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

DEC 23 1996

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

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PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION, ABB BUSINESS SERVICES, INC., AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Ellen G. Block
James S. Blaszak
Henry D. Levine
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-1703
202-223-4980

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SUMMARY

One of the most significant aspects of the Commission's decision in this proceeding has been to place carriers and their customers on an equal footing with respect to the negotiation and enforcement of telecommunications service agreements. In requiring nondominant carriers to withdraw their tariffs for interstate, interexchange offerings, the Commission has eliminated the filed tariff doctrine and given a boost to competition by reducing the risk of collusive pricing among competing carriers. Several aspects of the Order are unsupported or likely to have unintended consequences, however, and we seek reconsideration of them here.

First, one interexchange carrier has apparently been advised by the Commission staff that it may not offer local access services to customers on a detariffed basis. Any requirement that carriers segment their end-to-end domestic service offerings into interoffice and local access services and offer one under contract and another under tariff would involve a radical departure from the way business is conducted in this industry – and from the way the Commission has historically viewed these services in the past. The Commission should articulate its reasons for any such requirement or clarify that no such requirement exists.

Second, the Order requires nondominant carriers to publicly disclose information concerning the rates and other terms and conditions for all of their offerings. The scope of this requirement should be narrowed so that it

does not apply to customers-specific offerings. None of the interests cited in the Order would warrant disclosure of the terms of these offerings. Moreover, the public interest in minimizing any risk of collusive pricing among competing carriers – which the Commission repeatedly cites as a goal of its forbearance decision – militates against a broad disclosure requirement.

Finally, it has been our experience in recent weeks that some carriers are reading the Order to entitle – or possibly even require – them to preserve the advantages that they have historically enjoyed by reason of the filed tariff doctrine. This is clearly not the intent of the Order, and we ask the Commission to clarify the point.

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PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION

The Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America file this Petition for Partial Reconsideration concerning the Commission's Second Report and Order ("Order") in the above-captioned proceeding.[1]

In comments and reply comments in this proceeding, the undersigned organizations and companies urged the Commission to require nondominant carriers to cancel their customer-specific tariffs for interstate interexchange services. We wholeheartedly support the Commission's decision to do so. However, in the weeks since the Order was released, problems have emerged that warrant reconsideration of several provisions in the Order.

[1] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61, Second Report and Order, FCC 96-424 (released October 31, 1996), 61 Fed. Reg. 59340 (November 23, 1996) (hereinafter the "Order").

I. Treatment of Local Access Services Offered by Nondominant Interexchange Carriers on a Customer-Specific Basis.

There has been some confusion since the issuance of the Order regarding the services to which the Commission's detariffing requirement applies. The Order requires "all nondominant interexchange carriers to cancel their tariffs for interstate, domestic, interexchange services within nine months from the effective date of this Order." Order ¶ 3. It also requires all carriers to continue to maintain tariffs for international services until the Commission determines that the statutory criteria for forbearance are met with respect to those services. Order ¶ 98. In addition, AT&T must maintain its tariffs for analog private line and 800 directory assistance services for a specified period, based upon certain voluntary commitments AT&T made at the time the Commission granted it nondominant status. Order ¶ 106. In other words, the Commission excluded only three specific services from the mandatory detariffing requirement adopted for nondominant interexchange carriers -- international services and (for AT&T) analog private lines and 800 directory assistance.

In apparent conflict with this regime, one major interexchange carrier has told a customer that it has been advised by the Commission staff that the detariffing requirement does *not* extend to the local access components of the services provided by interexchange carriers, and that the carrier could not therefore offer these services to the customer other than under tariff.[2] The Order

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[2] The Commission staff has verbally confirmed to us that it has given such advice to carriers. Interestingly, this carrier has been somewhat coy on this issue in a letter sent to customers earlier this month. There it stated that "This Order applies only to [the carrier's] domestic interexchange services. International *and other services* are expected to remain

contains no statement to this effect and, as far as we know, other interexchange carriers are not excluding local access components from the off-tariff contracts that they are currently negotiating.

