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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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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

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COMMENTS OF LCI INTERNATIONAL TELECOM CORP.
IN SUPPORT OF PERMISSIVE TARIFFING

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SUMMARY

LCI International Telecom Corp. ("LCI") urges the Commission to reject its tentative conclusion to adopt a mandatory detariffing policy for interexchange carriers ("IXCs") and to adopt instead a permissive detariffing policy that permits IXCs and their customers to establish service arrangements by tariff, by contract, or by a combination of the two. Mandatory detariffing would impose substantial and wholly unnecessary costs upon IXCs and their customers. LCI, like many other IXCs and other carriers, tariffs all of its services, and also enters into contractual relationships with certain customers. These contracts typically reference provisions contained in the tariffs, thereby reducing the size of the contracts significantly and facilitating the contract negotiation process. Under mandatory detariffing, IXCs and customers would be forced to redraft -- and possibly renegotiate -- hundreds if not thousands of these contracts. This process would needlessly complicate the provision of service, and would require a huge investment in marketing resources and legal expense by carriers and customers alike. Moreover, if the Commission adopts its mandatory detariffing proposal, IXCs would incur even greater legal and marketing costs due to the need to negotiate contractual arrangements with the thousands of customers that currently take service exclusively through tariffs.

Concern over the possible administrative burden of tariffing on Commission resources cannot justify mandatory detariffing. Alternatives, such as requiring the filing of tariffs on diskette, or electronically, or privatizing the process of maintaining tariffs and making copies available to interested parties, could minimize or eliminate any undue imposition on Commission resources while retaining the benefits of tariffing for carriers and their customers.

Contrary to the Commission's tentative conclusion, permissive detariffing will not lead to price collusion among IXCs. Economic theory holds that price collusion is highly unlikely in markets characterized by numerous sellers with varying cost structures, highly diverse product

offerings and sporadic, high volume purchases. In orders released in 1990 and 1991, the Commission found that the market for interstate interexchange services reflects these characteristics. Competition has accelerated since then and will continue to do so under the Telecommunications Act of 1996.

Under a permissive detariffing policy, the filed rate doctrine would continue to apply, but would not have any negative impact on customers. The pressures of the competitive market will ensure that carriers do not use tariff revisions to revise unilaterally existing contracts to their customers' disadvantage. Indeed, only last year, the Commission released an order finding that competition in the interexchange market effectively eliminates this concern.

The Commission has requested comment on the adoption of new regulations prescribing ordering procedures for interexchange service, mandating IXC policy regarding service deposits, extending the public notice period if tariffing is retained, and imposing new information maintenance and reporting obligations on IXCs. Such proposals are fundamentally at odds with the procompetitive, deregulatory mandate of the Telecommunications Act of 1996, and are wholly unnecessary given the level of competition in the interexchange market. For all the reasons discussed herein, the Commission should not adopt a mandatory detariffing policy, and should refrain from imposing any new regulatory burdens on IXCs.

If the Commission does adopt a mandatory detariffing policy -- and LCI shows herein that it should not -- the Commission, at a minimum, should permit IXCs to maintain lists of terms and conditions in Section 203 tariffs on file with the FCC. This approach would reduce the unreasonable costs and disruption that a mandatory detariffing policy will impose upon IXCs and their customers. In addition, the Commission should phase in mandatory detariffing over an 18-24 month period.

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**COMMENTS OF LCI INTERNATIONAL TELECOM CORP.
IN SUPPORT OF PERMISSIVE TARIFFING**

LCI International Telecom Corp. ("LCI"), by its attorneys, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released March 25, 1996 in the above-captioned proceeding. LCI is among the largest and fastest-growing interexchange carriers ("IXCs") in the United States, employing an all-digital fiber optic network to originate switched and dedicated interexchange traffic in all 50 states. Therefore, LCI is directly and substantially affected by the Commission's proposed mandatory detariffing policy.

In these comments, LCI urges the Commission to reject its tentative conclusion that nondominant IXCs should be required to cancel their tariffs on file with the Commission and convert all customers to individual contract service arrangements. Instead, the public interest would best be served by adopting a permissive tariffing policy that enables IXCs and their customers to establish service arrangements by tariff, by contract, or by a combination of the two. At a minimum, if the Commission adopts a mandatory detariffing policy, it should

continue to permit nondominant IXCs to file Section 203 tariffs containing their standard terms and conditions of service.

