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Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

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

ORDER ON RECONSIDERATION

Adopted: August 15, 1997

Released: August 20, 1997

By the Commission: Commissioner Ness dissenting in part and issuing a statement.

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I. INTRODUCTION

1. On October 29, 1996, the Commission adopted the *Second Report and Order* in its proceeding reviewing the regulation of interstate, domestic, interexchange telecommunications services in light of the passage of the Telecommunications Act of 1996¹ (1996 Act) and the increasing competition in the interexchange market over the last decade.² Consistent with the intent of the 1996 Act to provide a "pro-competitive, deregulatory" national policy framework for telecommunications and information technologies and services,³ Congress directed the Commission to forbear from applying any provision of the Communications Act or the Commission's regulations if certain conditions are met.⁴

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act."

² *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, *Second Report and Order*, 11 FCC Rcd 20730 (1996) (*Second Report and Order*). The *Second Report and Order* was stayed by the United States Court of Appeals for the District of Columbia Circuit in *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

³ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

⁴ Section 10 of the Communications Act provides that:

[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --

- (1) enforcement of such regulation or provision is not necessary to

2. We determined in the *Second Report and Order* that the statutory forbearance criteria in section 10 of the Communications Act were met for complete detariffing⁵ of the interstate, domestic, interexchange services offered by nondominant interexchange carriers, and, therefore, that we would no longer allow such carriers to file tariffs pursuant to section 203 of the Communications Act for their interstate, domestic, interexchange services, with the limited exception of AT&T's provision of 800 directory assistance and analog private line services.⁶ At the same time, we recognized that a transition period was necessary to allow nondominant interexchange carriers time to adapt to complete detariffing.⁷ We therefore ordered all nondominant interexchange carriers to cancel their tariffs for such services within nine months from the effective date of the *Second Report and Order*.⁸ We maintained the tariffing requirement for the international portion of bundled domestic and international service offerings.⁹ We further required nondominant interexchange carriers to: (1) file an annual certification stating that they are in compliance with the geographic rate averaging and rate integration requirements of section 254(g) of the Communications Act;¹⁰ (2) maintain supporting documentation on the rates, terms, and conditions of their interstate, domestic, interexchange services that they could submit to the Commission within ten business days

ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). The Commission, in making the public interest determination, is required to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. 47 U.S.C. § 160(b).

⁵ "Complete detariffing" refers to a policy of neither requiring nor permitting nondominant interexchange carriers to file tariffs pursuant to section 203 of the Communications Act for their interstate, domestic, interexchange services. "Permissive detariffing" refers to a policy of allowing, but not requiring, nondominant interexchange carriers to file tariffs for such services.

⁶ *Second Report and Order*, 11 FCC Rcd at 20773, para. 77.

⁷ *Id.* at 20778-81, paras. 88-94.

⁸ *Id.* at 20779, para. 89. The *Second Report and Order* was published in the Federal Register on November 22, 1996, and became effective 30 days later. See *Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket No. 96-61, Public Notice, DA 96-1985 (rel. Nov. 27, 1996).

⁹ *Second Report and Order* at 20781-84, paras. 94-101.

¹⁰ *Id.* at 20775, para. 83.

upon request;¹¹ and (3) make publicly available information concerning current rates, terms, and conditions for all of their interstate, domestic, interexchange services.¹² The basis for the information disclosure requirement was to ensure that the public was provided with the information necessary to determine whether a nondominant interexchange carrier was adhering to the rate averaging and rate integration requirements of section 254(g) of the Communications Act.¹³ In addition, we determined that a public disclosure requirement would promote the public interest by making it easier for consumers, including resellers, to compare service offerings.¹⁴

3. Our actions in the *Second Report and Order* were intended to advance Congress' pro-competitive and deregulatory objectives by eliminating regulatory requirements that the Commission determined were no longer necessary to protect consumers or serve the public interest. We concluded that our actions would foster increased competition in the market for interstate, domestic, interexchange services by deterring tacit price coordination, eliminating the possible invocation of the "filed-rate" doctrine, and establishing market conditions that more closely resemble an unregulated environment.¹⁵ We found that elimination of the possible invocation of the "filed-rate" doctrine is in the public interest because, pursuant to the "filed-rate" doctrine articulated by the courts, where a filed tariff rate, term, or condition differs from a rate, term, or condition in a non-tariffed carrier-customer contract, the carrier is required to assess the tariff rate, term, or condition.¹⁶

4. Several parties appealed the *Second Report and Order* to the United States Court of Appeals for the District of Columbia Circuit and filed motions requesting that the court stay the *Second Report and Order* pending judicial review. On February 13, 1997, the court granted these motions.¹⁷ The Commission's rules adopted in this proceeding, therefore, are stayed until the court issues its determination on the merits of the appeal. Accordingly,

¹¹ *Id.* at 20777-78, para. 87.

¹² *Id.* at 20776-77, paras. 84-85.

¹³ *Id.* at 20776, para. 84.

¹⁴ *Id.* at 20776-77, para. 85.

¹⁵ *Id.* at 20733, para. 4; 20744, para. 23; 20760, para. 52.

¹⁶ See *Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *American Broadcasting Cos., Inc. v. FCC*, 643 F.2d 818 (D.C. Cir. 1980); see also *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 for all customers of that service 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).

¹⁷ *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

nondominant interexchange carriers are currently required to file tariffs for their interstate, domestic, interexchange services.¹⁸

5. In addition, eleven parties filed petitions requesting that we reconsider or clarify the rules we adopted in the *Second Report and Order*.¹⁹ For the reasons set forth below, we grant requests for reconsideration on three issues. Specifically, we modify the *Second Report and Order* by: (1) adopting permissive detariffing²⁰ for interstate, domestic, interexchange direct-dial services to which end-users obtain access by dialing a carrier's access code (CAC); (2) adopting permissive detariffing for the first 45 days of service to new customers that contact the local exchange carrier (LEC) to choose their primary interexchange carrier (PIC); and (3) eliminating the requirement that nondominant interexchange carriers make publicly available information concerning current rates, terms, and conditions for all of their interstate, domestic, interexchange services, except in the case of dial-around 0+ services from aggregator locations, pursuant to section 226 of the Communications Act.²¹ We deny all of the other petitions for reconsideration. We also make a number of clarifications in this Order on Reconsideration.

¹⁸ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Public Notice, DA 97-493 (rel. Mar. 6, 1997).

¹⁹ The United States Court of Appeals for the District of Columbia Circuit deferred the briefing schedule in the appeal of the rules adopted in the *Second Report and Order* to allow the Commission to act on these petitions for reconsideration. *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Apr. 4, 1997). The court directed the parties to file motions to govern further proceedings 60 days after April 4, 1997. *Id.* The Commission issued a public notice to establish a pleading cycle for the issues raised in the petitions for reconsideration and clarification. The public notice sought comments on or oppositions to the petitions and replies. *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings (rel. Jan. 7, 1997). For convenience, we will cite the parties' filings in these three phases as petitions, comments, and replies, respectively. For a list of parties filing petitions, comments, and replies, see *infra* Appendix A.

²⁰ See *supra* note 5.

²¹ In another proceeding, we are considering the issue of forbearing from applying section 226, which requires operator service providers to file informational tariffs. See *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 (1996); Public Notice, DA 96-1695 (rel. Oct. 10, 1996) (seeking further comment).

