focus upon the Commission's tentative conclusion that Section 410 of the Telecommunications Act of 1996 ("1996 Act") requires the Commission to prohibit interexchange carriers from filing tariffs with the FCC. BTI maintains that (1) the forbearance provisions of the 1996 Act allow the Commission the discretion to adopt a policy of permissive tariffing; (2) that mandatory detariffing of interstate interexchange carriers is not in the public interest, and therefore not permissible under the forbearance provisions of the 1996 Act; and (3) that a policy of permissive tariffing will reduce administrative burdens and improve carrier efficiencies thereby advancing the public interest and the pro-competitive goals embodied in the 1996 Act. Accordingly, BTI respectfully requests that the Commission adopt a policy of permissive detariffing of interexchange carriers rather adopt a policy of mandatory detariffing.

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COMMENTS OF BUSINESS TELECOM, INC.

Business Telecom, Inc. ("BTI"), by its undersigned counsel, hereby submits its comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned docket regarding the regulation of interstate interexchange carriers ("IXCs").¹

INTRODUCTION

Formed in 1983, BTI provides resold interexchange telephone service to small business and residential customers in 47 states. As a non-dominant interexchange carrier and a competitive market entrant, BTI maintains a substantial interest in the outcome of this proceeding. BTI's initial comments focus upon the Commission's tentative conclusion that Section 410 of the Telecommunications Act of 1996 ("1996 Act")² requires that the Commission forbear from

¹ See *Policy & Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking*, CC Docket No. 96-61, FCC 96-123 (released March 25, 1996) ("*NPRM*").

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

applying Section 203 of the Communications Act of 1934 (“Communications Act”) and thereby prohibit interexchange carriers from filing tariffs with the FCC. As discussed below, BTI respectfully submits: (1) that the forbearance provisions of the 1996 Act allow the Commission the discretion to adopt a policy of permissive tariffing; (2) that mandatory detariffing for interstate interexchange carriers is not currently justifiable under the 1996 Act; and (3) that a policy of permissive tariffing is consistent with and will otherwise advance the public interest and the pro-competitive goals of the 1996 Act.

DISCUSSION

I. THE 1996 ACT ALLOWS THE COMMISSION DISCRETION TO ADOPT A POLICY OF PERMISSIVE TARIFFING

Section 401 of the 1996 Act modifies the Communications Act of 1934, by adding a new Section 10 (47 U.S.C. §159) governing forbearance. Under section 10(a) of the Communications Act, the FCC is now authorized to forbear from applying any regulation or provision of the Communications Act 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 interest²⁷

²⁷ Section 10(b) of the Communications Act further provides that in determining the “public interest”, the Commission “shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to

To a word, the aforementioned forbearance provisions mirror Section 332 of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993 (“OBRA”), wherein Congress enabled the Commission, under similar circumstances, to designate any provision of Title II as “inapplicable to [any commercial mobile] service or person.”⁴² Although Congress provided the Commission with little guidance on how to apply the forbearance criteria of the 1996 Act, both the legislative history of Section 332 as well as the Commission’s rulemaking proceeding implementing this Section provide significant insight as to how to apply the similar forbearance provisions of the 1996 Act.

For example, in discussing the Section 332 forbearance test, the House Committee Report noted of the first factor (the language of which was included in the final version of the test adopted by Congress),⁴³ that “[t]he Commission may specify, for instance, that [a] service need not be

which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers . . . that determination may be the basis for a Commission finding that forbearance is in the public interest.” 47 U.S.C. § 10(b).

⁴² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-666, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993). Under the forbearance provisions of OBRA, codified at Section 332(c)(1)(A) of the Communications Act, the Commission must first reach a determination that --

- (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (ii) enforcement of such provision is not necessary for the protection of consumers; and
- (iii) specifying such provision is consistent with the public interest.

⁴³ House Conf. Rep. No. 103-213, *reprinted in* 1993 U.S.C.C.A.N.1088, 1179-80.

tariffed at all, or it may choose to subject such services to ‘permissive detariffing’. . . if [the Commission] finds that such policy is not needed to ensure charges are just and reasonable or otherwise in the public interest.”⁶ Indeed, the Commission implicitly recognized that permissive detariffing is within its authority when it considered just such a proposal in the context of its implementation of the Section 332 forbearance provisions.⁷ Recognizing that the forbearance provisions of the 1996 Act carefully mirror the Section 332 forbearance provisions, BTI asserts that Congress here too wished to provide the Commission with the opportunity to choose from a range of policy options -- including the permissive tariffing of domestic interstate interexchange services.

II. MANDATORY DETARIFFING OF INTERSTATE INTEREXCHANGE CARRIERS IS NOT PRESENTLY JUSTIFIED UNDER THE FORBEARANCE PROVISIONS OF THE 1996 ACT

A. Interexchange Carriers Operate Differently than CMRS Providers and Must be Treated Differently

Although the Commission held that under the forbearance provisions of Section 332 of the Communications Act, commercial mobile radio service (“CMRS”) providers must no longer file tariffs, BTI asserts that the Commission must recognize that application of the 1996 Act’s forbearance test -- although quite similar to Section 332’s -- will apply very differently to domestic interexchange carriers. Although the Commission has concluded that requiring tariff filings from CMRS providers (1) will take away these carriers’ ability to make rapid efficient responses to

⁶ H.R. Rep. 103-111, 103rd Cong., 1st Sess., pt. 3 (May 25, 1993), *reprinted in*, 1993 U.S.C.C.A.N. 378, 587-88.

