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

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COMMUNICATIONS SECTION

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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**REPLY COMMENTS OF THE AD HOC TELECOMMUNICATIONS
USERS COMMITTEE, THE CALIFORNIA BANKERS CLEARING
HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION,
ABB BUSINESS SERVICES, INC., AND
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA**

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SUMMARY

In this proceeding, the customers who take service under negotiated service arrangements have unanimously supported mandatory de-tariffing as the most effective means of leveling the playing field between carriers and their customers. So long as carriers can hide behind the filed rate doctrine, the market for these services cannot function in a rational manner.

Opposition to the mandatory de-tariffing of negotiated service arrangements comes only from a few carriers. Although they offer a technical argument based on an overly narrow construction of Section 10(a), the carriers are clearly less concerned with carrying out the intent of Congress than about preserving their own ability to make unilateral changes in contracts with their largest customers. The Commission should reject the carriers' agenda.

The carriers and groups representing consumer interests raise issues about de-tariffing of mass market services that warrant further study by the Commission. But those deliberations should not delay the elimination of the current regime for customer-specific arrangements.

Finally, the Commission should eliminate the CPE anti-bundling rules, as proposed in the NPRM. Opposition to the proposal comes not from consumers, but from vendors who purport to speak for their customers. Their claims are inaccurate and, if adopted, would work against the Commission's efforts to broaden consumer choice.

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The Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America file these reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

The undersigned organizations and companies have limited their comments in this proceeding to the application of the Commission's proposal to customer-specific service arrangements. The initial comments on that issue fall into an interesting pattern. The customers who take service under negotiated service arrangements unanimously support mandatory de-tariffing as the most effective means of leveling the playing field between carriers and customers. It

is their view that, so long as carriers can hide behind the filed rate doctrine, the marketplace for these services cannot function in a rational manner. Opposition to the mandatory de-tariffing of negotiated service arrangements comes only from a few carriers. Their argument is a technical one regarding the meaning of certain words in the recently enacted Section 10(a) of the Communications Act. A recent tariff filing by AT&T strongly suggests, however, that the carriers' real concern may be less for the fulfillment of Congress's intent than for the preservation of their own ability to make unilateral changes to contracts with their largest customers.

I. THE COMMISSION HAS STATUTORY AUTHORITY TO ORDER MANDATORY DE-TARIFFING WHERE THE SPECIFIED CONDITIONS ARE MET

The Commission has proposed to implement forbearance on a mandatory basis for the interexchange services of nondominant carriers. NPRM, ¶ 34. It has based this proposal on an analysis of the factors enumerated in Section 10(a) of the Act. The most important of these factors from the perspective of customers that enter into negotiated service arrangements is the fact that the elimination of the carriers' tariffs would also eliminate the carriers' ability to invoke the filed rate doctrine, which currently allows carriers "unilaterally to change rates, terms, and conditions of contract tariffs and other long-term service arrangements" *Id.*

Section 10(a) states, in pertinent part:

Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or

telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that [three conditions are met].

AT&T, LDDS WorldCom and MFS Communications argue that the Commission lacks authority under Section 10(a) to adopt mandatory de-tariffing of *any* communications service under *any* circumstances. AT&T Comments, pp. 7-12; LDDS WorldCom Comments, pp. 8-9; MFS Communications Comments, pp. 2-4.¹ The carriers claim that "forbear" means "refrain from enforcing" and does not mean "preclude voluntary compliance." They argue that the plain meaning of the statute supports this conclusion and, further, that Congress has used different language in other statutes when it wants to authorize an agency to deregulate on a mandatory basis. Neither argument is persuasive.

In support of their "plain meaning" argument, AT&T, LDDS WorldCom and MFS Communications point to dictionary definitions of "forbear." But reliance on dictionary definitions can be misleading where the history of regulation in an industry invests a word with particular meaning. For a decade, the Commission has used various forms of the word "forbear" to refer to mandatory, as well as permissive, de-tariffing.² It was against this backdrop that

¹ Although Sprint expresses some doubt as to whether the Commission has authority to adopt mandatory de-tariffing in general, it does not oppose such a policy with respect to customer-specific arrangements. Sprint Comments, p. 3 n.1.

² See *Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 F.C.C. 2d 1020, 1027 (1985) (ordering "cancellation of forborne carrier tariffs"); *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1480 (1994) ("*CMRS Order*") ("[W]e will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers.").

Congress adopted Section 10(a), and the word "forbear" used in that provision should be construed within its regulatory and historical context, not in a vacuum.