II. DETARIFFING ISSUES

A. Forbearance from Tariff Filing Requirements for the Interstate, Domestic, Interexchange Services of Nondominant Interexchange Carriers

1. Background

6. In the *Second Report and Order*, we concluded that the statutory forbearance criteria in section 10²² were satisfied, based on our findings that: (1) 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;²³ (2) tariffs for interstate, domestic, interexchange services of nondominant interexchange carriers are not necessary to protect consumers;²⁴ and (3) complete detariffing of interstate, domestic, interexchange services provided by nondominant interexchange carriers, and not permissive detariffing of such services, is in the public interest.²⁵ We further concluded that the Commission has the authority under section 10 to prohibit carriers from filing tariffs.²⁶ Accordingly, pursuant to section 10, we determined 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, with the limited exception of AT&T's provision of 800 directory assistance and analog private line services.²⁷

2. Positions of the Parties

7. Frontier, Telecommunications Resellers Association (TRA), and Telco petition the Commission to reconsider its decision to adopt complete detariffing, and urge the Commission to adopt permissive detariffing for the interstate, domestic, interexchange services

²² See *supra* note 4.

²³ *Second Report and Order* at 20739-47, paras. 16-28.

²⁴ *Id.* at 20747-53, paras. 29-43.

²⁵ *Id.* at 20753-68, paras. 44-66. We concluded that permissive detariffing of interstate, domestic, interexchange services provided by nondominant interexchange carriers is not in the public interest because it: (1) would not necessarily eliminate possible invocation of the "filed-rate" doctrine; (2) would create a risk that nondominant interexchange carriers would file tariffs to send price signals and to manipulate prices; and (3) would impose administrative costs on the Commission, which must maintain and organize tariff filings for public inspection. *Id.* at 20765-66, paras. 60-62.

²⁶ *Id.* at 20768-72, paras. 67-76.

²⁷ *Id.* at 20773, para. 77; 20785-86, para. 106.

offered by nondominant interexchange carriers.²⁸ TRA further argues that the increased costs and burdens of a complete detariffing regime will adversely affect small and mid-sized nondominant interexchange carriers, which have fewer resources.²⁹ TRA proposes specifically that the Commission adopt permissive detariffing in conjunction with a carrier-administered electronic tariff filing system, thereby relieving the Commission of the burden of administering and maintaining tariff filings.³⁰ AT&T, CompTel, SBC, U S WEST, and WorldCom also support permissive detariffing.³¹

8. AT&T, CompTel, and WorldCom argue that section 10 only authorizes the Commission to refrain from requiring tariffs, and does not empower the agency to prohibit carriers from voluntarily complying with section 203.³² These parties, and others, also challenge the Commission's determination that permissive detariffing is not in the public interest.³³ Specifically, these parties argue that: (1) the "filed-rate" doctrine³⁴ would no longer apply if the Commission adopted a permissive detariffing regime because the tariffed rate would no longer be the only permissible rate;³⁵ (2) even if the "filed-rate" doctrine would continue to apply, that doctrine and carriers' ability to limit their liability through tariff provisions, benefit consumers because the terms of the carrier-customer relationship are certain;³⁶ (3) price coordination would be difficult, if not impossible, with permissive detariffing, because carriers would at best have fragmentary information about their competitors' rates, terms, and conditions;³⁷ (4) requiring nondominant interexchange carriers to make price and service information publicly available allows carriers to coordinate prices as

²⁸ Frontier Petition at 2, 9-11; Telco Petition at 1, 4-6; TRA Petition at 8-16 (supporting mandatory tariffing as the best result, but advocating permissive detariffing over complete detariffing).

²⁹ TRA Petition at 1-2, 4.

³⁰ TRA Petition at 14-16.

³¹ AT&T Petition at 6-7; CompTel Comments at 1-2; SBC Comments at 7-8; U S WEST Comments at 3-6 (advocating permissive detariffing at least until the Commission has an opportunity to determine the law that would govern the legal relationship between carriers and customers in the absence of tariffs); WorldCom Reply at 4.

³² AT&T Petition at 5; CompTel Comments at 3-4; WorldCom Reply at 2-3.

³³ See *supra* note 25.

³⁴ See *supra* para. 3.

³⁵ AT&T Petition at 6; TRA Petition at 12.

³⁶ Frontier Petition at 5-7; SBC Comments at 7.

³⁷ Frontier Petition at 10; TRA Petition at 11; CompTel Comments at 7-8.

easily as with filed tariffs;³⁸ (5) even under a system of permissive detariffing, a carrier could not refuse to accommodate a customer's request for services tailored to its specific needs on the ground that the request is beyond the scope of the carrier's tariff;³⁹ (6) complete detariffing significantly increases transactional and administrative costs, especially for small carriers, by forcing nondominant interexchange carriers to conclude written agreements with every customer and notify them of modifications to the carriers' rates, terms, and conditions;⁴⁰ and (7) permissive detariffing, or even mandatory tariffing, promotes vigorous competition to an even greater extent than complete detariffing, because carriers can react to market conditions quickly and without appreciable costs by filing a new tariff.⁴¹

9. Ad Hoc Users Committee, American Petroleum Institute (API), and the Television Networks oppose the petitions of TRA and Frontier, at least to the extent that they request reconsideration of complete detariffing of individually-negotiated service arrangements.⁴² Ad Hoc Users Committee and API contend that the petitions for reconsideration should be denied because they merely repeat arguments previously made and rejected by the Commission in the *Second Report and Order*.⁴³ In addition, these parties argue that complete detariffing, and not permissive detariffing, of interstate, domestic, interexchange services offered by nondominant interexchange carriers is in the public interest, because: (1) the "filed-rate" doctrine would continue to apply under a system of permissive detariffing;⁴⁴ (2) the "filed-rate" doctrine harms consumers because it allows carriers unilaterally to alter or abrogate agreements;⁴⁵ (3) complete detariffing ensures that carriers would no longer be able to refuse to accommodate a customer's request for services tailored to its specific needs on the grounds that the request conflicts with the carriers' tariffs;⁴⁶ and (4) tariffs delay rapid responses to customer demands.⁴⁷ API further argues that the 1996 Act

³⁸ AT&T Petition at 6; Telco Petition at 5-6; TRA Petition at 11.

³⁹ TRA Petition at 11.

⁴⁰ AT&T Petition at 4; Frontier Petition at 7-9; TRA Petition at 13-14; CompTel Comments at 3, 5-7.

⁴¹ Frontier Petition at 3-5; TRA Petition at 10.

⁴² Ad Hoc Users Committee Comments at 1-2; API Comments at 4, 7; Television Networks Comments at 3-4; API Reply at 5-6.

⁴³ Ad Hoc Users Committee Comments at 1-2; API Comments at 4, 9.

⁴⁴ Television Networks Comments at 4; API Reply at 5-6.

⁴⁵ Ad Hoc Users Committee Comments at 2; API Comments at 5; Television Networks Comments at 4.

⁴⁶ Television Networks Comments at 4.

