

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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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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Comments of Citizens for a Sound Economy Foundation

Citizens for a Sound Economy Foundation (CSE Foundation) hereby submits these comments in support of a consistently deregulatory policy in the above-referenced proceeding. CSE Foundation is a nonprofit research and educational organization with 250,000 members and supporters in every state in the country. We have been active in telecommunications policy concerns since 1988, addressing issues such as price regulation, universal service, and use of the electromagnetic spectrum.

We believe that significant benefits will accrue to consumers should the Commission forbear from imposing mandatory tariff filing requirements on interexchange carriers. CSE Foundation believes, however, that tariff filing should be allowed on a permissive basis, so as to make available important protections against liability for interexchange providers operating under common carrier requirements. Lastly, we note that a debate over mandatory versus permissive tariff requirements overlooks the potential for reform in the long-distance market. The Commission should also move swiftly to facilitate new entry by Bell Operating Companies into this market, as provided by the Telecommunications Act of 1996.

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## **Regulatory Forbearance and the Interstate, Interexchange Market**

Section 401 of the Telecommunications Act of 1996 specifically requires that the Commission forbear from regulation in all cases in which such regulation is not necessary to ensure just, reasonable and non-discriminatory rates nor necessary to protect consumers, and in which such forbearance is consistent with the public interest.<sup>1</sup> In addition, the legislation requires that the Commission consider the competitive effect of a decision to forbear from regulation, noting that "(i)f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."<sup>2</sup>

In response to this requirement for regulatory forbearance, the Commission proposes to reform the tariff filing procedure for non-dominant domestic interexchange carriers.<sup>3</sup> This proposal continues a long-standing effort on the part of the Commission to forbear from its previous requirements for tariff filings,<sup>4</sup> an effort that was largely restricted by court rulings that mandated such filings.<sup>5</sup> Reconsidered under the forbearance requirements of the new legislation, this initiative should comprise an important part of the Commission's overall efforts to reform regulation and promote competition.

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<sup>1</sup> Telecommunications Act of 1996, Sec. 401(a).

<sup>2</sup> *Ibid*, Sec. 401(b).

<sup>3</sup> Federal Communications Commission, CC Dkt. No. 96-61, Para. 17-39. All other references to this docket cited as "NPRM" in these comments.

<sup>4</sup> See First Report and Order, 85 FCC 2d, Second Report and Order, 91 FCC 2d, Fourth Report and Order, 95 FCC 2d, Fifth Report and Order, 98 FCC 2d, Sixth Report and Order, 99 FCC 2d.

<sup>5</sup> See MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), and AT&T v. FCC, 978 F.2d 727, 737 (D.C. Cir. 1992).

The revision of tariff filing requirements will not, however, provide the only means by which Commission decisions will impact the market for interexchange services. The degree to which benefits accrue to consumers in a given market will to a great extent reflect the competitive nature of that market. Lowering regulatory requirements associated with tariffs, while simultaneously lowering entry barriers to all providers -- including local exchange carriers -- will ultimately provide at the interexchange level the competitive result desired by the Commission and mandated by Congress.

#### **Tariff Filing Requirements and the Promotion of Competition**

The Commission requests comments on its tentative conclusion that it is "required by Section 10 of the Communications Act, as amended, to forbear from requiring non-dominant domestic interexchange carriers to file tariffs."<sup>6</sup>

As the Commission recognizes, much of the impetus for detariffing comes from a concern over price collusion which may result from the tariff filing process.<sup>7</sup> There has been a long and heated debate as to whether tacit price collusion exists in any long-distance market. In prior proceedings, the Commission has found inconclusive evidence demonstrating such behavior.<sup>8</sup> For the purposes of the present proceeding, however, the existence or non-existence of tacit collusion should not determine the Commission's policy

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<sup>6</sup> NPRM, Para. 32.

<sup>7</sup> NPRM, Para. 21 and Competitive Carrier Further NPRM, 84 FCC 2d.

<sup>8</sup> Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (rel. Oct. 23, 1995).

solution. Under either situation, consumers would be benefitted by detariffing and the introduction of additional competition.

If, as some maintain, some or all of the interexchange markets are less than fully competitive, then the elimination of mandatory tariff requirements would serve to reduce the potential for anti-competitive price signalling and other collusive activity among firms. Such activity would occur because, in such an industry, government-mandated filing requirements provide colluding firms with a monitoring mechanism. Removal of such requirements means that potentially-colluding firms cannot force others to reveal whether they are in compliance with any tacit agreements.

Conversely, if there is significant competition in this market, then mandatory tariffing is unnecessary. The cost of preparing rate filings for the FCC represents simply an additional cost to be passed on to consumers, with no commensurate benefits.