Some of the carriers point to other statutory provisions in which, they claim, Congress has more clearly directed an agency to deregulate on a mandatory basis. They argue that Section 10(a) of the Communications Act differs from those statutes and does not, therefore, authorize the Commission to adopt a mandatory de-tariffing policy. In fact, the statutes they cite, and cases construing them, strongly support the Commission's conclusion that its authority to forbear includes the authority to order carriers not to file tariffs.

The carriers cite two statutes:

- The 1993 amendment to the Communications Act, which gave the Commission authority to "specify by regulation [provisions of Title II] as inapplicable to [commercial mobile radio services]." 47 U.S.C. § 332(c)(1)(A). Based on this authority, the Commission adopted a mandatory deregulatory regime.³
- The 1978 amendment to the Federal Aviation Act, which gave the Civil Aeronautics Board authority "to exempt from the requirements of this title . . . any person or class of person if it finds that such exemption is consistent with the public interest." 49 U.S.C. § 416(b). Based on this authority, the CAB adopted a mandatory deregulatory regime.

The textual argument advanced by the carriers with regard to Section 10(a) -- that to forbear from applying a requirement is not the same as to preclude voluntary compliance -- could be made of each of these statutes as well. By the carriers' logic, the Commission could not construe its authority to

³ The Commission has read this authority as encompassing both permissive and mandatory de-tariffing and has described it as "forbearance authority." *CMRS Order*, 9 FCC Rcd at 1475.

"specify [certain statutory requirements] as inapplicable" to mean that it may preclude voluntary compliance with those requirements. Nor could the Commission construe the CAB's authority to "exempt [a carrier] from the requirements of this title" to mean that the agency may preclude voluntary compliance. In other words, if the carriers' reading of Section 10(a) is correct, the statutes they cite should also have authorized only permissive deregulation. In fact, both statutes were construed by their implementing agencies as conferring authority to adopt mandatory deregulation. The similarity in the language used in all of these statutes --

- exempt from a requirement
- specify that a requirement is not applicable
- forbear from applying a requirement

-- *supports* the Commission's view of its authority here; it does not undermine it.

The D.C. Circuit agrees. In *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 835 (D.C. Cir. 1980), petitioners argued that, under the Federal Aviation Act, the CAB's "authority to exempt airlines from certain requirements cannot be used to prohibit airlines from filing [inter-carrier] agreements . . . if they choose to do so." The court flatly rejected that contention, describing the agency's exemption authority as "broad" and noting that the CAB's refusal to permit filing of inter-carrier agreements was consistent with Congress's deregulatory purpose. The claims made -- and rejected -- in that case are virtually identical to the claims made by the carriers here.

The Commission's forbearance authority is broad, its proposal is entirely consistent with the deregulatory thrust of the Telecommunications Act of

1996, and nothing in the Communications Act gives carriers the right to file tariffs with the Commission in order to secure the anomalous and unreasonable "rights" conferred by the filed rate doctrine.

II. THE COMMISSION SHOULD EXERCISE ITS AUTHORITY TO MANDATE DE-TARIFFING OF SERVICES PROVIDED UNDER CUSTOMER-SPECIFIC ARRANGEMENTS.

The undersigned organizations and companies believe that the public interest is better served if customer-specific arrangements for telecommunications services are embodied in contracts and *not* in tariffs. Our reasons for this were stated in our initial comments in this proceeding -- and in the comments filed by other large users of business services -- and we will not re-state them here. We do, however, wish to make two supplementary points.

A. The Alignment Of The Parties Speaks Volumes About The Role Tariffs Play In Protecting *Carrier* Interests.

Commenters representing large users of business services unanimously endorsed mandatory de-tariffing of customer-specific service arrangements.⁴ Although consumer groups oppose the Commission's proposal, they limit their remarks to its application to "off-the-shelf" services purchased by residential and small business customers; some specifically note that the Commission's proposal may be reasonable for services covered by negotiated arrangements.⁵ Even some carriers support mandatory de-tariffing for customer-

⁴ American Petroleum Institute Comments, pp. 3-10; Capital Cities/ABC *et al.* Comments, p. 3. See General Services Administration Comments, p. 11 (suggesting electronic publication of carrier rates in lieu of tariff filing).

⁵ The Telecommunications Research Action Center Comments, p. 6; Consumer Federation of America and Consumers Union Comments, p. 2.

specific arrangements -- Sprint "has no objection" to mandatory de-tariffing of contract tariffs of the kind entered into by large users. MCI agrees, adding that its own interests and those of its large customers "will be better served" without tariffs.⁶ AT&T stands alone in arguing that mandatory de-tariffing would not be warranted for customer-specific arrangements even if it were authorized by Section 10(a) of the Act.