The Commission has on several occasions examined the level of competition in the interstate interexchange marketplace and has decided to streamline or eliminate certain regulatory requirements applicable to carriers who are nondominant in that market. In each case, the Commission treated the carriers' services as end-to-end offerings. For example, in *Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554, 563 (1983), the Commission deregulated the following services when offered by nondominant carriers: "interstate, domestic interexchange telecommunications services – MTS/WATS, private line, and public switched record" services. Throughout the decade during which the policy articulated in the *Competitive Carrier* orders was in effect, nondominant interexchange carriers conducted business with their larger customers by means of contracts containing rates and charges, performance guarantees and other terms and conditions governing end-to-end service. In other words, the contracts were *not* limited to interoffice connections.[3]

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subject to tariff-filing requirements." (emphasis added) Letter from National Account Manager to existing telecommunication customer of December 1996. Insofar as the tariffing requirements for analog private line and 800 directory assistance services do not apply to this particular carrier, it is not clear what such "other services" might be.

[3] In the Fifth Report and Order in that proceeding, 98 FCC 2d 1191, 1206 (1984) , the Commission detariffed Digital Electronic Message Service (DEMS) on the grounds that it is in the same product market as the "domestic, interstate, interexchange services" detariffed in the

In *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880 (1991), the Commission found that there was substantial competition in most sectors of the "interstate interexchange marketplace" and, for this reason authorized AT&T and other interexchange carriers to offer services to their business customers on a contract carriage basis. The Commission did not require that AT&T (then still a dominant carrier) or any other carrier exclude local access components from its contract tariffs, and the thousands of such contract tariffs on file today include all of the components that comprise an end-to-end service. In fact, some contract tariffs consist of nothing but dedicated access services.[4]

More recently, the Commission reclassified AT&T as a nondominant carrier with respect to the "interstate, domestic interexchange market." *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* Order, FCC 95-427 (released October 23, 1995). As a consequence, AT&T became subject to the tariff-filing requirements applicable to all other nondominant carriers and began to file tariffs for customer-specific, end-to-end service offerings on one day's notice.

Any requirement that carriers segment their end-to-end domestic service offerings into interoffice and local access services and offer them under

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Fourth Report and Order. In making that determination, the Commission noted that DEMS services consist of transmissions over both intercity links and digital termination service ("DTS") facilities, and that these latter components perform the same function as switched and special access services. The Commission could not have reached this conclusion unless it viewed "domestic, interstate, interexchange services" (like DEMS) as end-to-end services.

[4] *See* AT&T Communications, Contract Tariff F.C.C. No. 6076.

separate legal instruments would involve a radical departure from the way the Commission has historically approached the regulation (and deregulation) of the interstate, interexchange services of nondominant carriers. Insofar as Congress intended Section 10 of the Telecommunications Act of 1996 to authorize the Commission to take further steps along that same path, such a departure may also be contrary to the intent of Congress. In any event, if the Commission intends to abandon its prior treatment of these services, it must offer a reasoned analysis for the change. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-42 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971).

We question whether a reasoned argument could be made for requiring the unbundling of local access from interstate interexchange services. The local access provided by interexchange carriers in the interstate jurisdiction is (and can be) used for no purpose other than to form part of an end-to-end interstate, interexchange service. The Commission's rules make this clear,[5] and the carriers' tariffs expressly prohibit the use of the local access they provide for any other purpose.[6] Moreover, any unbundling requirement would create a practical nightmare.

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[5] *See* 47 C.F. R. § 69.2(b) (defining "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication").

[6] *See* Sprint Communications Company, Tariff F.C.C. No. 8, Section 1.1; AT&T Communications, Tariff F.C.C. No. 11, Section 1.1.1.A ; MCI Telecommunications Corp., Tariff F.C.C. No. 8, Section C-1 (each stating that the access services provided in the cited tariffs may be used for connection to other services provided by that same carrier).

- Would carriers have to unbundle and tariff both dedicated and switched access?
- If not, then on what basis could a distinction be drawn between them so as to require the bundling and tariffing of one but not the other?
- If switched access must be unbundled and tariffed, carriers would have to restructure their pricing for nearly all voice services.[7]
- If dedicated access must be unbundled and tariffed, carriers would have to restructure the pricing for some data services as well.[8]

If the Commission has imposed an "unbundling" requirement of this kind *sub silentio* or by means of informal (unwritten) advice to individual carriers, we seek reconsideration of any such requirement. If no such requirement has been imposed, we ask that the Commission clarify that fact.