⁴⁷ *Id.* at 4-5.

gives the Commission authority to prohibit tariff filings.⁴⁸

3. Discussion

10. We deny the petitions of Frontier, Telco, and TRA urging us to adopt permissive detariffing for all interstate, domestic, interexchange services. As discussed *infra*, arguments presented by these petitioners, and others, have persuaded us that permissive detariffing is warranted in certain limited circumstances. Specifically, we find that permissive detariffing is warranted for: (1) interstate, domestic, interexchange direct-dial services to which end-users obtain access by dialing a carrier's CAC (dial-around 1+ services);⁴⁹ and (2) interstate, domestic, interexchange services provided by a nondominant interexchange carrier for the initial 45 days of service or until there is a written contract between the carrier and the customer, in those limited circumstances in which a prospective customer contacts the LEC to select an interexchange carrier or to initiate a PIC change (LEC-implemented new customer services).⁵⁰ Aside from these two limited categories of service, the petitions and comments do not present any arguments that were not considered and addressed in the *Second Report and Order*. Thus, we find no basis upon which to reconsider our determination that the statutory criteria are met for completely detariffing all other interstate, domestic, interexchange services of nondominant interexchange carriers, except for dial-around 0+ services from aggregator locations, pursuant to section 226 of the Communications Act.

11. In the *Second Report and Order*, we extensively considered and rejected the argument that the Commission does not have statutory authority under section 10 to adopt complete detariffing.⁵¹ No new arguments have been presented that persuade us to reconsider our decision. Therefore, we reaffirm our earlier conclusion that Congress, in section 10, provided the Commission with broad forbearance authority that enables the agency to eliminate tariff filings under section 203.

12. In the *Second Report and Order*, we also considered all of the arguments advanced by those parties now urging us to reconsider our determination that permissive detariffing is in the public interest and complete detariffing is not. With the exception of dial-around 1+ services and LEC-implemented new customer services, we affirm our

⁴⁸ API Comments at 9-10.

⁴⁹ A CAC enables callers to reach any carrier (presubscribed or otherwise) from any telephone. During the current transition from five to seven digit CACs, both five digit CACs (10XXX) and seven digit CACs (101XXXX) are in use. On April 11, 1997, the Commission determined that the transition will end on January 1, 1998. See *Administration of the North American Numbering Plan, Carrier Identification Codes (CICs)*, CC Docket 92-237, Second Report and Order, FCC 97-125 (rel. Apr. 11, 1997), *stay and recon. pending*. Thus, after January 1, 1998, only seven digit CACs may be used.

⁵⁰ See *infra* paras. 32, 39.

⁵¹ See *Second Report and Order* at 20768-72, paras. 67-76.

conclusion in the *Second Report and Order* that permissive detariffing of interstate, domestic, interexchange services offered by nondominant interexchange carriers is not in the public interest, for the reasons set forth in our prior order. We are not persuaded that a permissive detariffing regime would eliminate possible invocation of the "filed-rate" doctrine.⁵² In a permissive detariffing regime, a nondominant interexchange carrier may choose to file a tariff for an interstate, domestic, interexchange service, even if the carrier has signed an underlying contract with the customer. If a carrier files a tariff for an interstate, domestic, interexchange service with the Commission, whether on a permissive or mandatory basis, section 203(c) requires the carrier to provide service at the rates, and on the terms and conditions, set forth in the tariff until the carrier files a superseding tariff cancelling, or changing the rates, terms, and conditions of the tariffed offering.⁵³ Thus, if the tariffed rates, terms, and conditions differ from those in the contract, section 203(c), in all likelihood, requires the carrier to provide service at the rates, and on the terms and conditions, set forth in the tariff.⁵⁴ Only with a complete detariffing regime, under which the carrier-customer relationship would more closely resemble the legal relationship between service providers and customers in an unregulated, competitive environment, can we definitively avoid the negative consequences for consumers of the "filed-rate" doctrine.⁵⁵

13. Moreover, we reject carriers' arguments that the "filed-rate" doctrine benefits customers by creating certainty in the carrier-customer relationship.⁵⁶ In fact, the "filed-rate" doctrine creates uncertainty in the carrier-customer relationship. Invocation of the "filed-rate" doctrine can be especially harmful to consumers who have signed long-term service contracts with interexchange carriers. As Ad Hoc Users Committee, API and the Television Networks point out, the doctrine permits interexchange carriers subsequently to file a tariff that differs from the long-term contract, and if justified by substantial cause, unilaterally to alter or abrogate their contractual obligations in a manner that is not available in most commercial

⁵² *Id.* at 20765, para. 60.

⁵³ 47 U.S.C. § 203(c).

⁵⁴ Because the "filed-rate" doctrine is a judicially-created doctrine, the determination of how to apply the doctrine in a permissive detariffing regime when the tariffed rates, terms, or conditions differ from those contained in a contract must necessarily be left to the courts. *See supra* para 3.

⁵⁵ The Common Carrier Bureau, on numerous occasions, has issued Orders Designating Issues for Investigation to examine whether a carrier's proposed unilateral changes in a tariff meet the "substantial cause" standard applied by the Commission. *See AT&T Contract Tariff No. 374*, Transmittal Nos. CT 2952 and CT 3441, Order Designating Issues for Investigation, DA 95-1784 (Com.Car.Bur. rel. Aug. 11, 1995); *AT&T Communications Contract Tariff No. 360*, Transmittal No. CT 3076, CC Docket No. 95-146, Order Designating Issues for Investigation (Com.Car.Bur. rel. Sept. 8, 1995).

⁵⁶ *See Frontier Petition* at 5-7; *SBC Comments* at 7.

relationships and that undermines consumers' legitimate business expectations.⁵⁷ The "filed-rate" doctrine also harms residential and small business consumers who utilize mass market services and do not enter into long-term service arrangements. Such customers may purchase these mass market services in response to representations made by sales agents of the interexchange carrier or advertisements. In addition, such customers may assume the interexchange carrier will not modify its rates without actual notice to the customer. In the event of a dispute about the representations made by a sales agent, or a subsequent modification to an interexchange carrier's rates, terms, or conditions without actual notice to customers, a customer would be bound by the tariffed rates, terms, and conditions.

14. Moreover, we reaffirm our finding that permissive detariffing would facilitate tacit price coordination, because nondominant interexchange carriers could file tariffs to send price signals.⁵⁸ On further reflection, however, we are persuaded by the comments of AT&T, TRA, and Telco, which maintain that complete detariffing, in conjunction with a public disclosure requirement, may not effectively impede tacit price coordination, because a nondominant interexchange carrier's rates, terms, and conditions for its interstate, domestic, interexchange services would still be available to its competitors in one location.⁵⁹ We adopted the public disclosure requirement primarily to aid enforcement of the geographic rate averaging and rate integration requirements of section 254(g).⁶⁰ In response to petitions asking us to reconsider the information disclosure requirements, we determine, as discussed below,⁶¹ that we can effectively meet our obligations to enforce section 254(g) without the public disclosure requirement. We conclude that complete detariffing, without a public disclosure requirement, will more effectively deter tacit price coordination.

15. We recognized in the *Second Report and Order* that complete detariffing would change in significant respects the manner in which nondominant interexchange carriers conduct their business.⁶² We considered the arguments raised by the parties in their petitions for reconsideration and comments regarding costs and administrative burdens associated with complete detariffing that would be avoided if carriers were allowed to file tariffs. With the exception of casual calling services and LEC-implemented new customer services, these arguments either essentially restate claims that were advanced in the initial phase of this

⁵⁷ See Ad Hoc Users Committee Comments at 2; API Comments at 5; Television Networks Comments at 4; see also *Second Report and Order* at 20762, para. 55 & n.162.

