

Several parties further argue that tariffs facilitate coordinated pricing by enabling carriers to ascertain their competitors' rates, terms, and conditions for service at one, central location.¹²³ Finally, APCC argues that forbearance from tariff filing requirements would eliminate a regulatory requirement that is especially burdensome on small carriers.¹²⁴

46. Interexchange carriers and other commenters contend that complete detariffing is not in the public interest, because prohibiting nondominant interexchange carriers from filing tariffs with respect to interstate, domestic, interexchange services will impede competition and increase carriers' costs.¹²⁵ Specifically, these parties argue that complete detariffing would: (1) significantly increase transaction costs by forcing nondominant interexchange carriers to conclude literally millions of written agreements with customers in order to establish legally enforceable contractual relationships;¹²⁶ (2) make casual calling

Aero Trucking, Inc. v. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979); Farley Terminal Co., Inc. v. Atchison, T. & S.F. Ry., 522 F.2d 1095 (9th Cir.), cert. denied, 423 U.S. 996 (1975). Consequently, if a carrier unilaterally changes a rate by filing a tariff revision, the newly filed rate becomes the applicable rate unless the revised rate is found to be unjust, unreasonable, or unlawful under the Communications Act. See 47 U.S.C. § 201(b); see also Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990). For arguments that complete detariffing would eliminate the possible invocation of the filed rate doctrine, see Ad Hoc Users Reply at 4-6; API Comments at 8-9; GSA Comments at 8-9; Networks Comments at 4-6; see also CompTel Comments at 16 (arguing that carriers could still invoke the "filed-rate" doctrine with permissive detariffing, but that carriers would not do so in a competitive environment).

¹²³ BellSouth Comments at 17; Florida PSC Comments at 3-4 (noting that "[w]hile firms have various ways to obtain information on competing carriers' prices and service offerings, the tariffing of rates and charges for services presents one means for price coordination that can be eliminated"); Cato Institute Comments at 3; API Comments at 5.

¹²⁴ APCC Comments at 6.

¹²⁵ AT&T Comments at 16-20; MCI Comments at 14-15; MCI Reply at 14-15; Sprint Comments at 10-19; LDDS Comments at 9-11; LCI Comments at 2-5; MFS Comments at 5-7; NYNEX Comments at 3; Ameritech Comments at 1-8; Business Telecom Comments at 5; Eastern Tel Comments at 3; Ursus Comments at 6-7; Telecommunications Information Services Comments at 1; XIOX Comments at 1-2; MOSCOM Comments at 1-2; Pennsylvania Office of Consumer Advocate Comments at 9-10; CFA/CU Comments at 5; Casual Calling Coalition Comments at 8-11; Citizens Utilities Reply at 2-3; Audits Unlimited Comments at 2; Scheraga and Sheldon Comments at 1; Fone Saver Comments at 1; NARUC Comments at 5; ZWT Comments at 1-2; Tennessee Attorney General Comments at 5; Louisiana PSC Comments at 6-7. Some commenters contend that tariffs are needed especially for mass market services provided mainly to residential and small business customers. See, e.g., MCI Comments at 3; Sprint Comments at 9; GCI Comments at 2; CFA/CU Comments at 2; TRAC Comments at 5-6.

¹²⁶ AT&T Comments at 13, 16-18; MCI Comments at 10-12; MCI Reply at 14-15; Sprint Comments at 14-16; LDDS Comments at 9-11, 14; GCI Comments at 3; Cable & Wireless Comments at 7; TRA Comments at 14-15; Ameritech Comments at 1-8; US West Comments at 5; PacTel Comments at 6-7; Business Telecom Comments at 5-6; Eastern Tel Comments at 3; Ursus Comments at 6-7; CFA/CU Comments at 5; MFS Comments at 7; WinStar Comments at 4-5; LCI Comments at 2-5; Citizens Utilities Reply at 2-3; Casual Calling Coalition Comments at 8-11; CompTel Comments at 9-10; Frontier Comments at 5-7; CSE Comments at 6-7.

options more difficult, if not impossible;¹²⁷ and (3) prevent carriers from reacting quickly to market conditions because carriers would be forced to notify each individual customer of any changes to their rates, terms, and conditions before such changes could be effective.¹²⁸ ACTA further argues that any increased transaction costs would be especially burdensome on small carriers that have fewer resources.¹²⁹ LDDS contends that the increased transaction costs due to detariffing would discourage nondominant interexchange carriers from serving certain market segments (e.g., low-usage residential, small business, and casual callers), thereby decreasing competitive choices for these customers.¹³⁰ In addition, several parties argue that tariffs actually promote competition by sending accurate economic signals and disseminating rate and service information to consumers and competitors.¹³¹ In particular, they argue that residential and small business customers require access to such information to obtain the best rates available, and that small nondominant interexchange carriers need such information to compete with larger interexchange carriers.¹³² Several parties further argue that complete

But see Ad Hoc Users Reply at 11-12; API Reply at 4-6 (both arguing that transaction costs would not increase substantially because carriers could still cross-reference a standard publication).

¹²⁷ Casual calling refers to services that do not require a consumer to open an account or otherwise presubscribe to a service, including use of a third-party credit card, collect calling, or dial-around through the use of an access code. Several parties argue that tariffs are essential to casual calling services because callers use the services on a temporary basis without a preexisting contractual relationship, and that tariffs are the only cost-efficient way to establish a legal relationship with casual callers. AT&T Comments at 19-20; Sprint Comments at 3-5, 10-14; LDDS Comments at 10; Casual Calling Coalition Comments at 10-12; Ameritech Comments at 2; Market Dynamics Comments at 13; American Telegram Comments at 2.

¹²⁸ MCI Comments at 16-17; Sprint Comments at 16-19; AT&T Comments at 19; Ameritech Comments at 4; Casual Calling Coalition Comments at 8-9; American Telegram Comments at 2-3; Business Telecom Comments at 5-6; Eastern Tel Comments at 4; Ursus Comments at 7.

¹²⁹ ACTA Comments at 12-13.

¹³⁰ LDDS Comments at 9-11.

¹³¹ Tennessee Attorney General Comments at 3; Casual Calling Coalition Comments at 5-6, 8-9; National Black Data Processors Association Comments at 2; Audits Unlimited Comments at 1-2; Scheraga and Sheldon Comments at 1; Fone Saver Comments at 1; ZWT Comments at 1-2; Ohio Consumers' Counsel Comments at 5; Market Dynamics Comments at 9-10; Business Telecom Comments at 6; Eastern Tel Comments at 4; Ursus Comments at 5; Excel Comments at 3; TRAC Comments at 3-4; GCI Comments at 3-4; NARUC Comments at 5; MFS Comments at 5, 7-8; WinStar Comments at 4-6; Pennsylvania Office of Consumer Advocate Comments at 2-3; Iowa Utilities Board Comments at 2.

¹³² Tennessee Attorney General Comments at 3; Casual Calling Coalition Comments at 5-6, 8-9; National Black Data Processors Association Comments at 2; Audits Unlimited Comments at 1-2; Scheraga and Sheldon Comments at 1; Fone Saver Comments at 1; ZWT Comments at 1-2; Ohio Consumers' Counsel Comments at 5; Market Dynamics Comments at 9-10; Business Telecom Comments at 6; Eastern Tel Comments at 4; Ursus Comments at 5; Excel Comments at 3; TRAC Comments at 3-4; GCI Comments at 3-4; NARUC Comments at 5; MFS Comments at 5, 7-8; WinStar Comments at 4-6; Pennsylvania Office of Consumer Advocate Comments at 2-3; Iowa Utilities Board Comments at 2.

detariffing would not deter price coordination, to the extent it exists,¹³³ both because rate and service information would continue to be available to competitors¹³⁴ and because the existing streamlined tariff filing procedures prevent price signalling.¹³⁵ A few parties suggest that, if the Commission is concerned about tacit price coordination, it could remedy the problem by requiring nondominant interexchange carriers to file tariffs on no more than one day's notice, rather than not permitting such carriers to file tariffs.¹³⁶

47. Interexchange carriers and several other commenters that oppose complete detariffing contend that permissive detariffing would be consistent with the public interest. They maintain that: (1) permissive detariffing would be the most deregulatory and pro-competitive option because carriers could determine the most efficient means to establish contractual relations with their customers (e.g., carriers could file tariffs for such mass market offerings as residential and small business services, reducing transactions costs to carriers and consumers);¹³⁷ (2) the "filed-rate" doctrine would no longer apply if the Commission adopted a permissive detariffing regime, because the tariffed rate would no longer be the only legally permissible rate;¹³⁸ (3) price coordination would be difficult, if not impossible, with permissive detariffing because carriers would at best have fragmentary information concerning

¹³³ In the Notice, the Commission sought comment on whether tacit price coordination exists in the domestic interstate, interexchange market and on the best method to deal with such coordination to the extent it exists. See infra section IV.A.