II. Public Disclosure of Information Concerning the Rates, Terms and Conditions of Customer-Specific Service Arrangements

The Order requires nondominant carriers to cancel their tariffs for interstate interexchange services. Order ¶ 3. The rules adopted pursuant to the Order also mandate, however, that each of these carriers make available to the public "information concerning its current rates, terms and conditions" for

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[7] The only exception would be so-called "on-net" calling between business locations that are both served by dedicated access. All other voice services (the 800 and virtual private line services used by mid-sized and large businesses, as well as the long distance services used by millions of small business and residential customers) use switched access at one or both ends and include the costs of that access in a single per-minute rate.

[8] For most data services, local access and inter-office channels (*i.e.*, lines connecting the carriers' points of presence) are currently priced separately. The principal exception is frame relay service, where carriers often levy an "access port" charge that covers dedicated access, port and PVC components.

detariffed services. 47 C.F.R. § 42.10. There is considerable confusion over the scope of this disclosure requirement.

The rules and decisions of the Commission provide guidance in two areas. First, the new rule cannot be read to require carriers to publish the text of the entire carrier-customer contract. The Commission has previously rejected just such a requirement in the context of contract tariffs and should not be assumed to have reversed that judgment here without explanation.[9]

Second, the new rule does not appear to require carriers to publish the same information (or the same type or volume of information) that they are currently required to include in customer-specific tariffs. It requires a carrier to make available to the public "information concerning its current rates, terms and conditions" for detariffed services. 47 C.F.R. § 42.10. In contrast, Section 61.72 of the Commission's rules requires carriers to make available to the public "a schedule of rates and regulations for those services [that are still] subject to tariff filing requirements." 47 C.F.R. § 61.72. By using different language with respect to detariffed services, we believe that the Commission meant to mandate something different and, in particular, less comprehensive.[10]

Although it is possible to determine what the new regime does *not* require, the Order does not clearly state what it *does* require. This apparent

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[9] *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd at 5902 (contract-based tariff and a brief summary must be filed "in lieu of the entire contract").

[10] "Information concerning rates, terms and conditions" would seem to be something less than a schedule of the "rates and regulations" themselves. That conclusion is bolstered by the Commission's express statement that the new provision does *not* require more disclosure than is currently required for contract tariffs. Order ¶ 84.

vagueness would be of greater concern to carriers than to users if the issue involved only the cost of complying with an administrative requirement of questionable public value. But more is at stake here. For as the Order repeatedly notes, "tariff filings by nondominant interexchange carriers for interstate, domestic, interexchange services may facilitate, rather than deter, price coordination . . . ." Order ¶ 23; *see also* ¶¶ 37, 39, 42, 53, 61, 63, 125, 155 (also noting risk of "umbrella" pricing).[11]

In light of this oft-stated and fully justified concern, the Commission should impose a disclosure requirement only to the extent necessary to protect the public interest. The Commission articulated three reasons for the requirement:

- to enable the public "to determine whether a carrier is adhering to the geographic rate averaging and rate integration requirements of Section 254(g)." Order ¶ 84, *see also* ¶ 25.
- to "mak[e] it easier for consumers, including resellers, to compare carriers' service offerings." Order ¶ 85.
- to ensure the continued viability of businesses that analyze tariff information. Order ¶ 85.

None of these interests supports a broad disclosure requirement for information concerning the rates and other terms and conditions of

[11] The Commission suggests that the risk of collusive pricing arises primarily from the fact that, under a tariff regime, the pricing information is "collected in one, central location." Order ¶¶ 23, 53, 61. It is, frankly, inconceivable that the removal of certain loose-leaf binders and 3½-inch diskettes from a windowless room in Washington DC will make it difficult for carriers to exchange price information, particularly when the Commission has required publication of that same information and has "encourage[d] carriers to . . . post[ ] such information on-line." Order ¶ 86. Indeed, it is not unreasonable to ask whether the ability to download pricing information from the Internet and manipulate the data electronically is more likely to facilitate "cooperation" among competitors than the current tariff regime.

individually negotiated arrangements. As for the first item, Congress invited the Commission to forbear from applying Section 254(g) in certain cases,[12] and the Commission did just that with respect to "contract tariffs [and] Tariff 12 offerings" several months ago.[13] Disclosure of the terms of customer-specific offerings cannot be justified on grounds relating to enforcement of Section 254(g), because Section 254(g) does not apply to these offerings.[14]

As for the second item, the Commission's concern that carriers will not reveal their prices to resellers is inconsistent with the Commission's own finding that the market for domestic interstate, interexchange services is competitive. In a competitive market, resellers (like other customers) have the ability to buy service from any facilities-based carrier or even from other resellers who operate on a wholesale basis. In other words, the market will correct any refusal to deal on the part of one or more facilities-based carriers. It should also be noted that resellers are every bit as vulnerable to price collusion on the part of their suppliers as are other customers and, for that reason, would be equally ill-served by a broad disclosure requirement.