⁵⁸ *Second Report and Order* at 20766, para. 61.

⁵⁹ See AT&T Petition at 6; Telco Petition at 5-6; TRA Petition at 11.

⁶⁰ See *Second Report and Order* at 20766, para. 61.

⁶¹ See *infra* paras. 68-69.

⁶² *Second Report and Order* at 20763-64, para. 57.

proceeding in response to the *Notice*⁶³ and were rejected in the *Second Report and Order*, or are new, but unsupported by credible evidence.⁶⁴ For example, Frontier, CompTel and SBC contend, as numerous parties did in earlier comments in this proceeding,⁶⁵ that complete detariffing will increase the costs and administrative burdens on nondominant interexchange carriers because they will have to enter into individually negotiated contracts with every end user in order to establish a binding contractual relationship.⁶⁶ Commenters assert that the costs associated with establishing an enforceable contractual relationship in the absence of tariffs will be "enormous," "significant," and "substantial;" however, they do not provide any evidence in support of these claims.⁶⁷ In short, these parties did not raise any new arguments or provide any credible new evidence concerning the costs of providing interstate, domestic, interexchange service in a detariffed environment, as required by section 405 of the Communications Act.⁶⁸ We, therefore, affirm our conclusion, for the reasons set forth in the *Second Report and Order*, that requiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs.⁶⁹

16. In contrast, parties offered additional credible evidence on reconsideration concerning the costs and burdens to carriers of providing dial-around 1+ services and LEC-implemented new customer services in the absence of tariffs. As discussed below, we reconsider our decision in light of this evidence, and determine that permissive detariffing in these specific, limited instances is in the public interest.⁷⁰ With respect to other interstate, domestic, interexchange services, we affirm our finding that the benefits and pro-competitive effects of complete detariffing outweigh any increased transactional or administrative costs resulting from the shift to complete detariffing.

⁶³ *Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996) (*Notice*).

⁶⁴ See *Second Report and Order* at 20763-64, paras. 57, 58.

⁶⁵ *Id.* at 20755-57, para. 46 & n.126.

⁶⁶ Frontier Petition at 7; CompTel Comments at 3; SBC Comments at 4-5.

⁶⁷ See TRA Petition at 14; CompTel Comments at 4-5.

⁶⁸ 47 U.S.C. § 405. Section 405 states in relevant part: "Reconsideration shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, [or] evidence which has become available only since the original taking of evidence . . . shall be taken on any reconsideration."

⁶⁹ See *Second Report and Order* at 20763-64, para. 57.

⁷⁰ See *infra* paras. 32, 39.

17. Finally, we reject the argument that permissive detariffing or mandatory tariffing would promote competition more effectively than complete detariffing. As discussed above, allowing nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services creates the risk that such carriers will use these tariffs to send price signals in an effort to manipulate prices.⁷¹ Moreover, for the reasons discussed above and in the *Second Report and Order*, requiring nondominant interexchange carriers to conduct their businesses as do other businesses in unregulated markets will not substantially increase their costs.⁷² We, therefore, conclude that complete detariffing of the interstate, domestic, interexchange services of nondominant interexchange carriers is in the public interest, with the exception of dial-around 1+ services, LEC-implemented new customer services and section 226 tariffs associated with dial-around 0+ calls.⁷³

B. Casual Calling Services

1. Background

18. In contrast to other interstate, domestic, interexchange services, casual calling services are those services that do not require the calling party to establish an account with an interexchange carrier or otherwise presubscribe to a service.⁷⁴ We concluded in the *Second Report and Order* that the record did not support a finding that complete detariffing would cause nondominant interexchange carriers to cease offering such services. Rather, we found that nondominant interexchange carriers have options other than tariffs by which they can ensure the establishment of a contractual relationship with casual callers that would legally obligate such callers to pay for the telecommunications service they use and bind them to the carriers' terms and conditions.⁷⁵ We further concluded on the basis of the record before us at

⁷¹ See *supra* para. 14.

⁷² See *supra* para. 15, 16; *Second Report and Order* at 20763-64, para. 57.

⁷³ See *supra* note 22.

⁷⁴ "Casual calling" refers to services such as collect calling, the use of a third-party credit card, or dial-around through the use of an access code. Casual calling does not include services for which customers presubscribe to an interexchange carrier or otherwise establish an account with an interexchange carrier prior to using the service, such as by obtaining a calling card, in advance, from an interexchange carrier. References to casual calling in this reconsideration do not pertain to section 226 informational tariffs.

⁷⁵ *Second Report and Order* at 20764, para. 58. We stated that a casual caller providing billing or payment information, such as a credit card or billing number, and completing use of the telecommunications service, may be deemed to have accepted a legal obligation to pay for any such services rendered. *Id.* We also noted that a carrier could alternatively seek recovery under an implied-in-fact contract theory. *Id.* at para. 58 & n.169. An implied-in-fact contract "refers to that class of obligations which arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. Despite the fact that no words of promise or agreement have been used, such transactions are nevertheless true contracts, and may properly be called inferred contracts or contracts implied in fact." 1 Williston on Contracts, § 1.5, at 20-21

that time that the competitive benefits of complete detariffing of nondominant interexchange carriers' interstate, domestic, interexchange service outweighed any potential increased costs resulting from detariffing such services.⁷⁶

2. Positions of the Parties

19. AT&T, Frontier, Telco, and TRA petition the Commission to reconsider its decision to adopt complete detariffing for casual calling services and argue that the Commission, instead, should allow nondominant interexchange carriers to file tariffs for these services.⁷⁷ CompTel, Television Networks, SBC, Sprint and WorldCom support this request.⁷⁸ TRA and Sprint contend that unlike most other businesses, common carriers are required by statute to provide service upon demand prior to payment for their services.⁷⁹ AT&T argues that allowing nondominant interexchange carriers to file tariffs for casual calling services is the simplest and most efficient means of ensuring a contractual relationship between carriers and casual callers.⁸⁰ These parties, and others, contend that, in the absence of tariffs, carriers would need to develop costly and burdensome mechanisms to ensure the establishment of a legal relationship with casual callers to obligate them to pay for the services they receive and to bind casual callers to the terms and conditions of the service, including limitations on liability.⁸¹

20. Several of these parties also maintain that the alternatives to tariffs that the Commission suggested in the *Second Report and Order* are insufficient to ensure that carriers have a contractual basis for enforcing their rates, terms, and conditions for casual calling

(4th ed. 1990); see also 1 Arthur L. Corbin, et al., *Corbin on Contracts*, § 1.19, at 55-57 (rev. ed. 1993) (stating that an implied-in-fact contract requires the same terms as an express contract and those terms are determined through a process of implication and inference).

⁷⁶ *Id.*

⁷⁷ AT&T Petition at 3, 9-13; Frontier Petition at 9; Telco Petition at 1-6; TRA Petition at 12. AT&T states that it would support reconsideration of the Commission's determination that complete detariffing is within the Commission's authority under the Communications Act and is consistent with the public interest; however, it only seeks limited reconsideration of the *Second Report and Order* at this time. AT&T Petition at 5.

⁷⁸ See CompTel Comments at 9; Television Networks Comments at 5; Sprint Comments at 3-5; SBC Comments at 4. AT&T and WorldCom note that no party filed an opposition to this request. See AT&T Reply at 2; WorldCom Reply at 4.