¹³⁴ MCI Comments at 12; LDDS Comments at 11-12; PacTel Comments at 4; Ameritech Comments at 8; TRA Comments at 16; GCI Comments at 4; Frontier Comments at 3-4; Alabama PSC Comments at 3; Ohio Consumers' Counsel Comments at 8; Louisiana PSC Comments at 8; Pennsylvania PUC Comments at 8-9, 11; Casual Calling Coalition Comments at 7 n.12; Tennessee Attorney General Comments at 5; Florida PSC Comments at 3; ACTA Comments at 11-12.

¹³⁵ See Sprint Comments at 22; Casual Calling Coalition Comments at 6-7; Business Telecom Comments at 6; ACTA Comments at 11; Frontier Comments at 3-4; CFA/CU Comments at 7; see also supra note 29.

¹³⁶ Ohio Consumers' Counsel Comments at 4-5; Market Dynamics Comments at 17.

¹³⁷ AT&T Comments at 16-18; Sprint Comments at 6-7, 10-19; LDDS Comments at 9-11, 14; Cable & Wireless Comments at 7-8; US West Comments at 5; PacTel Comments at 6-7; Business Telecom Comments at 5-7; Eastern Tel Comments at 6-7; Ursus Comments at 4-5; MFS Comments at 8; WinStar Comments at 7-8; LCI Comments at 1-3; Casual Calling Coalition Comments at 8-11; CompTel Comments at 8; Frontier Comments at 5-7; CSE Comments at 6-7.

¹³⁸ AT&T Comments at 20-22; Casual Calling Coalition Comments at 16-17; LDDS Comments at 12-13; GSA Reply at 5 (supporting AT&T's interpretation, but noting that it would prefer if it were incorporated specifically into a Commission rule). Some parties add that nondominant interexchange carriers are unlikely to invoke the doctrine because they risk damage to their reputation and the loss of customers. See Cable & Wireless Comments at 7; CompTel Comments at 16-17 (acknowledging that the "filed-rate" doctrine would continue to apply in a permissive detariffing environment); LCI Comments at 8-9.

their competitors' rates, terms, and conditions;¹³⁹ and (4) casual calling options would still be feasible with permissive detariffing.¹⁴⁰

48. Several commenters, however, argue that permissive detariffing, that is, allowing nondominant interexchange carriers to file tariffs if they wish to do so, is not in the public interest.¹⁴¹ Several of these parties argue that permissive detariffing is contrary to the public interest, because it would allow nondominant interexchange carriers to "game" the system by filing tariffs when it serves their interest to do so, for example, to take advantage of the "filed-rate" doctrine or to engage in price signaling.¹⁴² Contrary to the interexchange carriers' assertions, these parties claim that the "filed-rate" doctrine would continue to exist if detariffing were implemented on a permissive basis.¹⁴³ TRA, which opposes any detariffing at all, argues that permissive detariffing would enable carriers to discriminate against resellers.¹⁴⁴

49. Some commenters suggest that the Commission limit forbearance from tariff filing requirements to individually-negotiated service arrangements and retain tariff filing requirements for mass market services offered to residential and small business customers, because tariffs allow carriers to establish a legal relationship with customers quickly and

¹³⁹ Frontier Comments at 6; CSE Comments at 5-6.

¹⁴⁰ AT&T Comments at 19-20; LDDS Comments at 4-6; Casual Calling Coalition Comments at 10-12; Market Dynamics Comments at 13; American Telegram Comments at 2 (supporting mandatory detariffing of rates, but not of terms and conditions).

¹⁴¹ These commenters include large telecommunications consumers that support complete detariffing and several state commissions that oppose detariffing entirely. See Tennessee Attorney General Comments at 3-5; Pennsylvania PUC Comments at 6-8; Pennsylvania Office of Consumer Advocate Comments at 3; Alabama PSC Comments at 3-5; Louisiana PSC Comments at 6-8; Ohio Consumers' Counsel Comments at 5-7; Bell South Comments at 17-18; Cato Institute Comments at 4; Ad Hoc Users Comments at 4-6; API Comments at 5-6; TRA Reply at 14-16; Television Networks Comments at 4-6; Market Dynamics Comments at 3-5 (favoring permissive detariffing of smaller carriers only).

¹⁴² TRA Reply at 14, 16; Television Networks Comments at 4-6; Ad Hoc Users Comments at 4-6; API Comments at 8-9; Florida PSC Comments at 3; Cato Institute Comments at 4; BellSouth Comments at 17-18.

¹⁴³ Ad Hoc Users Comments at 4-6; API Comments at 8-9; GSA Comments at 8-9; Television Networks Comments at 4-6; see also CompTel Comments at 16 (arguing that carriers could still invoke the filed rate doctrine with permissive detariffing, but that carriers would not do so in a competitive environment).

¹⁴⁴ TRA Comments at 10-13, 18.

inexpensively.¹⁴⁵ In addition, several parties urge the Commission to limit the scope of forbearance only to certain nondominant interexchange carriers,¹⁴⁶ or to certain types of information.¹⁴⁷

50. In addition, several commenters contend that it is premature to detariff now, in light of the dynamic changes occurring in the market, such as the reclassification of AT&T in October 1995, and the opening of all telecommunications markets to increased competition following enactment of the 1996 Act.¹⁴⁸ These commenters urge the Commission to defer any decision concerning forbearance from tariff filing requirements until it can evaluate the effect of these changes on the interstate, domestic, interexchange market.¹⁴⁹

51. Finally, several parties commented on how the Commission should treat the BOCs upon their entry into the interstate, domestic, interexchange services market in order to promote competition in this market. A number of BOCs and other parties argue that detariffing will only provide competitive benefits if we also detariff the BOCs once they enter the interstate, domestic, interexchange market.¹⁵⁰ They argue that failure to do so, would

¹⁴⁵ See Television Networks Comments at 3-5; API Reply at 14; MCI Comments at 3; Sprint Comments at 5; CFA/CU Comments at 2; GCI Comments at 2.

¹⁴⁶ For example, TRA and ACTA suggest that the Commission should forbear from applying Section 203 tariff filing requirements to those carriers with less than a certain percentage of the market and that are not affiliated with certain incumbent local exchange carriers, such as the BOCs. TRA Comments at 17-19; ACTA Comments at 14. But see AT&T Reply at 9-10 (arguing that the Commission should reject imposing different filing requirements for different carriers because the Commission has already determined that nondominant carriers cannot control prices).

¹⁴⁷ American Telegram Comments at 3-4; see also CompTel Comments at 18-19; Frontier Comments at 4-5; Cable & Wireless Comments at 7; Citizens Utilities Reply at 2-3.

¹⁴⁸ Tennessee Attorney General Comments at 3-4; Alabama PSC Comments at 5; Missouri PSC Comments at 3; Chrysler Minority Dealers Association Comments at 1; Association for the Study of Afro-American Life and History Comments at 1-2. These parties raised this issue in comments on all three of the statutory criteria. We address the issue under this criterion alone for administrative convenience, but our discussion of these issues applies to all such comments notwithstanding the criterion under which the commenters raised them.

¹⁴⁹ Tennessee Attorney General Comments at 3-4 (also expressing concern that the Commission may not have the authority to reverse a decision to forbear); Alabama PSC Comments at 5; Missouri PSC Comments at 3; Chrysler Minority Dealers Association Comments at 1; Association for the Study of Afro-American Life and History Comments at 1-2. But see Television Networks Comments at 3 n.2 (claiming that if circumstances were to change and tariffs become necessary, the Commission could always revisit its determination).

¹⁵⁰ NYNEX Comments at 2, 4-5; Ameritech Comments at 9; SBC Comments at 3-6; PacTel Comments at 3 n.4; BellSouth Comments at 18; Bell Atlantic Comments at 4; Corporate Managers Comments at 2-6; National Black Data Processors Association Comments at 2; National Association of Development Organizations Comments at 6-7.

place the BOCs, which they claim lack market power in the interstate, domestic, interexchange market, at a competitive disadvantage vis-a-vis existing interexchange carriers, which currently control the market, and would inhibit competition, thereby undermining Congress' objective in passing the 1996 Act.¹⁵¹ Others argue that, because the BOCs exercise market power in the exchange access market, the Commission should require the BOCs to file tariffs for interstate, domestic, interexchange services until the Commission has experience with the type and level of safeguards necessary to prevent cross-subsidization and other unlawful practices.¹⁵²

(3) Discussion

52. We adopt the tentative conclusion in the Notice that not allowing nondominant interexchange carriers to file tariffs for the provision of interstate, domestic, interexchange services is consistent with the public interest,¹⁵³ with the limited exception, as discussed below,¹⁵⁴ of AT&T's provision of 800 directory assistance and analog private line services. Section 10(b) specifically requires the Commission, in determining whether forbearance from enforcing a provision of the Communications Act or a regulation is in the public interest, to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. We find that a regime without nondominant interexchange carrier tariffs for interstate, domestic, interexchange services is the most pro-competitive, deregulatory system. Specifically, we find that not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment. Moreover, we find that permitting nondominant interexchange carriers to file tariffs on a voluntary basis would undermine several of these benefits, and therefore is not in the public interest.