B. The Current Tariff-Based Regime Undermines The Commission's Goals In Authorizing Contract Tariffs.

In authorizing interexchange carriers to offer service on a "contract tariff" basis, the Commission stated its expectation that such offerings would

- "increase the ability of customers to negotiate service arrangements that best address their particular needs,"
- "further benefit consumers by unleashing competitive forces for business services to the maximum extent possible," and
- "help to ensure that the long-distance industry stays competitive."⁷

These goals will be better served if non-dominant carriers are precluded from filing tariffs for negotiated service arrangements. We cannot state too strongly that, absent repeal of the filed tariff doctrine, permissive de-

⁶ Sprint Comments, p. 5 n.2; MCI Comments, p. 27. MCI's comments carry particular poignancy inasmuch as it was MCI that sought to block mandatory de-tariffing a decade ago. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Other carriers oppose the Commission's proposal in this proceeding, but limit their comments to factors relevant only to residential and small business services. See, e.g., Pacific Telesis Group Comments, p. 6 (opposes mandatory de-tariffing where customers have had no face-to-face contact with carrier sale representatives).

⁷ *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5899 (1991) (emphasis in original).

tariffing would *not* deprive the carriers of their current ability to use tariffs to distort the legal relationship of vendor and customer.

The tariff-filing requirement (and the filed rate doctrine) were intended to protect customers from a unjust or unreasonable rates and to prevent carriers from engaging in unreasonable discrimination in the provision of like services. As the comments filed in this proceeding make abundantly clear, tariffs for negotiated service arrangements do no such thing. Indeed, they have the opposite effect. We wish to add three observations on this point.

The first concerns the filed rate doctrine, which assures carriers that whatever clauses they put in their tariffs will "trump" contrary terms that they have negotiated with customers, even if the customer is not told of (and does not consent to) the tariff provisions. Put another way, customers can be strictly held to the bargains they have struck, while carriers can escape from their commitments without cost -- a state of affairs that the General Services Administration correctly describes as "intolerable." GSA Comments, p. 9. Only mandatory de-tariffing will put a well-deserved end to this practice.⁸

AT&T says that the Commission's concerns about the effects of the filed rate doctrine are misplaced and can be mitigated by a "few simple rules" applied within the context of a permissive de-tariffing regime.⁹ But there is

⁸ There is a difference of opinion among the carriers as to whether the filed rate doctrine would apply under a permissive de-tariffing regime. AT&T states that permissive de-tariffing would eliminate the statutory basis for the doctrine but adds that carriers could continue to rely on it if their tariffs contained a clause preserving the doctrine. AT&T Comments, p. 21 & n.24. We note that AT&T's caveat swallows its doctrinal concession. LDDS says that the doctrine would *not* apply in the case of voluntary tariffs. LDDS WorldCom Comments, p. 12. LCI disagrees. LCI International Telecom Comments, p. 8.

⁹ AT&T Comments, p. 21.

nothing "simple" about AT&T's proposal, which would allow a carrier and customer to agree that rates and other terms are governed by a contract,¹⁰ but would also allow the carrier to vitiate any such agreement by stating in its tariff that tarified terms may not be varied or supplemented by contract.¹¹

The Commission should not underestimate the risks posed by the filed rate doctrine, even to a carrier's most valued customers. AT&T tells the Commission that "the filed rate doctrine will rarely be invoked A carrier that acquires a reputation for going back on a bargain could not succeed in today's competitive market." AT&T Comments, p. 20 n.22.¹² Yet less than three weeks after seeking to reassure the Commission on this issue, AT&T revised its Tariff 12 specifically to pave the way for "going back on a bargain." New Section 7.2.33 establishes rates, terms and conditions for frame relay capabilities within Tariff 12. Section 7.2.33.B.1 states that AT&T's waiver of its (filed rate doctrine) rights to raise rates or make other adverse tariff changes without customer consent *does not apply to the frame relay portion of Tariff 12*.¹³ In 1993, AT&T

¹⁰ AT&T Comments, p. 22.

¹¹ AT&T Comments, p. 21 n.24.

¹² This argument has always seemed eerily reminiscent of the claims made in the last century by defenders of slavery. It is in the interest of the slave owner, so the argument goes, to treat his slaves well "so they will be healthy, willing to work, less restive or resistant or rebellious. That notion gave small comfort to slaves. Though it might have been to his own ultimate advantage for a slave owner to be a 'good master,' not all of them were." G. Wills, *Certain Trumpets: The Call of Leaders*, p. 119 Simon & Schuster (N.Y. 1994).