⁷⁹ TRA Petition at 14; Sprint Comments at 3.

⁸⁰ AT&T Petition at 10; see also Frontier Petition at 9; Telco Petition at 2-4; TRA Petition at 12-13.

⁸¹ AT&T Petition at 10 & n.10; Frontier Petition at 9; Telco Petition at 2-4; TRA Petition at 12-13.

services.⁸² Specifically, these parties assert that neither the implied-in-fact contract theory nor requiring customers to provide credit card information or a billing number guarantees that a carrier will be able to recover its charges for calls made by casual callers, because the carrier will have to demonstrate that the parties agreed upon definite terms.⁸³ AT&T, Sprint, CompTel, and SBC assert that without tariffs, interexchange carriers would have to resort to costly, repetitive, state-by-state litigation to secure payment for services rendered.⁸⁴ They assert that the outcome of such litigation is uncertain, and that the associated costs would inevitably be passed on to consumers.⁸⁵

21. AT&T argues that nondominant interexchange carriers, to ensure the establishment of a contractual relationship with a casual caller, would likely need to provide casual callers with the rates, terms, and conditions, or at a minimum, the option of obtaining the rates, terms, and conditions, prior to completion of the call.⁸⁶ AT&T contends that using a recorded announcement that provides the rates, terms, and conditions of the call would greatly inconvenience callers by adding a delay in call set-up time of between 1.5 and 2 minutes.⁸⁷ AT&T further maintains that even providing casual callers with the option of hearing such information would add between 7 and 9 seconds to the call set-up time.⁸⁸ AT&T argues that this time delay is especially burdensome to the casual caller because in most instances, the caller is placing the call from a telephone away from the home in circumstances that necessitate simplicity, convenience and speed.⁸⁹ Moreover, AT&T contends that these mechanisms would increase by approximately \$0.33 to \$0.77 the cost of each call.⁹⁰ AT&T also argues that computers and fax machines are unable to recognize the

⁸² See Telco Petition at 2-4; TRA Petition at 13; CompTel Comments at 5; Sprint Comments at 3-4; SBC Comments at 3-4.

⁸³ AT&T Petition at 7 n.6; Telco Petition at 3-4; TRA Petition at 12-13; Sprint Comments at 3-5.

⁸⁴ AT&T Comments at 5-6; CompTel Comments at 4-5; Sprint Comments at 5; SBC Comments at 6-7.

⁸⁵ AT&T Comments at 5-6; CompTel Comments at 4-5; Sprint Comments at 5; SBC Comments at 6-7.

⁸⁶ Letter from E. E. Estey, Government Affairs Vice President, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, April 11, 1997 (AT&T April 11 *Ex Parte*); Letter from E. E. Estey, Government Affairs Vice President, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, March 26, 1997 (AT&T March 26 *Ex Parte*).

⁸⁷ AT&T April 11 *Ex Parte*.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* AT&T asserts that the costs would be higher if the nondominant interexchange carrier announces the rates, terms, and conditions and lower if the carrier provides the option of hearing the information. AT&T further argues that it may have underestimated this incremental cost per call, because it was unable to calculate the cost of playing an announcement to dial-around callers. *Id.*

announcement, and, therefore, that any announcement would interfere with a caller's ability to use casual calling services for computer access or sending faxes.⁹¹ AT&T states, further, that an announcement of the rates, terms, and conditions transmitted to a computer or fax machine may be insufficient to create an enforceable contractual relationship with the caller.⁹²

22. AT&T and Sprint also claim that a recorded announcement may not even be an option for callers who use dial-around 1+ services, because interexchange carriers may be unable to distinguish these calls from direct dial 1+ calls placed from telephones presubscribed to that carrier.⁹³ Sprint contends that the technology to distinguish between these two types of calls exists, but that this feature is not universally offered by all LECs.⁹⁴ Sprint and AT&T further argue that the cost of implementing this technology, where available, is significant and inevitably will be passed on to consumers.⁹⁵

23. Several parties state that the increase in costs related to ensuring that a legally enforceable relationship is established with casual callers in the absence of tariffs may make it difficult for carriers effectively to provide casual calling services, and may ultimately result in carriers ceasing to offer these services altogether.⁹⁶

24. Telco and SBC also argue that possible invocation of the "filed-rate" doctrine -- a primary reason the Commission adopted complete detariffing in the *Second Report and Order* -- is not an issue with respect to casual calling services, for which carriers do not

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; Letter from Marybeth M. Banks, Director, Federal Regulatory Affairs, Sprint, to William F. Caton, Acting Secretary, Federal Communications Commission, April 30, 1997 (Sprint April 30 *Ex Parte*); Letter from Marybeth M. Banks, Director, Federal Regulatory Affairs, Sprint, to William F. Caton, Acting Secretary, Federal Communications Commission, March 21, 1997 (Sprint March 21 *Ex Parte*). Direct-dial 1+ calls are those interstate, interexchange calls that an end-user makes using his or her presubscribed interexchange carrier. A caller completes this call by simply dialing 1 before the number being called. In contrast, dial-around 1+ calls are generally those made by end-users to access the interstate, domestic, interexchange services of an interexchange carrier other than the carrier presubscribed to that line. Once an end-user dials a carrier's CAC, the caller is connected to that interexchange carrier, and may place a 1+ (dial-around 1+) or a 0+ (dial-around 0+) call using the services of that interexchange carrier. End-users may use a dial-around service to take advantage of a lower rate offered by a competing interexchange carrier for that specific call, or during outages of its presubscribed interexchange carrier's network.

⁹⁴ Sprint contends that only those LECs with switches capable of providing signalling using Signalling System 7 (SS7) protocol are able to provide this feature. Moreover, Sprint asserts that several LECs that have switches capable of providing SS7 do not offer this feature. Sprint April 30, 1997 *Ex Parte*; Sprint March 21 *Ex Parte*.

⁹⁵ Sprint April 30 *Ex Parte*; AT&T April 11 *Ex Parte*.

⁹⁶ Telco Petition at 1; SBC Comments at 4; *see also* AT&T Comments at 6; Sprint Comments at 5.

negotiate individual contracts.⁹⁷ Frontier and SBC claim, moreover, that contrary to the Commission's conclusions in the *Second Report and Order*, the "filed-rate" doctrine is actually beneficial to consumers because the ability to tariff a service "promotes certainty" in the carrier-customer relationship.⁹⁸ Frontier contends that this certainty is particularly beneficial in situations such as casual calling, where the carrier provides the service prior to establishing an enforceable contractual relationship with the customer.⁹⁹

25. Finally, Western Union urges the Commission to allow nondominant interexchange carriers to file tariffs for consumer messaging services (e.g., telegram services). Western Union advances essentially the same arguments in support of this claim that other parties make in urging the Commission to adopt permissive detariffing for casual calling services.¹⁰⁰ Western Union asserts that customers often convey to Western Union by telephone the message that they want transmitted by telegram. As a result, Western Union contends that it does not have an opportunity to formalize a written contract with the customer that would bind the customer to its terms and conditions.¹⁰¹ Western Union states that although the carrier could provide such information orally at the time the customer telephones Western Union to place an order, such a method of conveying the information would confuse customers, and may not create a legally enforceable contract that effectively limits the carrier's liability.¹⁰² Western Union further contends that if carriers are unable to limit their liability effectively, they may be forced to increase their rates or cease offering consumer messaging services altogether, which would not be in the public interest.¹⁰³

3. Discussion

26. A number of parties urge us to reconsider our decision to adopt complete detariffing for casual calling services in general.¹⁰⁴ Sprint has focused its comments on dial-

⁹⁷ Telco Petition at 5; SBC Comments at 7.

