



MCI Communications Corporation

1801 Pennsylvania Avenue, NW
Washington, DC 20006

October 9, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: **Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996; CC Docket No. 96-187**

Dear Mr. Caton:

Enclosed herewith for filing are the original and sixteen (16) copies of MCI Telecommunications Corporation's Comments regarding the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Comments furnished for such purpose and remit same to the bearer.

Sincerely yours,

Alan Buzacott
Regulatory Analyst

Enclosure
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)
)
Implementation of Section 402(b)(1)(A)) **CC Docket No. 96-187**
of the Telecommunications Act of 1996)
)

MCI COMMENTS

**Alan Buzacott
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1801 Pennsylvania Ave., NW
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October 9, 1996

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SUMMARY

MCI Telecommunications Corporation (MCI) hereby responds to the Notice of Proposed Rulemaking (Notice) initiating this docket. MCI believes that the interpretation of “deemed lawful” that best meets the text and intent of the Act establishes higher burdens for suspension and investigation. There is every indication that Congress intended that the new subsection (3) of Section 204(a) of the Communications Act primarily to reduce procedural barriers to tariff changes. This interpretation is consistent with the legislative history and with the pro-competitive goals of the 1996 Act.

The Commission should not adopt its alternate interpretation, that “deemed lawful” changes the legal status of LEC tariffs that become effective without suspension and investigation. This interpretation is inconsistent with Section 204(a)(1) because it would create a right to judicial review of Commission decisions not to suspend, and Section 204(a)(1) contains no standards that would guide the Commission in exercising its authority and the courts in reviewing that authority. Because, as the Commission notes, it can only adopt an interpretation of “deemed lawful” that is consistent with other sections of the Act, it is clear that Congress did not intend Section 204(a)(3) to change the legal status of tariffs allowed to go into effect without suspension.

Furthermore, there is no indication that Congress intended to limit customers’ remedies. Section 402(b)(1) of the 1996 Act not only amends Section 204(a), but it also amends Section 208(b) to shorten the deadline for the resolution of complaints. The

placement of these amendments to Sections 204 and 208 together in the same subsection demonstrates that tariffs filed on a streamlined basis pursuant to Section 204(a)(3) remain subject to complaint remedies under Section 208(b). If LEC tariff changes filed on a streamlined basis are subject to the complaint process, then “deem” can only mean “presume,” since under Arizona Grocery, a finding of lawfulness would immunize the rates from any subsequent complaint remedy. The Commission, however, is not required to adopt one of the four-part tests in Section 1.773 of its rules as the suspension standard for tariffs filed pursuant to Section 204(a)(3).

It is clear that Congress intended the Commission to continue pre-effective review of incumbent LEC tariffs, even those subject to the streamlining provisions of new Section 204(a)(3). First, the Commission’s Section 204(a)(1) authority to conduct pre-effective review is in no way altered by the 1996 Act and, moreover, is explicitly referenced by the new subsection (3), thus confirming its retention. Second, the 7/15 day notice periods prescribed by Section 204(a)(3), while significantly shorter than the 120-day maximum notice period provided by Section 203(b), are still sufficient to allow the Commission to exercise its statutory authority to examine tariff changes prior to their effective date. Congress did not, for example, specify the one-day notice periods that the Commission prescribed for nondominant carrier tariffs, which would have effectively foreclosed the exercise of the Commission’s pre-effective review authority.

Because Section 204(a)(3) forecloses the Commission’s deferral authority for tariffs eligible for streamlined treatment, the Commission must ensure that transmittals contain all necessary information when filed. Consequently, the Commission should

reject all transmittals that do not comply with its rules, including its cost support and rate structure rules. If a transmittal does not comply with the Commission's rules, the Commission must reject the transmittal and require that it be refiled. The Commission should not continue to allow LECs to evade the cost support requirements based on exaggerated assertions of potential competitive harm, or adopt its proposal to allow incumbent LECs to make "good faith" confidentiality claims.

