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August 20, 1998

EX PARTE OR LATE FILED

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Via Hand Delivery

Magalie Romas Salas
Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

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AUG 20 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **EX PARTE**

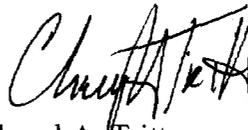
*Policy and Rules Concerning the Interstate, Interexchange Marketplace;
Implementation of Section 254(g) of the Communications Act of 1934, as
amended, CC Docket No. 96-61*

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. § 1.1206, I hereby notify you that the attached *ex parte* letter was submitted on Thursday, August 20, 1998 to the Office of General Counsel.

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, an original and two copies of this letter are being submitted to the Office of the Secretary for inclusion in the public record. Please direct any questions or concerns to the undersigned.

Sincerely,



Cheryl A. Tritt
Counsel for Telecommunications Management
Information Systems Coalition

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Via Hand Delivery

Christopher J. Wright
General Counsel
Federal Communications Commission
1919 M Street, N.W. - Room 614
Washington, D.C. 20554

Re: **EX PARTE**

*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*

Dear Mr. Wright:

At our July 27, 1998, *ex parte* meeting in the above-referenced proceeding,¹ we discussed whether the retention of a public disclosure requirement for rates for mass market interstate, domestic, interexchange service offered by nondominant interexchange carriers could invoke the filed rate doctrine. The Telecommunications Management Information Systems Coalition ("Coalition") and TRAC have researched this issue further and remain convinced that retaining a public disclosure requirement, as urged by the Coalition, TRAC and multiple other parties, will not implicate the filed rate doctrine. As discussed further below, in applying the controlling Supreme Court decision² on this issue, rates provided pursuant to a public disclosure requirement would not be subject to the filed rate doctrine because they do not meet the definition of a tariff. Moreover, the recent Supreme Court decision in *AT&T v. Central Office*³ addressing the filed rate doctrine does not alter this analysis.

¹ See Letter from Cheryl A. Tritt, Counsel for the Telecommunications Management Information Systems Coalition, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-61 (July 28, 1998).

² *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431 (1994) ("*Security Services, Inc.*").

³ *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S. Ct. 1956 (1998) ("*AT&T v. Central Office*").

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Under the filed rate doctrine, once a tariff has been filed, it exclusively controls the rights and liabilities of the parties. A carrier is precluded from negotiating a rate with a customer that differs from the published tariff.⁴ These published tariffs must specify the charges for service and the “classifications, practices, and regulations affecting such charges.”⁵ The Supreme Court has held, however, that the filed rate doctrine applies only to legally effective tariffs that have been filed with the appropriate regulatory agency.⁶ Thus, a “tariff” that does not comply with the governing regulations is not a tariff that can be enforced under the filed rate doctrine. The pricing information that the Coalition and TRAC urge the nondominant IXCs to make publicly available falls far short of a complete statement of the rates and charges, and the classifications, practices, and regulations affecting such rates and charges. Therefore, they are not tariffs, and the filed rate doctrine would not apply to such disclosure.

The Supreme Court addressed the question of what constitutes a tariff in *Security Services, Inc.* ICC regulations in effect at the time required a regulated motor carrier to file its rates with the ICC. Under the ICC regulations, a rate based on mileage, which Security Services (“Security”) chose to file in this case, had to state both the rate per mile and the distance between shipping points. Security filed a tariff that specified the rates to be charged but that did not include a list of distances. Instead, Security chose to provide the distances between relevant points by reference to a mileage guide (“Guide”). The Guide was a separate tariff published on behalf of a number of participating carriers. In order to participate in the Guide, a carrier had to pay a nominal fee and issue a power of attorney. Security initially participated in the Guide but that participation was subsequently cancelled for its failure to pay the required fee. Under ICC regulations, this cancellation rendered Security’s tariff void because it was incomplete.

Subsequent to the cancellation of Security’s participation in the Guide, Security negotiated a transportation contract with Kmart. The Kmart rate was below that specified in Security’s rate filing with the ICC. Kmart shipped goods with Security and paid the contract rate. Security subsequently filed for bankruptcy. The bankruptcy trustee then sought to recover the difference between the contract rate and the tariff rate pursuant to the filed rate doctrine. Kmart refused to pay the difference between the two

⁴ See *id.* at 1964 (customer may not rely on terms of contract or verbal assurances if terms differ from those set forth in tariff); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (rate duly filed by carrier is only lawful charge; deviation is not permitted).

⁵ 47 U.S.C. § 203(a).

⁶ See *Security Services, Inc.*, 511 U.S. at 444 (“Trustees in bankruptcy and debtors-in-possession may rely on the filed rate doctrine to collect for undercharges, (citation omitted), but they may not collect for undercharges based on filed, but void, rates.”).

rates, arguing that because Security's participation in the Guide was cancelled, its filings did not constitute a tariff under ICC regulations.⁷ Consequently, Kmart argued that the filed rate doctrine did not apply and the carrier was not entitled to collect any undercharges. The Supreme Court agreed, holding that the filed rate doctrine applies only to valid tariffed rates.⁸

The standard enunciated in *Security Services, Inc.* strongly supports the view that retaining a public disclosure requirement for nondominant IXC rates will not invoke the filed rate doctrine. Specifically, Federal Communications Commission ("Commission") regulations require that tariffs, pursuant to Part 61 of the Code of Federal Regulations must be "on file with the Commission and in effect"⁹ and "must conform to the rules [of Part 61]."¹⁰ Pricing information provided at a nondominant IXC's place of business or posted on an Internet website pursuant to a public disclosure requirement, however, is not "on file with the Commission and in effect," does not conform to Part 61 rules, and therefore, does not fit the definition of a tariff.¹¹ Thus, the filed rate doctrine will not apply to rate information provided under a public disclosure requirement, as proposed by the Coalition, TRAC and multiple other parties in this proceeding.

The Court's recent decision in *AT&T v. Central Office* does not affect the analysis. In that case, the Court held that billing and provisioning were subjects covered by the tariff at issue, and the filed rate doctrine therefore prevented a customer from relying on the terms of a contract or verbal assurances of a sales representative if those terms differed from those terms set forth in the tariff.¹² Because the pricing information to be provided by nondominant IXC's would not be valid tariffs, *AT&T* would not apply. Rather, the holding in *Security Services* would control.

⁷ See *id.* at 442.

⁸ See *id.* at 437.

⁹ 47 C.F.R. § 61.1(c).

¹⁰ 47 C.F.R. § 61.1(b).

¹¹ Given that the Communications Act of 1934, as amended, does not explicitly define a tariff, a Commission definition of the term would be given "controlling weight" by a court unless that determination is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). See also *Udall v. Tallman*, 390 U.S. 1, 16 (1965) (agency interpretation of agency regulations entitled to even greater deference than agency interpretation of ambiguous statutory terms).

¹² See *AT&T v. Central Office*, 118 S. Ct. 15 1964.

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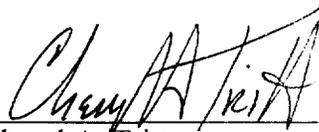
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Please do not hesitate to contact the undersigned if you have further questions.

Very truly yours,



Andy Schwartzman
Cheryl A. Leanza
Media Access Project
Counsel for TRAC



Cheryl A. Tritt
Bradley S. Lui
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