I. FAILURE TO ADOPT A PERMISSIVE TARIFFING POLICY FOR IXCs WOULD IMPOSE ENORMOUS COSTS ON CARRIERS AND THE PUBLIC

The Commission should reject its tentative conclusion that mandatory detariffing would serve the public interest. That conclusion seriously understates the value and importance of tariffing in the interexchange industry today, and fails to take into account the disruptive and costly impact that mandatory detariffing would have on IXCs and customers.

Like many IXCs and other carriers, LCI enters into contractual relationships with certain customers in addition to tariffing all of its services with the Commission and state public service commissions. In cases where LCI negotiates a contract with different or new terms and conditions, LCI revises its tariff to reflect such arrangements. When carriers and customers choose to do business by contract, tariffs are an indispensable means of managing contractual relationships more efficiently and effectively. Rather than present a customer with a voluminous contract listing all terms and conditions of service, descriptions of services and technical service parameters, IXCs often prepare a much shorter contract dealing with the issues subject to active negotiation while referencing the tariffs on file with the FCC for other pertinent terms and conditions. This facilitates the negotiation and service ordering process for carriers and customers alike, and ensures consistency among service arrangements and customers.

Denying IXCs the ability to file tariffs would needlessly impose enormous costs upon carriers and customers, and would greatly complicate the provision of long distance

services. As noted above, many IXCs currently have in effect hundreds if not thousands of individual contracts that reference terms, conditions and other information in their tariffs. Mandatory detariffing would force these carriers to redraft -- and perhaps renegotiate -- all of these outstanding contracts. The cost of such a project, in terms of the commitment of marketing resources and legal expenses, would be enormous. Further, even those costs could be dwarfed by the marketing and legal expense involved in converting to individual contracts the existing customers that currently take service exclusively through tariffs. Mandatory detariffing would force LCI to undergo this conversion process for literally thousands of customers. In statements before the United States Court of Appeals for the District of Columbia Circuit, the Commission has already recognized that mandatory detariffing may impose increased administrative burdens on carriers.¹ Through permissive detariffing, the Commission would give IXCs and their customers the option of selecting among tariff and contractual arrangements, while avoiding the significant costs of redrafting existing contracts and converting tariffed customers to contract status.²

¹ *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186, 1189 (D.C. Cir. 1985).

² In addition, the Commission cannot reasonably rely on the formal complaint process under Section 208 of the Communications Act of 1934 to replace the tariffing function. The complaint process is an adjudicatory process that focuses on individual parties and individual disputes; it is not designed to disseminate information to the public. Moreover, because the complaint process employs a formalized, litigation-oriented approach, it necessarily requires a commitment of resources by the Commission and the parties that is normally avoided in the tariff process.

Should the Commission have concerns that a permissive tariffing policy for IXCs would be too much of an administrative burden, it may address this concern without denying IXCs and their customers the use of tariffs. The Commission could minimize the burden of maintaining tariffs by requiring that all tariffs be filed electronically (tariffs could even be made accessible via the Internet) or on computer diskette (as is currently done by nondominant carriers). In fact, the Commission could eliminate any burden on its resources by privatizing the process of receiving tariff filings, preparing a daily tariff log, making tariffs available for public inspection and providing copies. The demand for tariff information is more than adequate to provide a revenue stream that would make this function attractive to an outside company. In either case, the drastic remedy of mandatory detariffing is not necessary to alleviate any undue burden on Commission resources.

If the Commission decides to adopt its proposed mandatory detariffing scheme -- and LCI has shown that it should not -- it should at a minimum take several steps to minimize the cost and disruption that such a policy will impose upon the industry. First, any mandatory detariffing policy should be phased in over at least 18-24 months. As noted above, mandatory detariffing would require IXCs to redraft existing contracts and convert customers currently taking tariffed service to contractual arrangements. It would be impossible to perform this work without a phase-in period of sufficient length to permit carriers and customers to obtain and apply the resources, as well as conduct the negotiations, necessary to accomplish these tasks.