⁹⁸ Frontier Petition at 5-6; SBC Comments at 7.

⁹⁹ Frontier Petition at 6.

¹⁰⁰ Western Union Petition at 1-4. AT&T and CompTel support Western Union's request. AT&T Comments at 5-6; CompTel Comments at 5-6.

¹⁰¹ Western Union Petition at 3.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ AT&T Petition at 3, 9-13; Frontier Petition at 9; Telco Petition at 1-6; TRA Petition at 12; CompTel Comments at 9; Television Networks Comments at 5; SBC Comments at 4.

around 1+ services.¹⁰⁵ After examining additional evidence presented by the parties on reconsideration, we partially grant the petitions and adopt permissive detariffing, on an interim basis, for a subset of casual calling services, specifically, the provision of dial-around 1+ services. For all other types of casual calling services that are the subject of this proceeding, we affirm our determination that complete detariffing is warranted, and, therefore, deny the petitions for reconsideration to this extent.¹⁰⁶

27. We note at the outset that the problems that nondominant interexchange carriers maintain will arise with respect to ensuring the establishment of a contractual relationship with casual callers in a detariffed environment do not arise with calling cards. Because customers obtain calling cards in advance of using the service, the carrier can formalize a contractual relationship at the time the customer obtains the card, rather than at the time the call is placed. Consumers always have the option of obtaining a carrier's calling card to make calls and carriers may choose to advertise calling cards as a preferable alternative to casual calling in a detariffed environment.

28. With the exception of dial-around 1+ calls, discussed *infra*, we affirm our prior finding that nondominant interexchange carriers have reasonable options other than tariffs by which they can ensure the establishment of a contractual relationship with casual callers that would legally obligate such callers to pay for the services they use and bind them to the carrier's terms, and conditions. We recognize that the implied-in-fact contract theory and the provision of credit card information or a billing number, alone, do not guarantee that nondominant interexchange carriers will have an enforceable contract with the casual caller, if the caller does not have knowledge of the carrier's rates, terms, and conditions prior to completion of the call. Interexchange carriers, however, do not dispute that alternatives can be created by which they can establish an enforceable contract with casual callers. One alternative, as discussed by AT&T, is that nondominant interexchange carriers could establish an enforceable contract with casual callers by providing them with the rates, terms, and conditions of the interstate, domestic, interexchange service by operator or recorded announcements prior to completion of the call.¹⁰⁷ The parties acknowledge that an enforceable contract would exist if the rates, terms, and conditions were provided prior to completion of the call.¹⁰⁸ Rather, these carriers argue only that providing such an announcement of rates, terms, and conditions prior to completion of the call would be burdensome to their casual calling customers.¹⁰⁹ Many casual calling services, including

¹⁰⁵ Sprint Comments at 3-5; Sprint April 30, 1997 *Ex Parte*; Sprint March 21 *Ex Parte*.

¹⁰⁶ See *supra* note 22.

¹⁰⁷ See AT&T March 26 *Ex Parte*.

¹⁰⁸ See, e.g., AT&T March 26 *Ex Parte*; Frontier Petition at 9 n.23.

¹⁰⁹ See AT&T Petition at 10 n.10; Frontier Petition at 9 n.23.

collect calling, and calls billed to third-party numbers, however, already require intervention by the interexchange carrier before the call is completed, and nondominant interexchange carriers could provide this announcement at that time. Furthermore, less burdensome alternatives may also be sufficient to ensure the establishment of a contractual relationship. Another alternative discussed by AT&T would be to provide casual callers with the option of obtaining the rates, terms, and conditions prior to completion of the call either through an operator or a recorded announcement.¹¹⁰ We need not address whether this alternative is sufficient to ensure the establishment of an enforceable contract, because, we conclude that providing the rates, terms, and conditions prior to completion of the call would establish an enforceable contract and, as discussed below, is a feasible alternative. Moreover, at a minimum, we agree with Frontier and reaffirm our conclusion in the *Second Report and Order* that if the customer has used the carrier's service with knowledge of the rates, terms, and conditions, nondominant interexchange carriers could seek recovery under an implied-in-fact contract theory.¹¹¹ Thus, we conclude that the fact that a casual caller has not signed a written contract does not preclude a finding that a legally enforceable obligation exists between the nondominant interexchange carrier and the casual caller, especially when the customer has knowledge of the carrier's charges.

29. We recognize that complete detariffing of casual calling services may require nondominant interexchange carriers to modify in significant respects the manner in which these carriers bill and collect charges for their affected services. We further recognize the concerns raised by AT&T and Sprint that the cost of casual calls may increase and that casual callers may experience a delay in call set-up time.¹¹² Nevertheless, we affirm our prior conclusion that the benefits of complete detariffing of casual calling services except dial-around 1+ services are substantial. These benefits include elimination of the possible invocation of the "filed-rate" doctrine,¹¹³ decreased risk of tacit price coordination, and increased rate and service information provided directly to casual callers to ensure that a legal relationship is established between carriers and customers at the time the caller uses the casual calling service. In our view, these benefits outweigh the increased costs and delays in call set-up time that AT&T and Sprint claim will result from complete detariffing. In addition, we reiterate that casual callers always have the option of obtaining and using an interexchange carrier's calling card, thereby avoiding any increased cost or delay.

30. We also recognize AT&T's concern that complete detariffing of casual calling services would impede the use of certain casual calling arrangements for calls originated by

¹¹⁰ See AT&T April 11 *Ex Parte*; AT&T March 26 *Ex Parte*.

¹¹¹ See Frontier Petition at 9 n.23; *Second Report and Order* at 20764, para. 58 & n.169.

¹¹² AT&T April 11 *Ex Parte*; Sprint April 30 *Ex Parte*.

¹¹³ As discussed below, we reject the argument that possible invocation of the "filed-rate" doctrine does not have a negative impact on casual callers. See *infra* para. 31.

computers and fax machines, because the computer or fax machine would not recognize the announcement, thereby interfering with the call, and because an announcement transmitted to a computer or fax machine may be insufficient to establish an enforceable contract.¹¹⁴ AT&T, however, overstates the problem. Casual calling services such as collect calling, and calls billed to third-party numbers presently require intervention by the interexchange carrier before the call is completed. Likewise, use of a third-party credit card often requires interaction with the carrier to provide the credit card information. Thus, the use of a recorded announcement in a detariffed environment will not significantly alter the current requirement of intervention by the interexchange carrier.¹¹⁵ Concededly, there may be situations where callers using third-party credit cards may be able to enter their credit card information electronically by swiping the card prior to beginning a call, and that in the absence of tariffs, these customers may face an additional announcement of rates, terms, and conditions. We nevertheless find that the negative consequences to the limited number of those casual callers who may use third-party credit cards for computer access and fax machines do not warrant reconsideration of our decision to detariff completely casual calling except dial-around 1+ services in light of the benefits of complete detariffing of such casual calling services¹¹⁶ and the fact that most casual calling services already require intervention by an interexchange carrier. Moreover, casual callers who now use third-party credit cards for computer access and fax machines can avoid the announcement of rates, terms, and conditions by obtaining in advance and using an interexchange carrier's calling card. As discussed above, an interexchange carrier can establish an enforceable contract with customers at the time they obtain the calling card, rather than when the call is placed.

