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E. E. Estey
Government Affairs Vice President

Suite 1000
1120 20th Street, NW
Washington, DC 20036
202 457-3895
FAX 202 457-2545

September 25, 1996

EX PARTE OR LATE FILED

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex Parte Presentation - Detariffing
CC Docket: 96-61

Dear Mr. Caton:

Today, Judy Argentieri, Roy Hoffinger and I met with Lauren J. Belvin and Dan Gonzalez of the Common Carrier Bureau, in separate meetings, to discuss AT&T's position in the above cited proceeding. The attached material was discussed in both meetings.

Two (2) copies of this letter along with the attachments are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

Attachment

CC: L. Belvin
D. Gonzalez

No. of Copies rec'd 0+2
List A B C D E

AT&T PRESENTATION TO THE FEDERAL COMMUNICATIONS COMMISSION--September 25, 1996

DETARIFFING--CC Docket 96-61

I. THE RECORD CONFIRMS THAT A PERMISSIVE DETARIFFING RULE IS THE MOST DEREGULATORY, LOWEST COST OPTION

1. Permissive detariffing is "deregulatory" because it reflects neither a regulatory requirement nor a regulation prohibition, but affords carriers and their customers the freedom and flexibility to decide for themselves whether to rely on tariffs or individual contracts.

Residence and small business customers want tariffs and therefore favor permissive over mandatory detariffing.

Large business customers' needs are also addressed by permissive detariffing; they have sufficient market leverage to use contracts for individually negotiated arrangements, and concede the benefits of tariffs for residential and small business customers.

2. Permissive detariffing is the "lowest-cost" option because it permits tariffing when that is the most efficient and certain means of establishing the service arrangement. E.g., AT&T, LDDS, GTE, NYNEX, Frontier.

II. MANDATORY DETARIFFING WOULD IMPOSE SIGNIFICANT COSTS AND ELIMINATE THE EFFICIENCIES OF PERMISSIVE DETARIFFING

1. Mandatory detariffing would require carriers and customers to incur enormous costs in establishing binding and enforceable arrangements with individual consumers.

Millions of customers, including low volume customers.

Millions of transactions.

Many rates and terms, frequent changes.

2. Mandatory detariffing could preclude casual calling. E.g., AT&T, Sprint, Casual Calling Coalition.

Dial-around/access code calling.

Collect calls.

III. MANDATORY DETARIFFING HAS NO COUNTERVAILING BENEFITS

1. The Filed Rate Doctrine -- Mandatory detariffing is not necessary to prevent carriers from invoking the "filed-rate" doctrine to unilaterally alter negotiated arrangements.

> The filed rate doctrine, as developed in regulated industries (including telecommunications), is based on the statutory requirement that carriers file their rates and charge only the rates on file. In this circumstance, courts reasoned that the "filed rate" was the "only lawful rate."[1] Under permissive detariffing, there would be no requirement that carriers file tariffs, and no basis to hold that a filed rate is the "only lawful rate."[2]

Contrary to Ad Hoc Telecommunications Users Group's claim (Reply, p. 9), AT&T has not proposed that carriers would be able to use tariffs to "vitiate [negotiated] agreements."

> AT&T Comments (p. 21): "A permissive detariffing rule can only mean that rates contained in unfiled contracts are lawful and enforceable." See also p. 22 n.25: "A contract may provide that a carrier relinquishes the right to file inconsistent tariffs or enforce such tariffs against the customer, and a customer could assert the contract as a defense to any claim based on the tariff."

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[1] See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126, 127 (1990) ("The Act requires a motor common carrier to publish its rates in a tariff filed with the Commission;" "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful rate"), quoting Louisville & Nashville RR Co. v. Maxwell, 237 U.S. 94, 97 (1915); Security Services, Inc . v. K Mart Corp., 14 S. Ct. 1702, 1706 (1994) ("A motor carrier subject to the Interstate Commerce Act must publish its rates in tariffs filed with the ICC. . . . We have held these provisions to create strict filed rate requirements"(emphasis added)); Dayton Coal & Iron Co. v. Cincinnati, New Orleans and Texas Pac. Ry Co., 239 U.S. 446, 451 (1915) ("tariffed rates required to be filed under the Interstate Commerce Act "are the only rates which the carrier may lawfully receive").

[2] See, e.g., Arkansas Louisiana Gas Co v. Hall, 453 U.S. 571, 577 (1981)(recognizing that carrier must charge and collect filed rate, "[e]xcept when the Commission [validly] permits a waiver"); Maislin, 497 U.S. at 135 (suggesting that negotiated rate could prevail if Congress amended Act to eliminate or allow ICC to eliminate filing requirement).

2. Price Coordination--Commenters (consumer groups, state PUCs and AGs, carriers) agree that tariffing has nothing to do with likelihood of collusion.

Collusion exists in other industries without tariffs.

Permissive tariffing would not give competitors any more information than would be available to them in the open market. Particularly with respect to residential and small business customers, carriers would have to rely even more on public price statements, thorough published price lists, tombstone advertising, etc.

Permissive detariffing further minimizes opportunities for collusion by creating uncertainty and encouraging "cheating."

3. Rapid Responses -- The ability to quickly "respond to changes in demand and costs" is enhanced, not impeded, by tariffs; delay is a function not of tariffs, but of lengthy advance notice requirements.

4. "Administrative Costs" -- Under permissive detariffing, carriers would file tariffs only where it is the "least-cost" option.

IV. MANDATORY DETARIFFING IS UNLAWFUL

1. Mandatory detariffing is not authorized by the Act.

Plain meaning of forbearance, "refraining from action," indicates that Congress intended to authorize the Commission to do no more than refrain from requiring compliance with the tariffing requirements of Section 203.

Ad Hoc's claim that the word "forbearance" should be construed in its "regulatory and historical context leads to the same result, because Congress acted against a background in which the Commission itself had used the term "forbearance" to refer only to permissive detariffing (Competitive Carrier Proceeding, Second and Fourth Reports). The Commission used other terms to refer to mandatory detariffing (i.e., "cancellation of all forborne carrier tariffs") (Sixth Report).

Construing the word "forbearance" as authorizing only permissive as opposed to mandatory detariffing is most consistent with the deregulatory policies embodied in the forbearance provisions of the Act.

2. On this record, mandatory detariffing could not be found to be "in the public interest." 47 U.S.C. § 160(a)(3).