53. The record in this proceeding supports our tentative conclusion that not permitting nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services will promote competition in the market for such services. Even under

¹⁵¹ NYNEX Comments at 2, 4-5; Ameritech Comments at 9; SBC Comments at 3-6; BellSouth Comments at 18; Bell Atlantic Comments at 4-5; Corporate Managers Comments at 2-6; National Black Data Processors Association Comments at 2.

¹⁵² LDDS Comments at 15-17; CompTel Comments at 19; ACTA Comments at 13; TRA Comments at 17-19.

¹⁵³ Notice, 11 FCC Rcd at 7161.

¹⁵⁴ See infra para. 106.

existing streamlined tariff filing procedures,¹⁵⁵ requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services impedes vigorous competition in the market for such services by: (1) removing incentives for competitive price discounting;¹⁵⁶ (2) reducing or taking away carriers' ability to make rapid, efficient responses to changes in demand and cost;¹⁵⁷ (3) imposing costs on carriers that attempt to make new offerings;¹⁵⁸ and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs.¹⁵⁹ Moreover, we believe that tacit coordination of prices for interstate, domestic, interexchange services, to the extent it exists, will be more difficult if we eliminate tariffs, because price and service information about such services provided by nondominant interexchange carriers would no longer be collected and available in one central location.

54. In addition, requiring tariffs for interstate, domestic, interexchange services offered by nondominant interexchange carriers impedes competition by preventing customers from seeking out or obtaining price and service arrangements tailored to their needs. As Ad Hoc Users and others note, carriers, in some cases, have refused to accommodate customers' requests for particular service terms on the ground that the requested terms are not contained in the carriers' tariffs, and that the Commission would reject any term or condition for service that differed from the carriers' general tariffs.¹⁶⁰ Eliminating tariff filings by nondominant interexchange carriers will prevent such carriers from refusing to negotiate with customers based on the Commission's tariff filing and review processes. As a result, carriers may become more responsive to customer demands, and offer a greater variety of price and service packages that meet their customers' needs.

¹⁵⁵ See supra note 29.

¹⁵⁶ BellSouth Comments at 17-18; API Comments at 5. This finding is consistent with the Commission's findings in the Competitive Carrier proceeding. Sixth Report and Order, 99 FCC 2d at 1030. The Commission recently reiterated this finding in the Regulatory Treatment of Mobile Services Order, 9 FCC Rcd at 1479.

¹⁵⁷ BellSouth Comments at 17. This finding is consistent with the Commission's findings in the Competitive Carrier proceeding. Sixth Report and Order, 99 FCC 2d at 1030. The Commission recently reiterated this finding in the Regulatory Treatment of Mobile Services Order, 9 FCC Rcd at 1479.

¹⁵⁸ BellSouth Comments at 17, Florida PSC Comments at 4; API Comments at 5. This finding is consistent with the Commission's findings in the Competitive Carrier proceeding. Sixth Report and Order, 99 FCC 2d at 1030. The Commission recently reiterated this finding in the Regulatory Treatment of Mobile Services Order, 9 FCC Rcd at 1479.

¹⁵⁹ BellSouth Comments at 20; Ad Hoc Users Comments at 11; API Reply at 6. This finding is consistent with the Commission's findings in the Competitive Carrier proceeding. Sixth Report and Order, 99 FCC 2d at 1031-32.

¹⁶⁰ Ad Hoc Users Comments at 11; BellSouth Comments at 20; API Reply at 6. The Commission justified its prior mandatory detariffing policy, in part, on the ground that carriers had engaged in such practices. See Sixth Report and Order, 99 FCC 2d at 1031-32.

55. Complete detariffing would also further the public interest by eliminating the ability of carriers to invoke the "filed-rate" doctrine. As noted above, courts have long held that, in a situation where a filed tariff rate, or other term or condition, differs from a rate, term, or condition set in a non-tariffed carrier-customer contract, the carrier is required to impose the tariffed rate, term or condition.¹⁶¹ While the Commission has held that unilateral changes that alter material terms and conditions of long-term service arrangements are reasonable only if justified by substantial cause,¹⁶² the filed rate doctrine provides carriers with the ability to alter or abrogate their contractual obligations in a manner that is not available in most commercial relationships. In addition, complete detariffing would further the public interest by preventing carriers from unilaterally limiting their liability for damages.¹⁶³ Accordingly, by permitting carriers unilaterally to change the terms of negotiated agreements, the filed rate doctrine may undermine consumers' legitimate business expectations. Absent filed tariffs, the legal relationship between carriers and customers will much more closely resemble the legal relationship between service providers and customers in an unregulated environment. Thus, eliminating the filed rate doctrine in this context would serve the public interest by preserving reasonable commercial expectations and protecting consumers.

56. Eliminating tariffs for the interstate, domestic, interexchange services of nondominant interexchange carriers will not, as some suggest,¹⁶⁴ reduce such carriers' incentive or ability to offer discounts or respond quickly to market changes by forcing them to give customers advance notice of all changes to their rates, terms, and conditions for service. Our experience over the past several years indicates that interexchange carriers' competitive offerings to residential and small business customers are typically optional calling

¹⁶¹ See supra note 122.

¹⁶² See RCA American Communications Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, CC Docket No. 80-766, Memorandum Opinion and Order, 84 FCC 2d 353, 358-59 (1980); Memorandum Opinion and Order, 86 FCC 2d 1197, 1201-02 (1981), remanded, RCA American Communications, Inc. v. FCC, 684 F.2d 1033 (1982); Memorandum Opinion and Order, 94 FCC 2d 1338 (1983); RCA American Communications Inc. Revisions to Tariff F.C.C. Nos. 1 and 2, Transmittal No. 273, Memorandum Opinion and Order, 2 FCC Rcd 2363 (1987), pet. for rev. denied, sub nom. Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991) (collectively RCA Americom Decisions); see also First Interexchange Competition Order, 6 FCC Rcd at 5898 n.155; February 1995 Interexchange Reconsideration Order, 10 FCC Rcd at 4574 n.51 (indicating that the substantial cause test would also apply to unilateral tariff modifications made by nondominant carriers).

¹⁶³ See, e.g., Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921); Western Union Tel. Co. v. Priester, 276 U.S. 252, 259 (1928). See Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc., 10 FCC Rcd 13639, 13641 (Com. Car. Bur. 1995).

¹⁶⁴ See AT&T Comments at 12, 16-18; MCI Comments at 10-12; Sprint Comments at 10-19; LDDS Comments at 9-11, 14; GCI Comments at 3; Cable & Wireless Comments at 6-7; TRA Comments at 14-15; Ameritech Comments at 1-8; PacTel Comments at 6-7; Business Telecom Comments at 5-6; Eastern Tel Comments at 3; Ursus Comments at 4-5; CFA/CU Comments at 5; MFS Comments at 5-7; WinStar Comments at 5; LCI Comments at 3; Casual Calling Coalition Comments at 8-9; CompTel Comments at 9-10; CSE Comments at 6-7. But see Ad Hoc Users Reply at 11-12; API Reply at 4-6.

plans in which consumers must affirmatively elect to participate. In order to induce customers to participate in such plans, carriers have widely advertised the terms and availability of these calling plans. Thus, detariffing of interstate, domestic, interexchange services is likely to have little, if any, impact on nondominant interexchange carriers' incentives or ability to engage in competitive price discounting. In addition, as a matter of contract law, nondominant interexchange carriers would not necessarily be required to provide notice before instituting changes that benefit, or do not adversely affect in a material way, customers (e.g., reducing rates).¹⁶⁵ Such carriers would, however, likely be required, as a matter of contract law, to give advance notice of those changes that adversely affect customers (e.g., rate increases). We conclude that it would not be unduly burdensome for nondominant interexchange carriers to provide customers advance notice of the latter changes through billing inserts or other measures. Such notice would provide greater protection to consumers and is more pro-competitive than allowing carriers to increase their rates by filing tariff changes with the Commission on one day's notice.