Second, the Commission should permit IXCs to continue to include in Section 203 tariffs their standard terms and conditions of service, even if carriers are not permitted to

retain tariffed rates. Maintaining a centralized base of terms and conditions would minimize the redrafting needed to convert existing contracts that currently reference the terms and conditions sections in IXC tariffs. While a mandatory detariffing policy that allowed the continued filing of terms and conditions would still impose unacceptable costs upon the industry, this approach would be preferable to one that eliminates all tariffed provisions in their entirety. Otherwise, every business relationship between a carrier and a customer (including residential subscribers) would have to be reflected in elaborate contractual documents containing a complete service description, payment terms, carrier and customer obligations, promotions, and all other basic terms and conditions of service.

Finally, LCI recognizes that AT&T has made certain voluntary commitments in exchange for reclassification as a nondominant domestic carrier, and that such commitments involve the filing of tariffs with the Commission.³ For example, AT&T voluntarily committed to file geographically-specific tariffs on five days' notice. Those voluntary commitments should not allow AT&T to retain its tariffs if other IXCs are forced to eliminate theirs. While LCI believes that AT&T should live up to its commitments, that can be done in a manner that is fully consistent with fair competitive conditions in the interexchange industry only if all nondominant carriers have an equivalent opportunity to provide service pursuant to a combination of tariffed and contractual arrangements in the best interests of their customers.

³ *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995).

II. PERMISSIVE DETARIFFING WILL NOT LEAD TO PRICE COLLUSION AMONG IXCs

The Commission posits that mandatory detariffing would benefit the public by “detering price coordination” among IXCs and thereby promoting price competition.⁴ As LCI discusses below, however, industry practice, economic theory, and recent Commission precedent all make clear that price collusion is virtually impossible in the interexchange market, and so cannot justify a mandatory detariffing policy.

As a practical matter, collusive price fixing among IXCs is impossible. There are literally hundreds of different providers of long distance service. These carriers differ markedly in their size, geographic service areas, network facilities and cost structures, and reflect a wide variety of business strategies, customer profiles, service packages, marketing initiatives and rate structures. It simply is not feasible to coordinate pricing in such a highly diversified market. Moreover, under the Commission’s currently effective tariffing rules, these IXCs file tariffs on one day’s notice, making advance coordination of tariffed rates impossible.

Indeed, the Commission has already established standards for determining the likelihood of price collusion, and has already found that collusion in the interexchange market is highly unlikely. In examining the state of competition in the interexchange market, the Commission, citing economic literature, stated, *inter alia*, that: 1) “a large number of sellers or size disparity among sellers makes [collusion] more difficult;” 2) differentiated products or

⁴ NPRM at ¶ 30.

rapid technological change tend to make collusion more difficult;" 3) "sporadically placed, high volume orders create incentives to cheat and make collusion less likely."⁵ Applying these factors, it concluded that "it is unlikely that there will be tacit collusion in the pricing of interstate business services"⁶ Application of these same standards in the instant proceeding compels a finding that tacit price collusion is highly unlikely, if not impossible, in the interexchange market. Even if the FCC believes it is possible for the largest interexchange carriers to undertake collusion, its regulatory response need not and should not affect all other interexchange carriers who lack any realistic ability or incentive to participate in such collusion. The undeniable benefits of permissive detariffing to carriers and customers are too great to throw away on an unfounded fear of collusion.⁷

⁵ *Competition in the Interstate Interexchange Market*, 5 FCC Rcd 2627, 2656 n.148 (1990). Since those statements were made, new entry and competition have significantly accelerated in the long distance market, a process which can only intensify further with the adoption of the Telecommunications Act of 1996.

⁶ *Id.* at 2640. The Commission later confirmed these findings in its final order in *Competition in the Interstate Interexchange Market*, 6 FCC Rcd 5880 (1991).

⁷ Moreover, IXC's still file tariffs for their intrastate service. If IXC's were able to collude -- and LCI has shown that they cannot -- they could easily use state tariffs, or press releases, or publicly available price lists, or any number of other means to share price information. Thus, even if collusion were possible, the costs associated with mandatory detariffing would still far outweigh any possible benefits.

III. THE FILED RATE DOCTRINE WILL NOT HAVE A NEGATIVE IMPACT ON CUSTOMERS, AND CANNOT SUPPORT MANDATORY DETARIFFING

The Commission has also tentatively concluded that absent mandatory detariffing, the effect of the filed rate doctrine could allow IXCs unilaterally to change the terms of contracts by filing inconsistent tariff provisions. NPRM at ¶ 34. LCI agrees that the filed rate doctrine would continue to apply in a permissive detariffing environment, but this poses no threat of harm to the public and cannot justify a mandatory detariffing policy. Indeed, the filed rate doctrine has applied to IXCs since they began filing tariffs, and has not posed a significant problem. Even during the 1980s, when permissive detariffing was in effect for nondominant IXCs, the filed rate doctrine was never identified as a source of significant regulatory concern.