The Commission should modify the proposed three-day deadline for filing petitions. If a transmittal were filed on a Friday, the three-day deadline would require interested parties to file their petitions the following Monday, allowing only one business day to prepare and file the petition. It would be a simple matter for the LECs to game their tariff filings to force petitioners into this highly-compressed schedule. To allow petitioners sufficient time to draft and file a petition, the Commission should either allow petitioners four days to file against rate increases filed on 15 days notice or modify its proposed three-day rule to allow petitioners a minimum of two business days.

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MCI COMMENTS

I. Introduction

MCI Telecommunications Corporation, pursuant to the Notice of Proposed Rulemaking in the above-captioned docket,¹ hereby submits its Comments. In the Notice, the Commission seeks comment on rules to implement Section 402(b)(1)(A) of the Telecommunications Act of 1996.²

Section 402(b)(1)(A) of the 1996 Act adds a new subsection (3) to Section 204(a) of the Communications Act, which provides for streamlined tariff filings by local exchange carriers (LECs). It also amends Section 204(a) of the Act to provide that the

¹Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 96-367, released September 6, 1996 (Notice).

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

Commission shall conclude all hearings initiated under Section 204 within five months after the date the tariff takes effect. In addition, Section 402(b)(1)(B) of the 1996 Act amends Section 208(b) to require that the Commission conclude complaint proceedings five months after the date on which the complaint is filed. Pursuant to Section 402(b)(4) of the 1996 Act, the new provisions will take effect on February 8, 1997.

II. Streamlined LEC Tariff Filings Under Section 402 of the 1996 Act

A. The Commission's Deferral Authority is Foreclosed Only For Rate Increases and Decreases

The second sentence of Section 204(a)(3) provides that tariffs eligible for streamlined treatment "shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it was filed. . . unless the Commission takes action under paragraph (1)" of Section 204(a). The Commission states that it believes that "Congress intended to streamline LEC tariff filings by providing that they would generally become effective within seven or fifteen days unless suspended and investigated by the Commission." In addition, the Commission tentatively concludes that Congress intended to foreclose Commission exercise of its general authority under Section 203(b)(2) to defer up to 120 days tariffs that LECs may file on seven or fifteen days' notice.

MCI agrees that the "shall be effective . . . unless the Commission takes action under paragraph (1)" language forecloses exercise of the 203(b)(2) deferral authority.

However, it is clear that the “shall be effective” language applies only “in the case of a reduction in rates” or “in the case of an increase in rates,” i.e. simple rate level changes. Accordingly, for all other LEC tariffs, including new services, restructured services, and changes in terms and conditions, the Commission may continue to exercise its Section 203(b)(2) authority to defer the effective date of a tariff.

B. “Deemed Lawful” Establishes Higher Burdens for Suspension and Investigation

The Commission solicits comment on the meaning of “deemed lawful,” stating that it will adopt the interpretation that best meets the text and intent of the 1996 Act’s tariff streamlining provisions.³ The Commission also identifies two possible interpretations of “deemed lawful.” The first proposed interpretation would foreclose complaint remedies for tariffs allowed to go into effect without suspension, while the second proposed interpretation would establish heightened standards for the review of LEC tariffs, similar to the current treatment of nondominant carrier tariffs and within-band filings by price cap LECs.

1. Heightened Standards Of Review Are Consistent With the 1996 Act

The Commission’s second interpretation of “deemed lawful” is the most rational reading of the 1996 Act’s tariff streamlining provisions. Under this interpretation,

³Notice at ¶15.

“deemed lawful” would be interpreted to establish higher burdens for suspensions and investigations, such as by “presuming” LEC tariffs to be lawful.⁴

The language of the statute indicates that Congress intended the new Section 204(a)(3) to allow LECs to file certain types of tariffs with a shorter notice period and a reduced risk of suspension. By choosing to characterize the tariff review process established by Section 204(a)(3) as “streamlined,” Congress was making a clear reference to the Commission’s past use of the term “streamlined” in the context of tariff review. In both the Competitive Carrier and Price Cap dockets, the Commission characterized a tariff review process as streamlined if it incorporated both 1) shortened notice periods, and 2) the presumption of lawfulness.⁵ The new Section 204(a)(3) was intended to afford similarly streamlined review to LEC rate increases and decreases.