57. We recognize that detariffing may change significant aspects of the way in which nondominant interexchange carriers conduct their business. Contrary to the suggestion of some parties, however, tariffs are not the only feasible way for carriers to establish legal relationships with their customers, nor will nondominant interexchange carriers necessarily need to negotiate contracts for service with each, individual customer.¹⁶⁶ As some parties note, such carriers could, for example, issue short, standard contracts that contain their basic rates, terms and conditions for service.¹⁶⁷ Moreover, parties that oppose complete detariffing have not shown that the business of providing interstate, domestic, interexchange services offered by nondominant interexchange carriers should be subject to a regulatory regime that is not available to firms that compete in any other market in this country. We conclude that requiring nondominant interexchange carriers to withdraw their tariffs and conduct their business as other enterprises do will not impose undue burdens on such carriers, substantially increase their costs, or, as LDDS suggests, force such carriers to abandon segments of the

¹⁶⁵ For example, carriers could expressly reserve the right to make rate reductions or new discounts immediately available to existing customers. Carriers could also include in their service contracts provisions giving them flexibility to alter specific, incidental contract terms in a manner not adverse to the customer. See Restatement (Second) of Contracts § 34 (1981) (discussing the analogous practice of allowing one or both parties to a contract to select certain terms during the performance of the contract).

¹⁶⁶ See AT&T Comments at 12, 16-18; MCI Comments at 10-12; Sprint Comments at 10-19; LDDS Comments at 9-11, 14; GCI Comments at 3; Cable & Wireless Comments at 6-7; TRA Comments at 14-15; Ameritech Comments at 1-8; PacTel Comments at 6-7; Business Telecom Comments at 5-6; Eastern Tel Comments at 3; Ursus Comments at 4-5; CFA/CU Comments at 5; MFS Comments at 5-7; WinStar Comments at 5; LCI Comments at 3; Casual Calling Coalition Comments at 8-9; CompTel Comments at 9-10; CSE Comments at 6-7.

¹⁶⁷ See API Reply at 4-6; Ad Hoc Users Reply at 11-12 (arguing that transaction costs would not increase substantially because carriers could still cross-reference a standard publication); see also Sixth Report and Order, 99 FCC 2d at 1033.

market to the detriment of residential and small business customers.¹⁶⁸ Moreover, we reject ACTA's argument that detariffing will disproportionately burden small, nondominant interexchange carriers. While some of the increased administrative costs that carriers may incur initially as a result of the shift to a detariffed environment are likely to be fixed (such as the cost of developing short, standard contracts), many such costs will vary based on the area or number of customers served by such carriers (e.g., advertising expenditures, the cost of promotional mailings or billing inserts). Nonetheless, we find that, on balance, the pro-competitive effects of not allowing nondominant interexchange carriers to file tariffs for their interstate, domestic, interexchange services outweigh any potential increase in transactional or administrative costs resulting from the shift to a detariffed environment.

58. We are also not persuaded that complete detariffing will make casual calling impossible. We believe nondominant interexchange carriers have options other than tariffs by which they can establish legal relationships with casual callers pursuant to which such callers would be obligated to pay for the telecommunications services they use.¹⁶⁹ By providing billing or payment information (e.g., credit card information or a billing number) and completing use of the telecommunications service, casual callers may be deemed to have accepted a legal obligation to pay for any such services rendered.¹⁷⁰ We do not believe that these options will prove unduly burdensome for carriers. In any event, we conclude that, on balance, the competitive benefits of complete detariffing of nondominant interexchange carriers' interstate, domestic, interexchange services outweigh any potential increased costs resulting from the shift to detariffing. We further believe that the nine-month transition period established by this Order,¹⁷¹ will afford carriers sufficient time to develop efficient mechanisms to provide casual calling services in the absence of tariffs.

¹⁶⁸ LDDS Comments at 10.

¹⁶⁹ For example, a carrier could seek recovery under an implied-in-fact contract theory if a customer has used the carrier's services, with knowledge of the carrier's charges, but has not executed a written contract. Under this theory, the customer's acceptance of the services rendered would evidence his agreement to the contract terms proposed by the carrier. See, e.g., Richard A. Lord, Williston on Contracts, ¶ 6:43 at 467-469 (4th ed. 1991) ("Indeed, any written contract, though signed by only one party, will bind the other, if he accepts the writing."); NLRB v. Local 825, Internat'l Union of Operating Engineers, 315 F.2d 695, 699 (3d Cir. 1963) ("Justice Holmes once said: 'Conduct which imports acceptance is acceptance or assent'"), quoting Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 (1893); Seaview Ass'n of Fire Island, N.Y., Inc. v. Williams, 517 N.Y.S.2d 709 (1987) (concluding that the purchase of property with knowledge of conditions imposed by homeowners' association results in implied-in-fact contract to pay for services); Watts v. Columbia Artists Management, Inc., 591 N.Y.S.2d 234, 237 (App. Div. 1992) ("The mere fact that plaintiff was not a party to the written contract does not preclude the formation of a new contract, implied in fact. . . .").

¹⁷⁰ Similarly, a casual caller who uses a carrier's access code to obtain service from the carrier may be deemed to have accepted an outstanding offer from the carrier to provide casual calling service, and therefore be obligated to pay for any services rendered.

¹⁷¹ See infra section II.D.

59. We reject the suggestion that eliminating tariff filing requirements for nondominant interexchange carriers' interstate, domestic, interexchange services would impede competition for such services by reducing information available to consumers and small nondominant interexchange carriers.¹⁷² As discussed above, nondominant interexchange carriers are likely to make rate and service information, currently contained in tariffs, available to the public in a more user-friendly form in order to preserve their competitive position in the market, and as part of their contractual relationship with customers.¹⁷³ In addition, as we discuss below, we will require nondominant interexchange carriers to provide rate schedules for all of their interstate, domestic, interexchange services to consumers.¹⁷⁴

60. As noted, several parties, asserting that complete detariffing is not in the public interest, instead argue that permissive detariffing would be in the public interest. We reject their arguments for several reasons. Contrary to the assertions of AT&T and others, we believe that a permissive detariffing regime would not necessarily eliminate possible invocation of the "filed-rate" doctrine by nondominant interexchange carriers.¹⁷⁵ Section 203(c) provides that a carrier may not "charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect."¹⁷⁶ Thus, it is possible that, once a carrier files a tariff with the Commission, even if it is on a permissive basis, Section 203(c) may require the carrier to provide service at the rates, and on the terms and conditions, set forth in the tariff until or unless the carrier files a superseding tariff cancelling, or changing the rates and terms of, the tariff. Because the filed rate doctrine is a legal doctrine developed by judicial precedent, it is not entirely clear how courts would apply the filed rate doctrine if nondominant interexchange carriers were permitted to file tariffs and the filed tariff rate differed from the rate set in a non-tariffed contract. We believe that only with a complete detariffing regime, under which the carrier-customer relationship would more closely resemble the legal relationship between service providers and customers

¹⁷² But see Tennessee Attorney General Comments at 3; Casual Calling Coalition Comments at 5-6, 8-9; National Black Data Processors Association Comments at 2; Audits Unlimited Comments at 1-2; Scheraga and Sheldon Comments at 1; Fone Saver Comments at 1; ZWT Comments at 1-2; Ohio Consumers' Counsel Comments at 5; Market Dynamics Comments at 9-10; Business Telecom Comments at 6; Eastern Tel Comments at 4; Ursus Comments at 5; Excel Comments at 3; TRAC Comments at 3-4; GCI Comments at 3-4; NARUC Comments at 5; MFS Comments at 5, 7-8; WinStar Comments at 4-6; Pennsylvania Office of Consumer Advocate Comments at 2-3; Iowa Utilities Board Comments at 2.

¹⁷³ See supra para. 25.

¹⁷⁴ See infra paras. 84-86.

¹⁷⁵ See Ad Hoc Users Comments at 4-6; API Comments at 8-9; GSA Comments at 8-9; Television Networks Comments at 4-6; see also CompTel Comments at 16 (arguing that carriers could still invoke the filed rate doctrine with permissive detariffing, but that carriers would not do so in a competitive environment).

¹⁷⁶ 47 U.S.C. § 203(c).

in an unregulated environment, can we definitively eliminate these possible anticompetitive practices and protect consumers.

61. Another consideration that precludes us from finding that permissive detariffing of the interstate, domestic, interexchange services of nondominant interexchange carriers is in the public interest is that, unlike complete detariffing, permissive detariffing would not eliminate the collection and availability of rate information in one centralized location. Although we recognize that nondominant interexchange carriers under a complete detariffing regime would still be able to obtain information concerning their competitors' rates and service offerings, we believe that tacit price coordination, to the extent it exists, will be more difficult. In contrast, allowing nondominant interexchange carriers to file tariffs on a voluntary basis would create the risk that carriers would file tariffs merely to send price signals and thus manipulate prices.¹⁷⁷ In this respect, we are not persuaded by Frontier and CSE who argue that permissive detariffing would eliminate any risk of coordinated pricing because carriers could not be certain of their competitors' rates, terms, and conditions for service.¹⁷⁸ Carriers could use tariffs to engage in price signalling, because any nondominant carrier that opted to file a tariff would be bound by its terms until or unless the carrier cancelled or modified the tariff through a new tariff filing, and thus competing carriers would be certain of such carrier's rates, terms and conditions for service while its tariff is in effect.