⁷ See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 94-252, ¶ 178 (March 7, 1994) (“CMRS R&O”).

changes in demand and cost,^{8/} and (2) will impose administrative costs on these carriers,^{9/} BTI asserts, for the reasons discussed below, that mandatory detariffing will have just the *opposite* effect upon interexchange carriers. Indeed, unlike with CMRS carriers, an end user does not always need to become a subscriber before utilizing the services of a given IXC. Accordingly, mandatory detariffing of interexchange carriers will actually *increase* transaction costs because the IXC will now be required to *individually* negotiate the terms, rates and conditions under which a user will be bound, whereas previously, the terms and conditions of the filed tariff simply would have governed.

B. A Policy of Mandatory Detariffing is Not Currently Justified Under the 1996 Act

As described above, Section 410 of the 1996 Act provides that the Commission may forbear from application of the tariff filing requirement when, among other things, the public interest is met. BTI asserts, however, that mandatory detariffing of the interexchange marketplace is inconsistent with the public interest and that voluntary tariff filings will serve to protect the interests of both consumers and carriers.

First, tariffs enable interexchange carriers -- and particularly smaller resellers -- to rapidly, efficiently and uniformly introduce new service offerings or implement price reductions to all customers. Under a policy of mandatory detariffing it would be difficult, if not impossible, to respond to market forces and reduce prices or introduce services without incurring the transaction costs associated with the renegotiation of all existing customer contracts. BTI submits that these additional transaction costs will actually impede competition and result in higher prices by

^{8/} See *CMRS R&O* at ¶177.

^{9/} *Id.*

contributing to a stagnation in the pricing competition that now pervades the industry.

Second, tariffs enable carriers to rapidly evaluate the status of competition in the marketplace and determine how best to market their services in new or innovative ways. Rather than impede “the introduction of new services, dampening competitive responses and ultimately encouraging price collusion through the forced publication of charges,”¹⁰ BTI asserts that, in fact, filed tariffs may contribute to development, by competitors, of new, innovative offerings to niche markets whose needs are currently unmet by their current service providers.

Third, tariffs actually promote price competition by ensuring that pricing information is disseminated throughout the marketplace. A complete ban on tariffs would impede both carriers and consumers from obtaining the information necessary to both sell and buy services at competitive prices. Indeed, given the vast number of IXC’s and their competitive service offerings, collusion is both improbable and impractical. Moreover, under the Commission’s streamlined tariff filing procedures, tariffs may be filed on a single day’s notice. Under streamlined filing procedures, carriers cannot signal prices to other carriers, and the likelihood of any anticompetitive conduct is minimized.

Since the public interest standard of Section 10(b) has not yet been met, the Commission may not require mandatory detariffing of non-dominant interexchange carriers. BTI asserts that sound judgment requires that the Commission refrain from adopting a mandatory detariffing proposal at this time, but that the Commission should continue to monitor the interexchange marketplace for conditions that would make the introduction of such a policy consistent with the public interest.

¹⁰ *NPRM* at ¶ 21 (citation omitted).

III. PERMISSIVE TARIFF FILINGS ARE IN THE PUBLIC INTEREST

BTI maintains that the introduction of permissive tariffing, rather than mandatory detariffing, will best serve the public interest. As previously discussed, it is not cost effective for carriers to execute contracts with every end-user customer, and not every carrier-customer relationship should require individualized contractual relationships. Nevertheless, in certain instances, it may be reasonable and efficient to file certain rates, terms, or conditions as tariffs, rather than including them in contracts. Accordingly, permissive tariffing would allow carriers to substantially reduce present administrative burdens yet retain the advantages and efficiencies inherent in tariff filings. This efficiency will result in lower costs to the carrier, and will necessarily lower user rates and increase the number of services available to consumers. For example, some carriers might find that filing certain promotional rates or service offerings subject to frequent change are better filed as tariffs rather than negotiated and renegotiated as contracts. In addition, carriers are likely to find that the filing of certain terms in tariffs rather than in individually negotiated contracts will serve to better protect the carrier from frivolous claims of unreasonableness, discrimination, or anti-competitive conduct. Accordingly, BTI asserts that the Commission should not foreclose the advantages and efficiencies afforded to both customers and carriers under a permissive detariffing policy.

CONCLUSION

A continued competitive long distance market is best realized if the Commission applies its forbearance authority and adopts a permissive tariffing policy, rather than imposing a policy of mandatory detariffing upon the industry. Permissive detariffing is in the public interest because it

will ensure that both carriers and consumers receive the benefits of competitive long distance services while continuing to gain the protections and efficiencies afforded by tariffs. Mandatory detariffing, on the other hand, imposes additional costs upon carriers and restricts the flow of important information to consumers and, as such, is not in the public interest. Accordingly, BTI respectfully requests that the Commission adopt a policy of permissive detariffing as such a policy will enhance marketplace efficiencies and provide consumers with lower prices and the availability of more services.

Respectfully submitted,



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Dated: April 25, 1996