In particular, Section 204(a)(3) extends the presumption of lawfulness not only to within-band filings by price cap LECs, but also to out-of-band and above-cap filings, and to rate changes proposed by rate-of-return carriers. In addition, the shorter notice periods and the limited foreclosure of the Commission’s 203(b)(2) deferral authority will allow LEC rate changes to take effect more quickly. Price cap LECs will be permitted to

⁴Notice at ¶12.

⁵In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C. 2d 1 (First Competitive Carrier Order); In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3095.

decrease within-band rates on only 7 days' notice, and to file out-of-band or above-cap rates on only 7 or 15 days' notice, while rate of return carriers will enjoy substantially shorter notice periods than are prescribed by the Commission's existing rules.

That Congress intended Section 204(a)(3) to speed up the pre-effective review of LEC rate increases and decreases is confirmed by the Joint Explanatory Statement of the Committee on Conference. It states that the new subsection "streamlines the procedures for revision" of LEC tariffs, strongly indicating that Congress was concerned primarily with reducing procedural barriers to LEC tariff changes. Senator Dole's statements on the floor of the Senate that the new provision would "[s]peed up FCC action" and that "[t]o block such changes, the FCC must justify its actions" further support the interpretation that "deemed lawful" establishes higher burdens for suspension.

A policy of shorter notice periods and reduced risk of suspension is consistent with the "pro-competitive" goals of the 1996 Act. With Section 402(b)(1)(A), Congress provided the LECs with the ability to adjust their rates more rapidly, allowing sufficient flexibility to respond to competitors entering the local exchange and exchange access markets under the Section 251-252 framework. However, Congress left in place the key components of the Act's tariffing procedures: the LECs must file tariffs, the Commission may exercise pre-effective review, and customers may obtain damages under the Section 206-209 complaint process. Congress recognized that the LECs' market power will not evaporate overnight, and that continued Commission scrutiny of tariffs before they go

into effect, coupled with the Act's complaint remedies, is required to ensure that incumbent LEC tariffs are just, reasonable, and nondiscriminatory.

2. The Elimination Of Complaint Remedies Is Inconsistent With Other Provisions of the Act

Under the Commission's alternate interpretation, "deemed lawful" is interpreted to change the legal status of LEC tariffs that become effective without suspension and investigation.⁶ Under this interpretation of "deemed lawful," a tariff revision that the Commission allows to go into effect without suspension would be the lawful rate until the Commission concluded in a rate prescription under Section 205, or a complaint proceeding under Section 208, that a different charge, practice, classification, or regulation would be lawful for the future. This interpretation would limit the remedies available to LEC customers for rates, terms, and conditions that violate Section 201 or 202 of the Act.

Under this interpretation, a Commission decision not to suspend, which today is non-final and nonreviewable, would be judicially reviewable. In Southern Railway, the Supreme Court found that an Interstate Commerce Commission decision not to suspend was non-final and unreviewable because the complaint procedure was still available.⁷

⁶Notice at ¶¶9-11.

⁷Southern Railway Co. v. Seaboard Allied Milling Corp. et. al., 442 U.S. 444, 454 (Southern Railway).

Relying on Southern Railway, the court in Aeronautical Radio found that a Commission decision to accept a tariff filing was not subject to judicial review because “a complaint procedure comparable to that of the Interstate Commerce Act is available. . .”⁸ The Commission’s proposed interpretation, if adopted, would foreclose the complaint remedy and would thus force the opposite result from Southern Railway and Aeronautical Radio. Petitioners would thus have the right to seek judicial review of a Commission decision not to suspend a LEC tariff transmittal filed under the Section 204(a)(3) streamlined review procedures.