62. In addition, we note that permitting nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services imposes administrative costs on the Commission, which must maintain and organize tariff filings for public inspection.¹⁷⁹ In light of our conclusion that market forces, the complaint process, and our ability to reimpose tariff filing requirements are adequate to protect consumers and ensure that nondominant interexchange carriers' rates, terms and conditions for interstate, domestic, interexchange services are just, reasonable and not unreasonably discriminatory, we believe that the public interest would be better served by the Commission devoting these resources to its enforcement duties.

63. With two limited exceptions described below,¹⁸⁰ we also do not believe that there is a sound basis for concluding that forbearance is in the public interest only with respect to certain interstate, domestic, interexchange services, such as individually negotiated

¹⁷⁷ Florida PSC Comments at 3; Cato Institute Comments at 4; BellSouth Comments at 17-18; see also Regulatory Treatment of Mobile Services Order, 9 FCC Rcd at 1479-80.

¹⁷⁸ See Frontier Comments at 6; CSE Comments at 5-6.

¹⁷⁹ See Corporate Managers Comments at 5-6; GSA Comments at 9-10; see also Sixth Report and Order, 99 FCC 2d at 1030-31. But see Casual Calling Coalition Comments at 17 n.19 (arguing that conservation of Commission resources is not an express statutory criterion for forbearance).

¹⁸⁰ See infra para. 106.

service arrangements offered by nondominant interexchange carriers. We find that the competitive benefits of not permitting nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services, discussed above,¹⁸¹ apply equally to all segments of the interstate, domestic, interexchange services market. Moreover, as discussed above, we reject the argument that detariffing mass market services offered to residential and small business customers will lead to substantially higher transactions costs. Similarly, we are not persuaded that the public interest benefits differ depending on the type of tariffed information that is at issue. The public interest benefit of removing carriers' ability to invoke the "filed-rate" doctrine applies equally with respect to terms and conditions as to rates.¹⁸² Moreover, permitting or requiring large nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services would not eliminate the risk of tacit price coordination among such carriers, and would raise the possibility that such carriers' tariffed rates would become a price umbrella.¹⁸³ Finally, we agree with AT&T that there is no basis to differentiate among nondominant interexchange carriers, because all such carriers are unable to exercise market power in the interstate, domestic, interexchange market.¹⁸⁴

64. Nor do we believe that we should delay our decision to detariff the interstate, domestic, interexchange services of nondominant interexchange carriers. Because we find the statutory criteria for forbearance are met at this time for all interstate, domestic, interexchange services offered by nondominant interexchange carriers, we are required by the 1996 Act to forbear from applying Section 203 tariff filing requirements to these services. Should circumstances change such that the statutory forbearance criteria are no longer met, we have the authority to revisit our determination here, and to reimpose Section 203 tariff filing requirements.

65. Finally, with respect to the regulatory treatment of BOC interexchange affiliates upon their entry into the interstate, domestic, interexchange market, we find no basis to exclude such carriers from the purview of this Order if they are classified as nondominant in their provision of interstate, domestic, interexchange services. We note that we are addressing the issue of whether incumbent local exchange carriers, including the BOCs, should be classified as dominant or nondominant in their provision of interstate, domestic, interexchange services in a separate ongoing proceeding.¹⁸⁵

¹⁸¹ See supra paras. 53, 54.

¹⁸² See supra para. 55.

¹⁸³ F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance 248-61 (3d ed. 1990).

¹⁸⁴ AT&T Reply at 10.

¹⁸⁵ See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18,

66. For the reasons explained herein, we find that complete detariffing of interstate, domestic, interexchange services offered by nondominant interexchange carriers is in the public interest, and that permissive detariffing of such services is not in the public interest.

3. Authority to Eliminate Tariff Filings

a. Background

67. In the Notice, the Commission sought comment on whether it has the authority under Section 10 of the Communications Act not to permit carriers to file tariffs.¹⁸⁶

b. Comments

68. Several interexchange carriers and others argue that the plain language of Section 10 authorizes the Commission only to refrain from requiring tariffs, but not to prohibit carriers from voluntarily complying with Section 203.¹⁸⁷ AT&T contends that the Commission has used the term "forbearance" to apply only to permissive detariffing,¹⁸⁸ and used the terms "cancellation" of all filed tariffs and "elimination" of future filings in adopting complete detariffing in the Competitive Carrier proceeding.¹⁸⁹ AT&T adds that Congress used different terms in other provisions of the Communications Act to authorize the Commission to adopt complete detariffing.¹⁹⁰ Specifically, AT&T argues that Congress gave the Commission authority to specify certain provisions of Title II of the Communications Act as "inapplicable" to CMRS providers.¹⁹¹ AT&T claims that by failing to use this term in Section 10, and instead using such permissive terms as "forbear from applying" or "enforcing," Congress did not intend to give the Commission authority to adopt complete detariffing.¹⁹²

1996).

¹⁸⁶ Notice, 11 FCC Rcd at 7162-63.

¹⁸⁷ AT&T Comments at 10; Sprint Comments at 3 n.1; MCI Reply at 4-9; LDDS Comments at 6-9; MFS Comments at 3-5; WinStar Comments at 3-4; GTE Comments at 5; CompTel Comments at 19-21; Eastern Tel Comments at 2-3.

¹⁸⁸ AT&T Comments at 11.

¹⁸⁹ Id.

¹⁹⁰ Id.; see also GTE Comments at 6; MFS Comments at 4-5; CompTel Comments at 21 n.27.

¹⁹¹ 47 U.S.C. § 332(c)(1)(A).

¹⁹² AT&T Comments at 11-12; see also MFS Comments at 4.

69. Other parties, however, argue that the 1996 Act gives the Commission legal authority to prohibit carriers from filing tariffs.¹⁹³ Ad Hoc Users argues that the Commission has used the term "forbearance" to refer to both mandatory and permissive detariffing.¹⁹⁴ Ad Hoc Users further argues that federal agencies and the courts have construed similar statutory provisions as authorizing federal agencies to adopt mandatory deregulation.¹⁹⁵ Specifically, Ad Hoc Users contends that: (1) the Commission adopted mandatory detariffing for CMRS based on Section 332(c)(1)(A) of the Communications Act, which gave the Commission authority to specify certain provisions of Title II of the Communications Act as "inapplicable" to CMRS providers; and (2) the Civil Aeronautics Board (CAB) mandatorily deregulated the airline industry based on an amendment to the Federal Aviation Act that gave the CAB authority to "exempt" certain domestic air carriers from the requirements of the Federal Aviation Act if it found that such exemption was "consistent with the public interest."¹⁹⁶ Ad Hoc Users argues that these statutory grants of authority are substantially similar to Section 10, and that AT&T's argument (*i.e.*, that Section 10 only allows permissive deregulation) could be made about each of those statutes.¹⁹⁷

c. Discussion

70. We conclude that the Commission has authority under Section 10 to refuse to permit nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services. We reject the argument advanced by AT&T and others that by using the term "forbear," Congress intended to authorize the Commission merely to "refrain from enforcing" its regulations or provisions of the Communications Act where the statutory forbearance criteria are met, and not to authorize the Commission to refuse to permit nondominant carriers to comply with such regulations or provisions voluntarily.¹⁹⁸ We conclude that the plain meaning of the statute does not support their argument, and that federal agencies and the courts have construed similar statutory provisions as authorizing agencies to bar regulated entities from filing rate schedules and other tariff equivalents.

¹⁹³ Ad Hoc Users Reply at 2-5; API Reply at 9-11.

¹⁹⁴ Ad Hoc Users Reply at 3.

¹⁹⁵ *Id.* at 4-5.

¹⁹⁶ Ad Hoc Users Reply at 4-5; *see also* Letter from C. Douglas Jarrett, Counsel to API, to William Caton, Acting Secretary, Federal Communications Commission (October 11, 1996) (API October 11 *Ex Parte*).

¹⁹⁷ Ad Hoc Users Reply at 4-5.

¹⁹⁸ *See* AT&T Comments at 10; Sprint Comments at 3 n.1; MCI Reply at 7; LDDS Comments at 6-9; MFS Comments at 3-4; WinStar Comments at 3-4; GTE Comments at 5; CompTel Comments at 20; Eastern Tel Comments at 2-3.