In other words, mandatory tariffing is at best wasteful, and at worst anti-competitive. There is no reason to continue to impose this requirement.

At the same time, CSE Foundation urges the Commission to remember a second necessary element of long-distance reform: allowing entry by new competitors. In the present NPRM, the Commission notes that "the 1996 Act provides the best solution to any problem of tacit price coordination, to the extent that it exists currently, by allowing for competitive entry in the interstate interexchange market by the facilities-based BOCs and others."<sup>9</sup>

Again, we wish to point out that such entry is beneficial to consumers regardless of

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<sup>9</sup> NPRM, Para. 81.

the present amount of competition in the long-distance marketplace. We cannot even say that any certain amount of competition is "enough" and thereby exclude new competitors.

Competition involves the search by many individuals for that combination of factors which best serve each individual's personal needs.<sup>10</sup> Because these needs are personal, subjective, and highly variant across large groups of people, no one product or service is likely to provide the preferred combination for everyone. Moreover, a continuous effort to meet these needs -- and thus win customers and profits -- requires the continuous pursuit of new technologies, new services, and new ways of adding value to the customer.<sup>11</sup> Viewed from this perspective, the interexchange market or any other market can always potentially benefit from the emergence of new competitors.

#### **Mandatory v. Permissive Detariffing**

In addition to concluding that it must forbear from requiring tariff filings, the Commission also invites comments on its tentative conclusion to adopt a policy of mandatory detariffing of filing requirements in the interexchange market.<sup>12</sup> It argues that the alternative policy of allowing the voluntary posting of rates -- "permissive" detariffing -- does not lie in the public interest.

We urge the Commission to reconsider this tentative decision. Removing the

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<sup>10</sup> See Hayek, Friedrich, "The Meaning of Competition," Individualism and Economic Order, (1948).

<sup>11</sup> For an explanation of the entrepreneurial behavior that drives this process of continuous improvement, see Kirzner, Israel, Competition and Entrepreneurship, (1973).

<sup>12</sup> NPRM, Para. 34.

requirement that firms file tariffs should be sufficient to eliminate any reasonable fear of collusive behavior. As stated above, without the monitoring mechanism of required tariffs, firms interested in collusion will have great difficulty in knowing how well their restriction on the market is maintained. In fact, successful collusion generally requires both a means to monitor all producers and an enforcement mechanism to ensure compliance.<sup>13</sup> The potential for successful collusion can thus be severely limited by the simple act of removing tariff filing requirements, even if voluntary filing is permitted.

Under a policy of mandatory detariffing, however, there is a potential for additional costs to be imposed on interexchange carriers. Tariff filings -- whether mandatory or permissive -- limit the liability providers incur. CSE Foundation notes that liability costs and the transactions costs associated with overcoming such liability stand to rise under the mandatory detariffing requirement.

It is true that interexchange carriers can, like any other service provider, develop a contract with each and every customer and thus limit their liability in this fashion. Standard agreements are common for many services, from cable television to pest control to any of a number of contracted services. While such contracts should in no way be restricted by the Commission or any other regulatory agency, however, it is unlikely that such arrangements could be applied as inexpensively -- and provide as much certainty -- as a voluntary tariff.

In short, forcing interexchange carriers to arrange for liability protection with each of their customers imposes a cost that is ultimately passed back to the ratepayers themselves. It limits the opportunity for these consumers to choose a service that offers a reduced ability to

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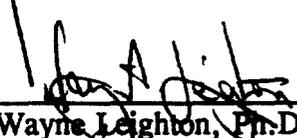
<sup>13</sup> Stigler, George, "The Economic Effects of Antitrust Laws," 9 Journal of Law and Economics, (October, 1966), pp. 225-58.

sue for consequential damages along with a commensurately lower price. Under a policy of permissive detariffing, competition would encourage providers to offer those alternatives consumers most preferred.

### Concluding Comments

Mandatory tariffing of interexchange rates hurts consumers, is inconsistent with the public interest, and is not necessary to ensure just, reasonable or non-discriminatory pricing. Therefore, as required under the Telecommunications Act of 1996, the Commission should forbear from mandatory tariff requirements in the interexchange market. We urge the Commission, however, to continue to allow tariff filing in this market on a permissive basis.

CSE Foundation also urges the Commission to act to allow new entry into this industry, so as to maximize all of the benefits of competition. Only by pursuing both objectives -- detariffing and new entry -- can the Commission fully meet the pro-competitive, deregulatory goals set forth in the Telecommunications Act of 1996.

  
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