It is no answer to say that a truncated complaint remedy might still be available for prospective relief, as the Notice suggests. The complaint remedies that rendered the decisions not to investigate nonreviewable in Southern Railway and Aeronautical Radio would have provided the injured ratepayers “actual damages” for the entire period the tariffs were in effect.⁹ Under the Commission’s alternative interpretation of “deemed lawful,” ratepayers would obtain no damages for the period the tariff was in effect until after it had been found unlawful.

An interpretation of “deemed lawful” that creates a right to judicial review of Commission decisions not to suspend would be inconsistent with Section 204(a)(1) of the Act. In Southern Railway, the Supreme Court stressed the discretionary, permissive

⁸Aeronautical Radio v. F.C.C., 642 F.2d 1221, 1235.

⁹See, e.g., Southern Railway, 442 U.S. at 455.

language in the tariff review provision in the Commerce Act in holding that the lack of standards reflected a Congressional intent that a decision to let charges go into effect is unreviewable.¹⁰ Section 204(a)(1) of the Communications Act similarly contains no standards that would guide the Commission in exercising its suspension authority and the courts in reviewing that authority. As a matter of statutory construction, the Commission must interpret Section 204(a)(3) in a manner that is most consistent with the other provisions of the statute. As a result, the statute should be interpreted to mean that Congress did not intend “deemed lawful” to change the legal status of tariffs allowed to go into effect without suspension. Under 204(a)(1), a decision to permit a tariff to take effect is unreviewable, and 204(a)(3) simply adds a presumption of lawfulness.

The creation of a judicially reviewable decision not to suspend would also have disruptive practical consequences. As the Supreme Court noted in Southern Railway, “[i]f the Commission. . . must carefully analyze and explain its actions with regard to each component of each proposed schedule. . . , all in order to avoid judicial review and reversal, its workload would increase tremendously.”¹¹ The Court also discussed the disruptive consequences that would be created by “the allowance for independent judicial appraisal of the reasonableness of rates by every court of appeals in the country. . . .”¹²

¹⁰Southern Railway, 442 U.S. at 456.

¹¹Id. at 457.

¹²Id. at 460.

Thus, the proposed interpretation of “deemed lawful” as one that declares a tariff to be lawful is inconsistent with any realistic conception of “streamlined” review.

Finally, there is no indication that Congress intended to limit customers’ remedies. Section 402(b)(1) of the 1996 Act not only amends Section 204(a), but it also amends Section 208(b) to shorten the deadline for the resolution of complaints. The placement of these amendments to Sections 204 and 208 together in the same subsection demonstrates that tariffs filed on a “streamlined basis” pursuant to Section 204(a)(3) remain subject to complaint remedies under Section 208(b). If LEC tariff changes filed on a streamlined basis are subject to the complaint process, then “deem” can only mean “presume,” since under Arizona Grocery, a finding of lawfulness would immunize the rates from any subsequent complaint remedy.¹³

C. The Presumption of Lawfulness

As noted above, “deemed lawful” can only be interpreted as meaning “presumed lawful,” rather than suggesting any finding of lawfulness. The presumption of lawfulness accorded by Section 204(a)(3) requires a substantial change in the tariff review procedures for new services, restructured services, and out-of-band and above-cap filings by price cap LECs, and in the tariff review procedures for filings by rate of return carriers. The Notice, however, does not discuss the showing that a petitioner would have

¹³Notice at ¶9.

to make in order to rebut the presumption of lawfulness, although it suggests that the tests contained in Section 1.773 (a)(ii) and (a)(iv) of the Commission's rules would provide a model.¹⁴

Nothing in the 1996 Act requires the Commission to apply any of the four-part tests in Section 1.773 of its rules to LEC tariffs filed pursuant to Section 204(a)(3). The statute only requires the Commission to adopt suspension standards that accord LEC tariffs the presumption of lawfulness; it does not codify any of the tests in Section 1.773. The Commission may therefore adopt a test that reflects the particular circumstances of LEC tariff filings, much as it has prescribed different suspension standards for nondominant carrier tariffs, tariffs filed pursuant to Section 61.39 of its rules, and within-band tariffs filed by price cap LECs.