¹³ AT&T has waived its filed rate doctrine rights in Sections 7.2.9.H and 7.2.9.I of Tariff 12. The tariff gives "teeth" to these provisions by stating, in Sections 7.2.17.A.1 and 7.2.17.A.2, that the customer may terminate without liability of AT&T should raise the rates or make other adverse tariff changes without the customer's consent.

attempted a similar end-run around Tariff 12's waiver of the filed rate doctrine with regard to charges for vertical features on 800 service, but customers successfully protested the attempt.¹⁴ Because amendments to Tariff 12 are no longer subject to a 14-day public notice period, there was no opportunity for customers to protest AT&T most recent action. So much for the inhibitory effects of a bad reputation.¹⁵

Our second observation concerns the fact that, under the current regulatory regime, non-dominant carriers are effectively free from regulatory oversight, but can nonetheless "hide" behind their tariffs whenever customers attempt to negotiate truly customer-specific terms and conditions. Rather than admit that its resistance is based on business considerations, a carrier may instead tell its customer:

- We can't offer you that term, because it contradicts our general tariff.¹⁶
- We'd like to write the customer-specific tariff the way you want, but if we file anything that looks different from the tariff "options" we have filed for other customers, the

¹⁴ Compare AT&T Communications Revision to Tariff F.C.C. No. 12, Tariff Transmittal No. 5047 (filed April 16, 1993) with AT&T Communications Revision to Tariff F.C.C. No. 12, Tariff Transmittal No. 5442 (filed July 14, 1993).

¹⁵ We note that the considerations raised by AT&T apply with equal weight to the world of contracts in general, but in that world the law has for many centuries nevertheless seen fit to preclude one party from unilaterally altering a bilateral contract. Contract law does not exist to protect contracting parties from other contracting parties in ordinary times; it exists in significant part to prevent "reasonable" parties from shafting their customers (or vendors) when times are bad or the temptation to cease a "small" advantage cannot be resisted. AT&T's actions provide ample evidence of the value of contract law in this respect.

¹⁶ Of course, departure from the carrier's general tariff is the *raison d'être* of customer-specific arrangements. See *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd at 5899 (contract carriage will enable users to depart from the carriers' "plain vanilla" generic tariffs" and negotiate arrangements "that best address their particular needs").

FCC will reject the filing or otherwise delay the effective date.¹⁷

- We'd like to offer you that term, but if we publish it in a tariff, other customers will want it too.¹⁸

Our third observation concerns the claim of some carriers that the current tariff regime should be continued so that they may continue to cross-reference their standard tariffs in the contracts they negotiate with individual customers.¹⁹ Although it is understandable that a carrier would want to limit the number of issues on which it will engage in active negotiation, the Commission should not continue to require or permit tariff filings in order to further that agenda.

Modern word processing makes the incorporation of previously tariffed terms into a carrier-customer contract a simple matter of point-and-click. In addition, it has long been common for carrier-customer contracts to cross-reference other documents, e.g., technical publications, standard procedures for the administration of calling cards, etc. It should make no difference whether a cross-referenced document is a tariff lodged with the Commission or another

¹⁷ One major carrier all-too-frequently concedes that its own customer-specific tariff provisions are vague and ambiguous but tells the customer that they cannot be changed because the Commission would reject (or at least postpone the effective date of) any customer-specific filing that differed from the carrier's (admittedly incomprehensible) language in filings for other customers.

¹⁸ A related phenomenon is the inclusion in customer-specific offerings of "fences" -- tariff provisions that make a customer-specific tariff unusable by any other customer. Although the carriers generally reassure the initial customers that they are not the intended targets of these provisions, it is not unusual for carriers to press for terms that inhibit the customer's business plans (e.g., prescribed limits on the number of switched access locations would constrain a user's plans to expand small retail locations).

¹⁹ See Sprint Comments, pp. 9-10 (citing the "convenien[ce]" of incorporating tariff terms into contracts); LCI International Telecom Comments, p. 2.

standard publication prepared by the carrier and made available to its customers. We can surmise only two reasons why the carriers prefer to incorporate a tariff -- the tariff provides (what appears to be) a government-sanctioned reason for refusing to meet a customer's demands, and the tariff provides a basis for invoking the filed rate doctrine.