71. As noted, AT&T and others argue that the dictionary definition of the term "forbear" authorizes the Commission to detariff only on a permissive basis.¹⁹⁹ We agree with Ad Hoc Users that, in this context, such reliance solely on dictionary definitions is inappropriate, and can be misleading, where the historical usage of a term endows that term with a distinct meaning.²⁰⁰ The Commission has consistently used the term "forbear," or a variation thereof, to refer to mandatory, as well as to permissive, detariffing. For example, in the Sixth Report and Order, the Commission stated that its mandatory detariffing proposal, if adopted, "would result in the cancellation of all forborne carrier tariffs currently on file with the Commission and would eliminate future federal tariff filings by carriers treated by forbearance."²⁰¹ Similarly, in Regulatory Treatment of Mobile Services, the Commission stated that it would "forbear from requiring or permitting tariffs of interstate service offered directly by CMRS providers to their customers," based on the Commission's authority to specify any provision of Title II as "inapplicable" to any CMRS provider.²⁰²

72. The courts and Congress have also used the term "forbear" to apply to circumstances involving this agency's authority to refuse to permit carriers to file tariffs. In MCI Telecommunications Corp. v. FCC, the U.S. Court of Appeals for the D.C. Circuit used the term "forbearance" to refer to our previous mandatory detariffing policy, noting that "[t]he Sixth Report . . . changed the permissive forbearance arrangement to a mandatory one."²⁰³ In addition, in describing the Commission's previous tariff forbearance policy, the Senate Commerce, Science, and Transportation Committee applied the term "forbearance" to the

¹⁹⁹ See AT&T Comments at 10; Sprint Comments at 3 n.1; MCI Reply at 7; LDDS Comments at 8; WinStar Comments at 3; MFS Comments at 3-4 (citing, among others, definitions from Black's Law Dictionary ("forbear" defined as "refraining from action"); and Webster's Third International Dictionary ("forbear" defined as "to refrain from, abstain")).

²⁰⁰ See Ad Hoc Users Reply at 3-5.

²⁰¹ Sixth Report and Order, 99 FCC 2d at 1021 (emphasis added). See also Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2652 n.41 (1990) ("Subsequently, in the Sixth Report, the Commission required nondominant carriers subject to forbearance to provide their service offerings on a non-tariffed basis."); Decreased Regulation of Certain Basic Telecommunications Services, CC Docket No. 86-421, 2 FCC Rcd 645, 654 n.17 (1986) ("The Sixth Report, which required those nondominant carriers subject to forbearance to provide their services on a non-tariffed basis, was reversed and remanded by the U.S. Court of Appeals for the D.C. Circuit.").

²⁰² Regulatory Treatment of Mobile Services Order, 9 FCC Rcd at 1480.

²⁰³ MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1189 (D.C. Cir. 1985). In determining that the Commission lacked statutory authority at that time to adopt mandatory detariffing for interstate, interexchange carriers, the court noted, that in the Record Carrier Competition Act, Congress had expressly authorized the Commission to "forbear from exercising its authority under [Title II of the Communications Act]." Id. at 1195 (quoting the Record Carrier Competition Act of 1981, Pub. L. No. 97-130, § 2, 95 Stat. 1687). But see AT&T Co. v. FCC, 978 F.2d 727, 729 (D.C. Cir. 1992), cert. denied, AT&T Co. v. FCC, 509 U.S. 913 (1993) (stating that "[t]he Commission, however, went beyond mere forbearance in 1985 in its Sixth Report and Order . . .").

entire Competitive Carrier proceeding, encompassing both mandatory and permissive detariffing.²⁰⁴

73. It was against this background that Congress adopted Section 10(a). Accordingly, we concur with Ad Hoc Users that the term "forbear" must be construed within its historical and regulatory context, and not in a vacuum.

74. We further note that in construing a similar statutory provision, the U.S. Court of Appeals for the D.C. Circuit rejected a virtually identical argument that Congress had only provided the CAB authority to deregulate the airline industry on a permissive basis.²⁰⁵ In an amendment to the Federal Aviation Act, Congress granted the CAB authority to "exempt" domestic air carriers from statutory requirements of the Federal Aviation Act.²⁰⁶ The CAB used this authority to prohibit certain air carriers from filing tariffs and certain intercarrier agreements.²⁰⁷ In National Small Shipments Traffic Conference, Inc., petitioners argued that the CAB's "authority to exempt airlines from certain requirements cannot be used to prohibit airlines from filing [intercarrier] agreements . . . if they choose to do so."²⁰⁸ The court rejected this argument, noting that the CAB's exemption authority was "broad" and that its refusal to permit airlines to file intercarrier agreements was consistent with Congress' deregulatory purpose.²⁰⁹

75. Moreover, the action we take here is consistent with the Commission's order adopting complete detariffing for domestic CMRS providers.²¹⁰ In Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (OBRA), Congress granted the Commission authority to declare "inapplicable to [any commercial mobile] service or person" any provision

²⁰⁴ See Telephone Operator Consumer Services Improvement Act of 1990, S. Rep. No. 439, 101st Cong., 2d Sess. 3 n.10 (1990) reprinted in 1990 U.S.C.C.A.N. 1577, 1579 (stating that "[t]he FCC has chosen to 'forbear' from regulating the rates of 'non-dominant' carriers because they do not possess market power and thus have little ability to charge unjust or unreasonable rates in violation of the Communications Act of 1934," and citing, inter alia, the Sixth Report and Order).

²⁰⁵ National Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819 (D.C. Cir. 1980).

²⁰⁶ Id. at 822 n.2, 823, 827 (citing 49 U.S.C. §§ 1386(b), 1388(c)).

²⁰⁷ Id. at 825-26.

²⁰⁸ Id. at 835.

²⁰⁹ Id. ("The [CAB's] attempt to further reduce the amount of regulation through use of its broad exemption powers is quite consistent with Congress' purpose in enacting the amendments. Indeed, it promotes Congress' purposes in making the changes.").

²¹⁰ See generally Regulatory Treatment of Mobile Services Order, 9 FCC Rcd 1411.

of Title II, subject to certain limitations.²¹¹ This grant of authority, while not identical, is similar to the Commission's authority under Section 10. In response to this grant of authority under Section 6002(b), the Commission determined that it would "forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers."²¹²

76. In addition, we conclude that Section 203, which was "enacted to control monopoly abuse" by the carriers,²¹³ does not grant to carriers a statutory right to file tariffs. As noted in the 1996 Act's legislative history, "given that the purpose of this legislation is to shift monopoly markets to competition as quickly as possible, the Committee anticipates this forbearance authority will be a useful tool in ending unnecessary regulation."²¹⁴ Thus, it seems inconceivable that Congress intended Section 10 to be interpreted in a manner that allows continued compliance with provisions or regulations that the Commission has determined were no longer necessary in certain contexts.

²¹¹ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392-93 (1993). Similar to the forbearance provision of the 1996 Act, Section 332 of the Communications Act, as amended by OBRA, authorizes the Commission to specify by regulation any provision of Title II, subject to certain limitations, as "inapplicable to [any commercial mobile] service or person" engaged in the provision of commercial mobile service, otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A). Section 332(c)(1)(A) requires that before forbearing from applying any section of Title II the Commission must find that each of the following conditions applies:

- (1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such provision is not necessary for the protection of consumers; and
- (3) specifying such provision is consistent with the public interest.

Id. In evaluating the public interest, Section 332(c)(1)(C) requires the Commission to consider:

whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. If the Commission determines that such regulation . . . will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation . . . is in the public interest.

47 U.S.C. § 332(c)(1)(C).

²¹² Regulatory Treatment of Mobile Services Order, 9 FCC Rcd at 1480.

²¹³ Sixth Report and Order, 99 FCC 2d at 1028.

²¹⁴ H.R. Rep. No. 204, 104th Cong., 1st Sess. 89; see also Joint Explanatory Statement at 1.

4. Summary of Findings and Conclusions

77. We therefore conclude that tariffs are not necessary to ensure that the rates, practices, classifications, and regulations of nondominant interexchange carriers for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory. In addition, we conclude that tariffs for the interstate, domestic, interexchange services of nondominant interexchange carriers are not necessary to protect consumers. Moreover, we find that complete detariffing of interstate, domestic, interexchange services provided by nondominant interexchange carriers is in the public interest, and that permissive detariffing of such services is not in the public interest. Accordingly, pursuant to the requirements of Section 10, we conclude that we must forbear from applying Section 203 tariff filing requirements to the interstate, domestic, interexchange services offered by nondominant interexchange carriers and not permit nondominant interexchange carriers to file tariffs for their interstate, domestic, interexchange services. We also conclude that the Commission has authority under Section 10 to refuse to permit nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services. We therefore order that nondominant interexchange carriers cancel all tariffs for such services currently on file with the Commission, subject to the procedural details specified below, and prohibit nondominant interexchange carriers from filing tariffs for such services in the future.²¹⁵

C. Maintenance and Disclosure of Price and Service Information; Certifications

1. Background

78. In the Notice, the Commission tentatively concluded that, if it were to adopt a complete detariffing policy, nondominant interexchange carriers would be required to maintain at their premises price and service information regarding all of their interstate, domestic, interexchange service offerings, which they could submit to the Commission upon request.²¹⁶ In addition, the Commission tentatively concluded that it would require nondominant providers of interexchange telecommunications services to file certifications stating that they are in compliance with the geographic rate averaging and rate integration requirements of Section 254(g) in order to ensure compliance with those requirements.²¹⁷ The Commission

²¹⁵ See infra section II.D.