The Commission should establish a suspension standard for tariffs filed pursuant to Section 204(a)(3) that is consistent with the current structure of the exchange access market. Underlying the Commission's existing suspension standards for tariffs accorded the presumption of lawfulness is a recognition of market characteristics. For example, the test for suspension of nondominant carrier filings in 1.773(a)(ii) reflects the Commission's determination that "firms lacking market power cannot rationally price their services in ways which, or impose terms and conditions which, would contravene

¹⁴Notice at ¶12.

Sections 201(b) and 202(a) of the Act.”¹⁵ On the other hand, the suspension standard for within-band price cap filings reflects the Commission’s belief that “the risk of carriers filing within-band rate changes that are nonetheless unreasonable is low.”¹⁶ The suspension standard for tariffs filed pursuant to Section 204(a)(3) should recognize that incumbent LECs possess market power that nondominant carriers do not, and that out-of-band and above-cap filings, as well as new services and restructured services, present a greater risk of being unlawful than within-band filings.

Accordingly, the suspension standard for tariffs filed pursuant to Section 204(a)(3) could, for example, specify that the filing will not be suspended unless the petition requesting suspension shows (A) That there is the probability that the tariff would be found unlawful after investigation; (B) That the suspension would not substantially harm other interested parties; (C) That the probability that competition will suffer injury if the tariff takes effect is greater than the probability that the LEC will suffer irreparable injury if the tariff is suspended; and (D) That the suspension would not otherwise be contrary to the public interest. This test establishes higher burdens for suspensions and investigations than the current standard the Commission uses to determine whether to suspend and investigate, *i.e.* that a transmittal raises significant

¹⁵*Id.* at 31.

¹⁶In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786,

questions of lawfulness,¹⁷ but recognizes the potential impact of LEC tariffs on competition.¹⁸

In the Price Caps Further Notice, the Commission found that it had the authority to establish guidelines that express “a tentative opinion about the location between the just and the unjust, the reasonable and the unreasonable.”¹⁹ Nothing in the 1996 Act limits this authority, which is grounded in the discretionary suspension power granted to the Commission by Section 204(a)(1). The Commission may therefore continue to indicate that above-band and above-cap filings are more likely to be suspended. In particular, the Commission can indicate, in its rules, that a petition to suspend an above-band or above-cap filing automatically satisfies the first part of the four-part showing that petitioners would be required to make, that there is the probability that the tariff would be found unlawful after investigation.

The Commission should also make clear that the statements it made concerning non-dominant carrier tariffs that are presumed lawful apply equally to LEC tariffs filed under the streamlining provisions of Section 204(a)(3). In the First Competitive Carrier

¹⁷In the Matter of Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection for Switched Transport, Memorandum Opinion and Order, February 14, 1994 at ¶8.

¹⁸The Commission could still prescribe alternate suspension standards where circumstances warranted, such as for within-band filings.

¹⁹In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, 3 FCC Rcd 3195, 3301 (Price Caps Further Notice) (citing Trans Alaska Pipeline Cases, 436 U.S. 632, 653).

Order, the Commission stated that it would be a mistake to read its rules as precluding an investigation of a tariff filing of a non-dominant carrier if the four-part suspension standard is not met, noting that “we may consider whether tariff proposals of these carriers should be investigated, either on the basis of the petition or on our own initiative even though the petitioner fails to demonstrate that a tariff should be suspended.”²⁰ The Commission therefore can, and in the case of above-band and above-cap filings, should investigate LEC tariff filings on its own initiative.