31. We also reject Telco's and SBC's argument that, because carriers do not negotiate individual contracts with casual callers, possible invocation of the "filed-rate" doctrine is not a concern for casual callers. Although we agree with Telco and SBC that generally the "filed-rate" doctrine is an issue when a tariffed rate, term, or condition differs from a rate, term, or condition in a contract, invocation of the "filed-rate" doctrine may also harm casual callers. Customers may use a casual calling service in response to an advertisement or direct solicitation, which may provide rates, terms, and conditions for the interstate, domestic, interexchange casual calling service. If the interexchange carrier modifies these rates, terms, or conditions in the future, the consumer would be bound by the tariffed rates, terms, and conditions, even if the consumer did not receive actual notice of the modification. In the absence of tariffs, consumers will likely receive, or have the option of receiving, current information on the rates, terms, and conditions for the specific service they are about to use, because nondominant interexchange carriers will likely disclose such

¹¹⁴ AT&T April 11 *Ex Parte*.

¹¹⁵ One casual calling service that does not require intervention with the interexchange carrier prior to completion of the call is dial-around 1+ service. As discussed *infra*, we are permitting carriers to file tariffs for dial-around 1+ service through use of a carrier's CAC.

¹¹⁶ See *supra* para. 29.

information to the casual caller in order to ensure the establishment of a contractual relationship.

32. While we continue to require complete detariffing for casual calling services in general, we adopt permissive detariffing for dial-around 1+ services using a nondominant interexchange carrier's access code. We are persuaded that the means of ensuring the establishment of an enforceable contract with customers of other casual calling services cannot be implemented currently for dial-around 1+ services, because, as explained below, the interexchange carrier does not have the ability reasonably to distinguish a caller using dial-around 1+ services from direct dial 1+ services, as required to provide the dial-around 1+ caller with the rates, terms, and conditions prior to completion of the call.¹¹⁷

33. Sprint and AT&T have presented evidence that the technology to distinguish dial-around 1+ calls from direct dial 1+ calls placed from telephones presubscribed to an interexchange carrier is not universally offered by all LECs either because some LEC switches are not capable of providing signalling using SS7, which is necessary to provide this feature, or because some LECs have chosen not to offer the technology needed to distinguish dial-around 1+ calls from direct dial 1+ calls.¹¹⁸ Sprint's and AT&T's unchallenged representations, which were not in the record when we considered casual calling services in the *Second Report and Order*, lead us to find that adoption of complete detariffing at this time for dial-around 1+ services would not be in the public interest. Such a regime would impose substantial costs and burdens on nondominant interexchange carriers that offer dial-around 1+ services and their customers. The rates, terms, and conditions of services provided to presubscribed direct dial callers often differ from those provided to casual callers using a dial-around 1+ service. Because nondominant interexchange carriers would not always be able to distinguish between these two types of calls, they would not always be able to determine the rates, terms, and conditions for a particular call at the time the call is placed. Moreover, the inability of nondominant interexchange carriers to distinguish between these

¹¹⁷ We note that this issue is not a concern for dial-around 0+ calls from aggregator locations, because those calls require intervention between the carrier and customer, at which time the carrier can establish a contractual relationship with the customer. We further note that not all dial-around 1+ calls are from casual callers. Presently, some customers may need to dial their presubscribed interexchange carrier's access code to use that carrier's interstate, domestic, interexchange services, rather than the caller's LEC, for interstate, intraLATA calls. After February 8, 1999, however, customers will no longer need to dial their presubscribed interexchange carrier's access code to use that carrier's interstate, domestic, interexchange services because LECs are required to institute dialing parity and allow customers to select a PIC for intraLATA toll calling by then. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, CC Docket Nos. 96-98, 95-185, NSD File No. 96-8, CC Docket No. 92-237, IAD File No. 94-102, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 at para. 62 (1996).

¹¹⁸ AT&T April 11 *Ex Parte*; Sprint April 30 *Ex Parte*; Sprint March 21 *Ex Parte*; see also *supra* note 94.

two types of calls would require these carriers to implement for dial-around 1+ callers and direct dial 1+ callers the recorded announcement of the rates, terms, and conditions or other means adopted by such carriers to ensure a contractual relationship with dial-around 1+ callers. Such a recorded announcement may confuse direct dial 1+ customers. Further, the increased costs and the delay in call set-up time that AT&T and Sprint contend are attendant with ensuring the establishment of a contractual relationship would likely be imposed on both dial-around 1+ calls and direct dial 1+ calls from a presubscribed telephone line. We find that imposing these increased costs and delays in call set-up time on both dial-around 1+ callers and customers using a direct dial 1+ service from a telephone line presubscribed to that carrier -- in all likelihood, the majority of calls over that line -- would impose an unreasonable burden on consumers using direct dial 1+ services from their PIC.¹¹⁹ We reach this conclusion because the volume of direct dial 1+ calls from a PIC is vastly larger than the volume of dial-around 1+ calls, and therefore, the costs and burdens associated with providing an announcement of rates, terms, and conditions for dial-around 1+ callers would be imposed on this much larger group. In contrast, the increased costs and delays in call set-up time for other casual calling services would be imposed only on those customers using that particular casual calling service, and the benefits of completely detariffing those casual calling services outweigh the costs, as discussed above.

34. We recognize that nondominant interexchange carriers, to avoid burdening their presubscribed customers, could decide not to provide an announcement of rates, terms, and conditions prior to completion of dial-around 1+ calls. In this circumstance, as in any circumstance where there is no contract, the carrier, at a minimum, could seek to recover under a theory of quantum meruit¹²⁰ for the value of its services. Because we appreciate the somewhat greater burden of pursuing a collection action when only a quantum meruit theory of recovery is available, however, we find that allowing nondominant interexchange carriers to file tariffs for dial-around 1+ services at this time is in the public interest. We are also concerned that nondominant interexchange carriers, to avoid imposing these costs and delays on their presubscribed customers, may decide not to offer a dial-around 1+ service option.¹²¹ Such a result would limit consumers' choices, and, therefore, would also not be in the public interest.

35. We realize that the unique problems created by dial-around 1+ services as they

¹¹⁹ We note that these concerns do not arise with respect to dial-around 0+ calls from aggregator locations, because such calls always require intervention by the interexchange carrier and, therefore, implementation of a recorded announcement or some other means of providing customers with the rates, terms, and conditions of the call would not affect consumers making calls other than dial-around 0+ calls.

¹²⁰ Quantum meruit is an "equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor." Black's Law Dictionary 1243 (6th ed. 1990).