²¹⁶ Notice, 11 FCC Rcd at 7163. In adopting its prior mandatory detariffing policy, the Commission required affected carriers to maintain such information at whatever company location they desired. Sixth Report and Order, 99 FCC 2d at 1034.

²¹⁷ Notice, 11 FCC Rcd at 7178, 7182. New Section 254(g), adopted as part of the 1996 Act, requires that a provider of interexchange telecommunications services charge its subscribers in rural and high cost areas rates that do not exceed the rates that the carrier charges subscribers in urban areas (i.e., that rates be geographically averaged). Section 254(g) also requires that providers of interexchange telecommunications services charge subscribers in each State rates that do not exceed the rates it charges subscribers in another State (i.e., that rates be integrated). 47 U.S.C. § 254(g); see also Geographic Rate Averaging Order, 11 FCC Rcd 9564

further tentatively concluded that it would rely on the complaint process under Section 208 to bring violations of Section 254(g) to its attention.²¹⁸

2. Comments

79. Several commenters recommend that, if the Commission adopts detariffing, it should require nondominant interexchange carriers to make their rates available to the public in some other fashion, such as by posting pricing information on-line, submitting current rate information to the Commission, or making such information available to any member of the public upon request.²¹⁹ These commenters argue that the public needs such information to determine whether a carrier is complying with the geographic rate averaging and rate integration requirements of Section 254(g) as well as with the nondiscrimination requirements of Section 202.²²⁰ Several of these commenters further argue that consumers, especially residential and small business customers, need information on rates, terms and conditions to compare carriers' service offerings.²²¹ Several small businesses that analyze tariff information for business and residential customers argue that they need such information to conduct their businesses.²²²

80. Other commenters, however, oppose any record-keeping requirement. They argue that imposing such a requirement would eliminate any cost savings resulting from

(implementing Section 254(g)).

²¹⁸ Notice, 11 FCC Rcd at 7178, 7182.

²¹⁹ Iowa Utilities Board Comments at 2-4; Florida PSC Comments at 5; GSA Comments at 6-7, 11-16; Pennsylvania Office of Consumer Advocate Comments at 1-6; Missouri Office of Public Counsel Comments at 4; TRA Phase 1 Comments at 6-13, 17-18; GTE Phase 1 Comments at 17-19; USTA Phase 1 Comments at 4-6; Audits Unlimited Comments at 1-2; Scheraga and Sheldon Comments at 1; Rural Telephone Coalition Comments at 3-13; NARUC Comments at 4-5; ZWT Comments at 1; XIOX Comments at 1-2; MOSCOM Comments at 1-2; Telecommunications Management Information Systems Coalition Comments at 6-11; TRAC Comments at 6-8.

²²⁰ Iowa Utilities Board Comments at 2-4; Florida PSC Comments at 5; GSA Comments at 6-7, 11-16; Pennsylvania Office of Consumer Advocate Comments at 1-6; TRA Phase 1 Comments at 6-13, 17-18; GTE Phase 1 Comments at 17-19; USTA Phase 1 Comments at 4-6; Audits Unlimited Comments at 1-2; Scheraga and Sheldon Comments at 1; Rural Telephone Coalition Comments at 3-13; NARUC Comments at 4-5; ZWT Comments at 1; XIOX Comments at 1-2; MOSCOM Comments at 1-2; Telecommunications Management Information Systems Coalition Comments at 6-11; Alaska Reply at 9-11; Hawaii Reply at 24.

²²¹ TRA Comments at 17; GCI Comments at 3; NARUC Comments at 5; Eastern Tel Comments at 4; Ursus Comments at 5; Casual Calling Coalition Comments at 8; TRAC Comments at 5-6; CFA/CU Comments at 2-3; Pennsylvania Office of Consumer Advocate Comments at 3; WinStar Comments at 4-6; National Association of Development Organizations Comments at 6; Market Dynamics Comments at 9-10.

²²² XIOS Comments at 1-2; MOSCOM Comments at 1-2; Network Analysis Center Comments at 1-2; Audits Unlimited Comments at 1-2; Scheraga and Associates Comments at 1; Telecommunications Management Information Systems Coalition Comments at 5-6; Telecommunications Information Services Comments at 1-2.

detariffing.²²³ Several parties further insist that carriers will make rate and service information available to consumers through other means.²²⁴

81. AT&T argues that, to the extent the Commission seeks to justify its decision to detariff on the ground that complete detariffing would eliminate the "filed-rate" doctrine, a requirement that carriers make rate information available on-line or through a clearinghouse would undermine this objective.²²⁵ AT&T insists that the "filed-rate" doctrine would continue to apply if such a requirement is imposed, because the doctrine is based on the imposition of a filing requirement and not on the manner or place of filing.²²⁶

82. Several interexchange carriers and BOCs contend that the Commission's proposed certification requirement and the complaint process are appropriate mechanisms to enforce the requirements of Section 254(g).²²⁷ Others, however, argue that the Commission should not require certifications, but should rely instead on the complaint process and its ability to examine rates upon request.²²⁸ These parties argue that certifications do little to advance the Commission's enforcement objectives, and that the complaint process and the Commission's ability to examine rates upon request are the only effective means to ascertain whether carriers are in compliance with their statutory obligations.²²⁹

3. Discussion

83. We adopt the tentative conclusion in the Notice that nondominant providers of interstate, domestic, interexchange telecommunications services should be required to file annual certifications signed by an officer of the company under oath that they are in compliance with their statutory geographic rate averaging and rate integration obligations. We believe that annual certifications will emphasize the importance that we place on the rate averaging and rate integration requirements of the 1996 Act and put carriers on notice that they may be subject to civil and criminal penalties for violations of these requirements, especially willful violations.

²²³ CompTel Comments at 15; MCI Comments at 13; Market Dynamics Comments at 19.

²²⁴ BellSouth Comments at 20; Ad Hoc Users Reply at 12-13.

²²⁵ AT&T Reply at 5.

²²⁶ Id. at n.11.

²²⁷ BellSouth Phase 1 Comments at 3-5; LDDS Phase 1 Comments at 14-15; Ameritech Phase 1 Comments at 15; Frontier Phase 1 Comments at 8 n.27; MCI Phase 1 Comments at 32-33; Commonwealth of Northern Mariana Islands Comments at 12-13.

²²⁸ Cable & Wireless Phase 1 Comments at 7; CompTel Phase 1 Comments at 9.

²²⁹ Cable & Wireless Phase 1 Comments at 7; CompTel Phase 1 Comments at 9.

84. While we believe that carrier certifications will be an important mechanism for enforcing the 1996 Act's geographic rate averaging and rate integration requirements, we are persuaded by the arguments of many parties, including numerous state regulatory commissions and consumer groups, that publicly available information is necessary to ensure that consumers can bring complaints, if necessary, to enforce those requirements.²³⁰ As noted above, we find that it is highly unlikely that interexchange carriers that lack market power could successfully charge rates, or impose terms and conditions, for interstate, domestic, interexchange services in ways that violate Sections 201 and 202 of the Communications Act, and that such carriers will generally provide rate and service information to consumers to preserve or improve their competitive position in the market.²³¹ We recognize, however, that in competitive markets carriers would not necessarily maintain geographically averaged and integrated rates for interstate, domestic, interexchange services as required by Section 254(g).²³² Because the public should have the ability to bring violations of the geographic rate averaging and rate integration requirements of the 1996 Act to our attention, we believe it is appropriate to require carriers to make available to the public the information that is necessary for the public to determine whether a carrier is adhering to the geographic rate averaging and rate integration requirements of Section 254(g). Accordingly, we will require nondominant interexchange carriers to make information on current rates, terms, and conditions for all of their interstate, domestic, interexchange services available to the public in an easy to understand format and in a timely manner.²³³ We note that, by adopting this requirement, we do not intend to require carriers to disclose more information than is currently provided in tariffs, in particular in contract tariffs.