III. LEC Tariffs Eligible for Filing on a Streamlined Basis

A. Changes in Terms and Conditions

The Commission tentatively concludes that LEC tariff filings that involve changes to terms and conditions are eligible for streamlined treatment.²¹ The Commission reasons that the first sentence of Section 204(a)(3) suggests that “any LEC tariff filing may be eligible for streamlined treatment.”²² In addition, the Commission claims that permitting changes in terms and conditions to be filed on a streamlined basis “would simplify the administration of the LEC tariffing process as a whole.”²³

²⁰First Competitive Carrier Order, 85 F.C.C. 2d at 37 n. 93.

²¹Notice at ¶17.

²²Id.

²³Id.

While the first sentence of Section 204(a)(3) states that a LEC may file a “new or revised charge, classification, regulation, or practice” on a streamlined basis, the second applies the reduced notice periods only “in the case of a reduction in rates” or “in the case of an increase in rates.” It does not require any particular notice periods for transmittals that do not involve a rate level change, or foreclose exercise of the Commission’s Section 203(b)(2) authority to defer the effective date of such a tariff. As part of the price cap regime, changes in terms and conditions may already be filed on 45-days notice, substantially less than the 120-day maximum notice period specified by Section 203(b)(2).

The Commission should not use its preexisting Section 203(b)(2) or 204(a)(1) authority to accord streamlined treatment to changes in terms and conditions. In establishing a 45-day notice requirement for price cap carriers seeking to change terms and conditions, the Commission recognized that changes to terms and conditions can give rise to claims of unreasonable discrimination.²⁴ Given the LECs’ continued market power, there is still a substantial possibility that proposed terms and conditions will create an unreasonable discrimination, in violation of Section 202 of the Act. Furthermore, in contrast to rate level changes, which are generally within-band and thus simpler to review, changes to terms and conditions can require clarification or correction before the tariff goes into effect. The Commission’s desire to “simplify” the LEC tariffing process

²⁴Price Cap Further Notice, 3 FCC Rcd at 3302 n. 371.

is not sufficient grounds for relaxing its scrutiny of changes to LEC tariffs' terms and conditions.

B. New Services

The Commission solicits comment on whether Section 204(a)(3) applies to new or revised charges associated with existing services, but not to charges associated with new services.²⁵ It states that the first sentence of Section 204(a)(3), which provides that a “new or revised charge, classification, regulation , or practice” may be filed on a streamlined basis, could be read to apply only to “a new or revised charge, classification, regulation, or practice” associated with existing services. The Commission cites as an example the introduction of a “new” charge for a formerly non-chargeable feature of an existing service.

As noted above, the second sentence of Section 204(a)(3) makes clear that the reduced notice periods apply only to rate increases or rate decreases. The Commission may continue to exercise its 203(b)(2) deferral authority for new services and restructured services, and is not required to adopt either of the notice periods specified in Section 204(a)(3). New services are already eligible for filing on 45 days' notice, substantially less than the 120-day maximum notice period permitted by Section 203(b)(2).

²⁵Notice at ¶18.

As the Commission notes, treating charges for new services differently is preferable as a matter of policy because it would permit the Commission and interested parties a fuller opportunity to review tariff changes that are more likely to raise issues under Section 201 and 202 of the Act than revisions to services that have already been subject to review.²⁶ Therefore, transmittals that propose to introduce new services should continue to be effective on 45 days' notice, as they are today under the Commission's rules.

IV. The Commission May Not Rely Exclusively On Post-Effective Tariff Review

In the Notice, the Commission solicits comment on whether it can, and should, in implementing the tariff streamlining provisions of the 1996 Act, adopt a policy of relying exclusively on post-effective tariff review, at least for certain types of tariff filings.²⁷ Under this approach, the Commission would review tariffs after their effective date and at that time determine whether it is necessary to initiate a tariff investigation pursuant to Section 205 of the Act.

It is clear that Congress intended the Commission to continue pre-effective review of incumbent LEC tariffs, even those subject to the streamlining provisions of new Section 204(a)(3). First, the Commission's Section 204(a)(1) authority to conduct pre-

²⁶Notice at ¶18.