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12 *See* Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 132 (1996).

13 *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 9564 at ¶ 27 (1996). In concluding that forbearance was appropriate, the Commission noted that customer-specific arrangements must be generally available to similarly situated customers, regardless of their geographic location. By definition, then, such arrangements are unlikely vehicles for violation of Section 254(g). *Id.* at ¶ 24.

14 Section 254(g) *does* apply to the carriers' mass market offerings, and in those cases the Commission may want to consider strengthening the geographic rate averaging certification by requiring the carriers to specifically notify the Commission (and possibly other interested government entities) of any rate that "directly or indirectly, by or through any means or device whatsoever" is offered on a geographically deaveraged basis. *See* 47 U.S.C. § 503(a).

The third item – the welfare of tariff publishing companies -- simply does not justify the imposition of disclosure requirements on all nondominant interexchange carriers. Like lawyers, economists and other consultants, tariff publishers may benefit from certain requirements imposed by the Commission on regulated entities, but their livelihood is hardly a cognizable justification for regulation.

At most, the interests identified by the Commission would support a requirement that rate and other information relating to customer-specific offerings be retained by the carriers and produced upon proper request to (1) complainants in discovery proceedings in court or before the Commission; (2) Commission staff involved in an investigation, rulemaking or other agency functions; (3) Congress in connection with agency oversight; and/or (4) state officials (*e.g.*, public service commissions, attorneys general) acting in their official capacities.

In sum, the Order does not articulate any cognizable public interest to be served by requiring broad publication of information concerning the rates, terms and conditions negotiated by individual customers. And in light of the risks of price collusion identified repeatedly in the Order, it is puzzling why the Commission has "encouraged" the publication of such information on the Internet. Whatever disclosure requirement may be appropriate for the carriers' mass market services, no case has been made for such a requirement for *customer-specific* offerings.

III. The Detariffing Policy and the Unilateral Abrogation of Negotiated Service Arrangements

In the Order, the Commission noted that "[O]ur detariffing policy should not be interpreted to allow parties to alter or abrogate the terms of long-term arrangements currently on file with the Commission." Order, ¶ 92. In contract negotiations since the issuance of the Order, several of the major carriers have taken positions that suggest that they are interpreting the Order to entitle – or possibly even require -- carriers to preserve the advantages that they enjoyed by reason of the filed tariff doctrine.

In the clearest example of this problem, one carrier recently proposed a contract clause under which the applicable terms of any withdrawn tariffs would be incorporated into the contract. That is a reasonable request, but the proposed clause went on *to permit the carrier to alter those terms at any time (and for any reason) thereafter.* The carrier appears to be reading the Order as expressing the Commission's intent to preserve the filed tariff doctrine for the indefinite future with respect to withdrawn tariffs.

While customers are certainly free to strike bad bargains, we ask the Commission to clarify that the intent of its Order was not to preserve the unfair advantage that carriers enjoy under the tariff regime, but to *eliminate* the filed tariff doctrine and thus "serve the public interest by preserving reasonable commercial expectations and protecting consumers." Order ¶ 55. In clarifying its intent in this way, the Commission can avoid inadvertently aiding in the perpetuation of a commercially unreasonable regime.

CONCLUSION

For the reasons stated, the Commission should clarify or partially reconsider its Order with respect to the issues raised above.

Respectfully submitted,

Ellen G. Block
Henry D. Levine
James S. Blaszak
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, NW Suite 500
Washington, DC 20036
(202) 223-4980

Counsel for the Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America

Dated: December 23, 1996

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Certificate of Service

I, Andrew Baer, hereby certify that true and correct copies of the preceding Petition of the Ad Hoc Telecommunications Users Committee for Clarification and Partial Reconsideration concerning the Commission's Second Report and Order in CC Docket 96-61, were filed this 23rd day of December, 1996, with the Secretary of the Federal Communications Commission and delivered to ITS.

Andrew Baer

December 23, 1996

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