85. The requirement that nondominant interexchange carriers make available to the public information concerning the current rates, terms and conditions for all of their interstate, domestic, interexchange services also will promote the public interest by making it easier for

²³⁰ See Iowa Utilities Board Comments at 2-4; Florida PSC Comments at 5; GSA Comments at 6-7, 11-16; Pennsylvania Office of Consumer Advocate Phase 1 Comments at 1-6; TRA Phase 1 Comments at 6-13, 17-18; GTE Phase 1 Comments at 17-19; USTA Phase 1 Comments at 4-6; Audits Unlimited Comments at 1-2; Scheraga and Sheldon Comments at 1; Rural Telephone Coalition Comments at 3-13; NARUC Comments at 4-5; ZWT Comments at 1; XIOX Comments at 1-2; MOSCOM Comments at 1-2; Telecommunications Management Information Systems Coalition Comments at 6-11; Alaska Reply at 9-11; Hawaii Reply at 24.

²³¹ See *supra* para. 25.

²³² Carriers in a competitive market might, for example, seek to deaverage their rates to respond to competition. See, e.g., Geographic Rate Averaging Order, 11 FCC Rcd at 9583 (declining to create a competitive exception to geographic rate averaging).

²³³ A nondominant interexchange carrier must make available to any member of the public such information about all of that carrier's interstate, domestic, interexchange services.

consumers, including resellers, to compare carriers' service offerings.²³⁴ While nondominant interexchange carriers will generally provide rate and service information to consumers in order to attract and retain customers, some consumers may find it difficult to determine the particular service plans that are most appropriate, and least costly, for them, based on their calling patterns, because of the wide array of calling plans offered by the scores of carriers. Businesses and consumer organizations that analyze and compare the rates and services of interexchange carriers perform a valuable function in assisting consumers to judge the specific carriers' rates and service plans that are best suited to their individual needs. The foregoing requirement will ensure that such businesses, many of which are small businesses, continue to have access to the information they need to provide their services.²³⁵

86. In order to minimize the burden on nondominant interexchange carriers of complying with this requirement, we will not require nondominant interexchange carriers to make rate and service information available to the public in any particular format, or at any particular location. We reject the suggestion that we should require nondominant interexchange carriers to provide information on their interstate, domestic, interexchange services at a central clearinghouse or on-line. We find that mandating such a requirement would be unduly burdensome at this time. Rather, we will require only that a carrier make such information available to the public in at least one location during regular business hours. We will also require carriers to inform the public that this information is available when responding to consumer inquiries or complaints, and to specify the manner in which the consumer may obtain the information.²³⁶ In addition, because we are simply requiring carriers to make information available to the public, we need not address AT&T's argument that requiring nondominant interexchange carriers to make price and service information available on-line or at a central clearinghouse is a filing requirement within the meaning of Section 203.

87. Finally, we adopt the tentative conclusion in the Notice that we should require nondominant interexchange carriers to maintain price and service information regarding all of their interstate, domestic, interexchange service offerings, that they can submit to the

²³⁴ See TRA Comments at 17; GCI Comments at 3; NARUC Phase 1 Comments at 5; Eastern Tel Comments at 4; Ursus Comments at 5; Casual Calling Coalition Comments at 8; TRAC Comments at 5-6; CFA/CU Comments at 2-3; Pennsylvania Office of Consumer Advocate Comments at 3; WinStar Comments at 4-6; National Association of Development Organizations Comments at 6; Market Dynamics Comments at 9-10.

²³⁵ See XIOX Comments at 1-2; MOSCOM Comments at 1-2; Network Analysis Center Comments at 1-2; Audits Unlimited Comments at 1-2; Scheraga and Associates Comments at 1; Telecommunications Management Information Systems Coalition Comments at 5-6; Telecommunications Information Services Comments at 1-2.

²³⁶ Although we do not require carriers to make such information available to the public at more than one location, we encourage carriers to consider ways to make such information more widely available, for example, posting such information on-line, mailing relevant information to consumers, or responding to inquiries over the telephone.

Commission upon request.²³⁷ We believe it is appropriate that this information should include the information that carriers provide to the public as required above, as well as documents supporting the rates, terms, and conditions of the carriers' interstate, domestic, interexchange offerings.²³⁸ We also find that it is appropriate to require nondominant interexchange carriers to retain the foregoing records for a period of at least two years and six months following the date the carrier ceases to provide services on such rates, terms and conditions, in order to afford the Commission sufficient time to notify a carrier of the filing of a complaint, which generally must be commenced within two years from the time the cause of action accrues.²³⁹ We will also require nondominant interexchange carriers to file with the Commission, and update as necessary, the name, address, and telephone number of the individual, or individuals, designated by the carrier to respond to Commission inquiries and requests for documents. We will further require that nondominant interexchange carriers maintain the foregoing records in a manner that allows carriers to produce such records within ten business days of receipt of a Commission request. We conclude that the availability of such records will enable the Commission to meet its statutory duty of ensuring that such carriers' rates, terms, and conditions for service are just, reasonable, and not unreasonably discriminatory, and that these carriers comply with the geographic rate averaging and rate integration requirements of the 1996 Act. In addition, maintenance of such records will enable the Commission to investigate and resolve complaints.

D. Transition

1. Comments

88. Several commenters suggest that if the Commission were to adopt the complete detariffing proposal, it should also implement an appropriate transition period to afford nondominant interexchange carriers time to adapt their operations to a detariffed regime.²⁴⁰ Ad Hoc Users and API suggest that we adopt a six-month transition period.²⁴¹ Eastern Tel, AT&T, and LDDS recommend a period of at least one year, and LCI suggests a phase-in period of 18-24 months.²⁴² In addition, AT&T urges the Commission to "make clear that the

²³⁷ Notice, 11 FCC Rcd at 7163.

²³⁸ We note that we will not require carriers to make such supporting documentation available to the public.

²³⁹ 47 U.S.C. § 415. We note that, in the event a complaint is filed against a carrier, we will require the carrier to retain documents relating to the complaint until the complaint is resolved.

²⁴⁰ Ad Hoc Users Comments at 13-14; API Reply at 13; Eastern Tel Comments at 5.

²⁴¹ Ad Hoc Users Comments at 13-14; API Reply at 13.

²⁴² Eastern Tel Comments at 5; LDDS Comments at 14-15; LCI Comments at 4; Letter from R. Gerard Salemme, Vice President - Government Affairs, AT&T, to Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission, October 17, 1996 at 4 (AT&T October 17 Ex Parte); Letter from R.

terms of individual carrier/customer deals currently on file at the Commission stay on file and remain unchanged by a decision to prohibit the filing of tariffs.²⁴³ Ad Hoc Users and API, on the other hand, urge the Commission to prevent carriers from filing tariffs that supersede existing contracts during the transition period.²⁴⁴ API further recommends that during the transition period, carriers should not be permitted to require that the terms of existing pricing arrangements be extended as a condition for negotiating contracts to replace existing tariffs.²⁴⁵ Finally, Eastern Tel requests the Commission to work with industry to develop a standard contract for telecommunications services, similar to the form contracts used in the real estate industry, that address such issues as the collection procedures that can be utilized.²⁴⁶

2. Discussion

89. We agree that we should allow nondominant interexchange carriers an appropriate transition period to adjust to detariffing. We conclude that a nine-month period is sufficient to provide for an orderly transition. We believe that this transition period will afford carriers sufficient time to adjust to detariffing. We do not believe that a more extended period is needed for nondominant interexchange carriers to adjust their operations. Nondominant interexchange carriers are not required to negotiate a new contract with each customer. Nondominant interexchange carriers may utilize various methods to establish legal relationships with customers in the absence of tariffs, including, for example, the use of short standard agreements. We therefore order all nondominant interexchange carriers to cancel their tariffs for interstate, domestic, interexchange services on file with the Commission within nine months of the effective date of this Order and not to file any such tariffs thereafter.²⁴⁷

90. Nondominant interexchange carriers may cancel their tariffs for interstate, domestic, interexchange services at any time during the nine-month period. Pending such

Gerard Salemme, Vice President - Government Affairs, AT&T, to Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission, October 22, 1996 at 1-2 (AT&T October 22 Ex Parte); see also LDDS Reply at 14 (stating that up to two years may be necessary for the transition to detariffing).

²⁴³ AT&T October 17 Ex Parte at 4.

²⁴⁴ Ad Hoc Users Comments at 14; Letter from Henry D. Levine, Counsel to Ad Hoc Users, to William Caton, Secretary, Federal Communications Commission, October 16, 1996 (Ad Hoc Users October 16 Ex Parte); Letter from C. Douglas Jarrett, Counsel to API, to William Caton, Secretary, Federal Communications Commission, October 18, 1996 (API October 18 Ex Parte).

²⁴⁵ API Reply at 13-14 (maintaining that such a requirement would give carriers undue leverage in negotiations, and give carriers an incentive not to negotiate in good faith).

²⁴⁶ Eastern Tel Comments at 5.

²⁴⁷ We note that the effective date of this Order (i.e., the date the rules and requirements promulgated by this Order will become effective) will be 30 days from the date of publication of this Order in the Federal Register. See infra para. 162.