Moreover, the Commission has already found that the filed rate doctrine does not raise insuperable public interest concerns. When the Commission approved AT&T's use of contract-based tariffs, it found that:

Given the substantial competition that exists for the services in contract-based tariffs, there should be few incidents, if any, of unilateral, material tariff revisions to a contract deal. If a carrier attempts making such changes, it risks losing the future business of the affected customers and damaging its own reputation in the marketplace. Thus, it is not clear that, as a practical matter, a carrier would ever seek to make such unilateral material changes to contract-based tariffs.⁸

That finding, made only last year, is even more apposite today, following the enactment of the Telecommunications Act of 1996, which will increase competition in the interexchange market

⁸ *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4573 (1995).

and will ensure that market forces are an even greater restraint on unreasonable pricing behavior or other practices by IXCs. LCI respectfully submits that concerns about the filed rate doctrine are neither well-founded nor sufficient to justify a mandatory detariffing policy.

IV. THE COMMISSION MUST REJECT REQUESTS TO ADOPT NEW AND BURDENSOME REGULATIONS GOVERNING IXC BUSINESS PRACTICES

The Commission has solicited comments on a number of alternative regulations, including: 1) whether the commission should prescribe specific ordering procedures for contract tariffs, such as uniform ordering information, customer descriptions, or allowable deposit amounts (NPRM at ¶ 99); 2) whether notice periods longer than 24 hours should be required if IXCs are permitted to retain tariffs (NPRM at ¶ 99); and 3) whether IXCs should be required to maintain rate and service information for submission to the Commission upon request (NPRM at ¶ 36).

LCI urges the Commission to refrain from adopting expansive new regulations for IXCs. Prescribing practices for ordering service, expanded tariff notice periods, or new reporting requirements is unnecessary and is fundamentally at odds with the regulatory forbearance mandate of the Telecommunications Act of 1996. That Act specifically authorizes the Commission to identify regulations that are no longer necessary and to forbear from applying them as a means of reducing the regulatory burden on carriers in increasingly competitive markets. For the Commission to use a rulemaking proceeding intended to implement this deregulatory mandate as a basis for establishing new regulations and increasing the regulatory burden on IXCs would contravene the letter and spirit of the Act.

Moreover, new regulations are unnecessary. The Commission can and should rely upon marketplace competition to dictate how nondominant IXCs offer their services to customers. Were the Commission to promulgate regulations, for example, on allowable deposits, new entry or new service offerings could be impeded. To the extent individual carriers nevertheless seek to engage in unreasonable or discriminatory practices, such practices would be unlawful under the existing provisions in Sections 201(b) and 202(a) of the Communications Act, and customers could file informal or formal complaints with the Commission.

The Commission repeatedly has found that the interexchange market is subject to robust competition,⁹ and the Telecommunications Act of 1996 has taken dramatic steps to promote competition in all market segments. In such an environment, the Commission can reasonably rely on market forces, where they exist, to ensure fair and reasonable business practices, and need not establish new regulations for what is the most fully competitive telecommunications market in the United States

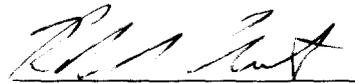
V. CONCLUSION

The Commission should adopt a policy that provides IXCs and their customers with the opportunity to establish service arrangements under tariff. Such action would eliminate

⁹ The Commission has not found that the Bell Operating Companies (“BOCs”) are completely without power to engage in unreasonable pricing practices, either within or outside of their traditional service areas. For this reason, the Commission should require the BOCs to tariff interexchange services, at least on an interim basis, until it can determine that the public and competitors are adequately protected from the possibility of unlawful cross-subsidization or other unreasonable pricing practices by the BOCs.

unnecessary legal and transaction costs for carriers, remove restrictions on IXCs' ability to respond to market demand, and maximize customer information and choice. This approach is fully consistent with the mandate of the Telecommunications Act of 1996, and best serves the public interest. If the Commission determines not to adopt such a policy, it should at a minimum allow IXCs to maintain statements of terms and conditions on file with the Commission in Section 203 tariffs.

Respectfully submitted,



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