¹²¹ See Telco Petition at 2; Sprint Comments at 4-5.

are presently handled could be eliminated if we were to require LECs to deploy universally switches capable of providing SS7. We are not requiring LECs to take such measures in this Order on Reconsideration. A significant number of LEC switches do not presently have SS7 capability,¹²² and we do not have an adequate record in this proceeding to evaluate the costs that such a decision would impose on LECs. We note, however, that LECs have been rapidly deploying switches capable of providing SS7,¹²³ and therefore, the unique technological concerns about the ability to distinguish between dial-around 1+ calls and direct dial 1+ calls from presubscribed customers will not be an issue in the near future. Once LECs universally deploy switches that are capable of providing SS7, we will reexamine this issue to determine whether we will completely detariff dial-around 1+ services for the same reasons that we determine that complete detariffing of other casual calling services is in the public interest. In the meantime, we conclude that permissive detariffing of dial-around 1+ services offered by nondominant interexchange carriers is in the public interest as an interim measure. In addition, we strongly encourage nondominant interexchange carriers to provide dial-around 1+ services on a detariffed basis as soon as they have the capability to do so.¹²⁴

36. We recognize that adopting permissive detariffing for dial-around 1+ services may raise concerns about invocation of the "filed-rate" doctrine for customers of these services. Due to the unique technological concerns with dial-around 1+ services that prevent the interexchange carrier from reasonably being able to provide the dial-around 1+ caller with the rates, terms, and conditions prior to completion of the call, discussed above, we conclude, on balance, that the costs to consumers of adopting complete detariffing for dial-around 1+ services outweigh the benefits of complete detariffing with respect to this particular type of service.

C. Initial Period of Service to Presubscribed Customers

1. Background

37. The *Second Report and Order* did not specifically address whether complete detariffing is in the public interest with respect to the provision of interstate, domestic, interexchange service to new customers that select and use an interexchange service before receiving information about the rates, terms, and conditions of that service. None of the

¹²² See Report, *Infrastructure of the Local Operating Companies Aggregated to the Holding Company Level*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission at table 10(a) (rel. Mar. 13, 1997), indicating that as of 1995, approximately 27 percent of LEC switches did not have SS7 capability. The rate at which these switches are upgraded to include SS7 capability, however, is increasing each year. In 1991 only 25% of LEC switches had SS7 capability. *Id.*

¹²³ *Id.*

¹²⁴ Because we are adopting permissive detariffing for dial-around 1+ services, we need not address concerns raised by Sprint that the "bad debt ratio" is higher for dial-around 1+ calls than for calls from presubscribed customers. Sprint April 30 *Ex Parte*.

comments filed in response to the *Notice* raised this issue.

2. Positions of the Parties

38. AT&T contends that we should permit carriers to file tariffs that are effective for the initial 45 days of service to residential and small business customers, or until a contract with the new customer is consummated, whichever is earlier.¹²⁵ AT&T claims that many of the concerns carriers raise with respect to casual calling services in a detariffed environment are also relevant with respect to presubscribed customers during the initial period of service. AT&T states that, absent tariffs, nondominant interexchange carriers will be required to provide service to new customers prior to the formalization of a contractual relationship during the period: (1) after the customer contacts the LEC to designate an interexchange carrier or initiate a PIC change, but before the nondominant interexchange carrier is able to ensure the establishment of an enforceable contractual relationship; and (2) when the customer contacts the interexchange carrier or its marketing agents directly, but before the contract can be prepared and mailed to the customer.¹²⁶ AT&T contends that in both situations, tariffs are the only means by which the interexchange carrier can enforce its rates, terms, and conditions and limit its liability before a contract is finalized, without resort to costly, repetitive litigation.¹²⁷ AT&T concludes that permitting nondominant interexchange carriers to file tariffs before they have an opportunity to finalize a written contract with a new customer will not adversely affect consumers because market forces will ensure that the filed rates, terms, and conditions will be just, reasonable, and nondiscriminatory, and the Commission's complaint process is available as an additional safeguard.¹²⁸ Several commenters support AT&T's request.¹²⁹

3. Discussion

39. We grant, in part, AT&T's petition for reconsideration urging us to adopt permissive detariffing for the initial 45 days of nondominant interexchange carriers' provision of interstate, domestic, interexchange mass market services to new residential and business customers, or until a written contract is consummated, whichever is earlier. We find, based on the evidence presented by the parties, that permitting interexchange carriers to file tariffs to cover the provision of service during this period is in the public interest in the limited circumstance when a new customer contacts the LEC to select an interexchange carrier or to

¹²⁵ AT&T Petition at 9, 11-12 & n.12.

¹²⁶ AT&T Petition at 11-12 & n.11. *See also* Sprint Comments at 6.

¹²⁷ AT&T Petition at 11-12. *See also* CompTel Comments at 4-5, 9.

¹²⁸ AT&T Petition at 13.

¹²⁹ CompTel Comments at 9; SBC Comments at 3-4; Sprint Comments at 5; Television Networks Comments at 5; WorldCom Reply at 4. No commenters opposed AT&T's request. *See* WorldCom Reply at 4.

initiate a PIC change. We expect each LEC to process service requests promptly. Interexchange carriers are reminded that during the effective period of their tariffs, they must make their services generally available to all similarly-situated customers, pursuant to section 202(a).¹³⁰ We conclude, however, that the interexchange carriers have not demonstrated that this exception to our detariffing policy should be extended to the initial period of service to a new customer when the customer directly contacts the interexchange carrier or its marketing agents.

40. We find persuasive AT&T's argument that when a residential or small business customer contacts the LEC in order to presubscribe to an interexchange carrier or initiate a PIC change,¹³¹ the selected interexchange carrier, because it does not have direct contact with the customer, may be unable immediately to ensure that a legal relationship is established with that customer. AT&T presented evidence establishing that: (1) it takes some LECs up to 60 days to notify AT&T of the PIC designation;¹³² (2) AT&T, because of the enormous churn rate in the industry, processes in excess of 30 million PIC changes or requests annually (an average of more than 600,000 requests per week);¹³³ and (3) an additional two weeks may elapse after AT&T receives notice that it has been designated as a customer's PIC before contract information is mailed to that customer.¹³⁴ Thus, during some initial period after interexchange service is established, carriers may be providing interstate, domestic, interexchange service to new customers without adequate assurance that the carriers' rates, terms, and conditions will be legally enforceable, and as a result, may be required to seek recovery of unremitted charges under alternative equitable theories, as discussed above.¹³⁵

¹³⁰ During the effective period of a tariff, interexchange carriers are required, pursuant to section 201(a), to make all efforts to provide service quickly, even under protest. *See In the Matter of Hawaiian Telephone Company*, 78 F.C.C. 2d 1062, 1065 (1980). Carriers are also bound by section 201 when providing service pursuant to individually-negotiated contracts.

¹³¹ We note that residential and small business customers that contact the LEC to presubscribe to an interexchange carrier or initiate a PIC change are generally those customers that utilize mass market services.

¹³² The 45-day period during which we are allowing permissive detariffing was requested by the parties. Although AT&T asserts that it takes LECs up to 60 days to notify it of a PIC change, AT&T's petition for reconsideration requests only that we adopt permissive detariffing for at most 45 days to enable it to formalize a contract. *See* AT&T Petition at 9, 11-12 & n.12. Other parties supported AT&T's request. *See supra* note 129. AT&T subsequently clarified that allowing interexchange carriers to file tariffs that are applicable for a maximum of 45 days after the customer begins taking service would provide the interexchange carrier a sufficient amount of time to establish a contractual relationship with the customer in almost all cases. Letter from E. E. Estey, Government Affairs Vice President, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, July 16, 1997.

¹³³ AT&T does not specify whether these PIC changes are initiated by residential customers, small business customers, or both.

¹³⁴ AT&T Petition at 11.

¹³⁵ *See supra* para. 34.