²⁷Notice at ¶23.

effective review is in no way altered by the 1996 Act and, moreover, is explicitly referenced in the new subsection (3), thus confirming its retention. Second, the 7/15 day notice periods prescribed in Section 204(a)(3), while significantly shorter than the 120-day maximum notice period provided by Section 203(b), are still sufficient to allow the Commission to exercise its statutory authority to examine tariff changes prior to their effective date. Congress did not, for example, specify the one-day notice periods that the Commission adopted when it determined that advance scrutiny of nondominant carrier tariffs was unnecessary.²⁸

The Commission has found that post-effective review alone is sufficient to protect the public interest only when carriers do not exercise market power, *i.e.* for nondominant carrier tariffs. In the Nondominant Carrier Tariff Order, the Commission determined that post-effective review of nondominant carrier tariffs would be sufficient, stating that “because by definition nondominant carriers cannot exercise market power, unlawful tariffs should be rare, and in those few instances in which they occur, remedial action can be taken after the tariffs become effective.”²⁹ By contrast, the Commission has never discontinued pre-effective review for dominant carriers. In 1991, even as it was permitting AT&T an even greater degree of tariff streamlining than is foreseen by Section

²⁸See In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6756 (Nondominant Carrier Tariff Order).

²⁹Id.

204(a)(3), the Commission maintained a 14-day notice period and pre-effective review because AT&T remained a dominant carrier.³⁰

Because the incumbent LECs remain dominant carriers, pre-effective review remains essential to protecting the public interest. The nascent competition that exists in the local exchange and exchange access markets today is by no means sufficient to ensure that unlawful LEC tariffs will be “rare.” Competition in the exchange access market today is clearly much less developed than it was in the interexchange market in 1991, when the Commission still found it necessary to continue pre-effective review of AT&T tariffs. Under these circumstances, it would not be in the public interest to foreclose the exercise of the Commission’s authority to impose accounting orders. Nor would it be in the public interest to rely on the cumbersome complaint process. New entrants will not be able to wait the months, and often years, that it takes to resolve a complaint.

Pre-effective tariff review is necessary for other reasons as well. First, it permits the Commission to exercise its authority to reject tariffs that are demonstrably unlawful because they conflict with the Communications Act, a Commission order, or a Commission rule.³¹ In particular, the Commission must be able to reject LEC filings that fail to comply with the Commission’s cost support or rate structure rules. Incumbent

³⁰Id.

³¹See e.g., American Broadcasting Companies, Inc. v. FCC, 663 F.2d 133, 138 (D.C. Cir. 1980); Associated Press v. F.C.C., 448 F.2d 1095, 1103 (D.C. Cir. 1971); MCI v. AT&T, 94 F.C.C. 2d 332, 340-41 (1983).

LEC customers should not have to incur the expense of a complaint to eliminate a tariff that obviously violates the statute or Commission rule. Such a practice would eviscerate the Commission's enforcement capabilities by forcing injured parties to expend considerable legal resources to force the ILECs to comply with the law. Second, pre-effective tariff review also benefits customers by permitting modifications or corrections to tariffs before they take effect. In many cases, tariffs contain errors or ambiguities that can be addressed informally by Commission staff.

V. Pre-Effective Tariff Review

A. Tariffs That Do Not Comply With the Commission's Rules Should Be Rejected

The Commission solicits comment on what measures, if any, it should establish in order to be able to decide whether to suspend and investigate a transmittal within seven or fifteen days.³² It proposes to require the filing of a summary of the changes in terms and conditions and the impact on customers, as well as an analysis showing that the proposed tariff is lawful under applicable rules. The Commission also solicits comment on whether it may, consistent with the Act, and should, establish in its rules presumptions of unlawfulness for narrow categories of tariffs.

The Commission should reject transmittals that do not comply with its existing rules. Today, the Commission often defers the effective date of a tariff in order to permit

³²Notice at ¶25.