III. THE COMMISSION MAY WISH TO REFINE ITS PROPOSAL WITH RESPECT TO RESIDENTIAL AND SMALL BUSINESS SERVICES.

The carriers are uniformly opposed to any requirement that they de-tariff the services sold to residential and small business customers. Commenters representing the purchasers of such services cite different considerations but reach the same conclusion

The consumer groups defend tariffs as a means by which price information is "disseminated throughout the marketplace," and state that tariffs are "critical to customers who are trying to make informed service decisions."²⁰ But tariffs are only one vehicle for public disclosure of rate and other information -- and not a very good vehicle at that.²¹ Interexchange services are marketed to residential and small business customers through mass advertising, direct mail, telephone solicitation, sponsorship of sporting events and a host of other

²⁰ Business Telecom Inc. Comments, p. 6; Telecommunications Management Information Systems Coalition Comments, p. 1.

²¹ CFA/CU Comments, p. 8 (urging the Commission to explore ways of making rate and other information accessible to consumers "in a comprehensible form"); Telecommunications Management Information Systems Coalition Comments, p. 6; General Services Administration Comments, pp. 11 (advocating a requirement that carriers post their prices on electronic bulletin boards).

methods. It is not clear what role, if any, tariffs play in that process. To the extent that there is cause for concern about the accuracy and value of information disseminated through existing channels, the Commission may wish to address those issues in a Further Notice in this proceeding. In particular, the Commission may wish to seek comment on how the interests of residential and small business users could be protected, regardless of whether carriers are required or permitted to file tariffs.

In no event, however, should further proceedings on these issues delay the mandatory de-tariffing of customer-specific service arrangements.

IV. THE COMMISSION SHOULD ADOPT ITS PROPOSAL REGARDING CPE BUNDLING.

Opposition to the Commission's proposed elimination of the CPE anti-bundling rule comes, not from consumers, but from vendors who purport to speak for their customers: "Bundling . . . will harm consumers [and] limit[] consumer choice. . . . [T]he carriers will use their ability to bundle CPE to the detriment of consumers." Information Technology Association of America ("ITAA") Comments, p. 4; Independent Data Communications Manufacturers Association ("IDCMA") Comments, pp. 3-8. Their arguments are inaccurate and, frankly, infuriating to those whose interests they purport to represent.

The equipment providers' claim that a change in the existing rules will cause the prices of interexchange services to rise as carriers use their service revenues to subsidize CPE give-aways was not borne out in the frame

relay market.²² Until the Bureau's ruling last fall, frame relay service and CPE were sold on a bundled basis where such bundling was requested by the customer. As a result, customers were able to buy according to their individual needs and preferences. Some purchased their CPE independently. Others purchased through the carrier. Two facts are plain, based on our experience.

First, the interexchange carriers did not compel customers to purchase only bundled offerings. Second, they priced the CPE on close to a pass-through basis, with any financial advantage to the customer arising from its ability to take advantage of the volume discounts enjoyed by the carrier -- not from any cross-subsidized, bargain basement price-slashing.²³ On the contrary, modifying the rules as the Commission has proposed -- allowing bundling but also requiring carriers to offer their services on a stand-alone basis -- will broaden the range of consumer choices.²⁴

²² See ITAA Comments, p. 5. In fact, just the opposite has occurred. When AT&T tariffed its frame relay service earlier this year on an unbundled basis, the rates were on average 6% higher than the rates AT&T had charged when it was permitted to offer the service bundled with CPE. J. Wexler & D. Rohde, "Frame Prices Shaken," *Network World*, p. 1, col. 1 (January 29, 1996).

²³ This is, of course, the real reason why the equipment manufacturers defend the existing rules -- their withdrawal will result in lower prices to customers and smaller margins for manufacturers. If withdrawal of the anti-bundling rule would offer a windfall to the carriers, one might expect them to wholeheartedly endorse the Commission's proposal. In fact, MCI confesses to "some reservations" about the proposal and suggests a one-year trial period. MCI Comments, pp. 4, 25.

²⁴ See American Petroleum Institute Comments, p. 12.

CONCLUSION

For the reasons stated above and in our initial comments, the Commission should adopt mandatory de-tariffing of customer-specific tariffs and permit the inclusion of international services and CPE in such offerings.

Respectfully submitted,

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Certificate of Service

I, Andrew Baer, hereby certify that true and correct copies of the preceding Reply Comments to CC Docket No. 96-98, 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, were served this 24th day of May, 1996, via first class mail, upon the parties on the attached service list, and via hand delivery of the following

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May 24, 1996