

ORIGINAL

MORRISON & FOERSTER LLP

ATTORNEYS AT LAW

SAN FRANCISCO
LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
DENVER

2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
WASHINGTON, D.C.
LONDON
BRUSSELS
HONG KONG
SINGAPORE
TOKYO

EX PARTE RATE FILED

August 26, 1998

Writer's Direct Dial Number
(202) 887-1510

Via Hand Delivery

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

RECEIVED

AUG 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **EX PARTE**
CC Docket No. 96-61

Dear Ms. Salas:

Yesterday, August 25, 1998, Emmitt Carlton, Senior Consultant for Telecommunications Research and Action Center ("TRAC"); Andrew Schwartzman and Cheryl Leanza of the Media Access Project, on behalf of TRAC; Telecommunications Management Information Systems Coalition ("Coalition") members, David Joseph of Salestar; Kimberly Russo of Tele-Tech Services; and Brian Soper of CCMI; and the undersigned on behalf of the Coalition, met with Kathryn Brown, Common Carrier Bureau Chief, and Blaise Scinto, Andrea Kearney and Aaron Goldschmidt of the Common Carrier Bureau staff, to discuss the above-captioned proceeding.

We focused on several points during the discussion: (1) consumers and small businesses continue to require access to full pricing information for domestic interexchange carrier services and should not have to rely solely on billing or advertising information; (2) price collusion should not be a concern in a robustly competitive long distance market; (3) any risk of collusive pricing is muted by Sections 201-202 of the Communications Act of 1934, as amended, and the federal and state antitrust laws; and (4) a public disclosure requirement for domestic, mass market interexchange service rates will not invoke the filed rate doctrine. The discussion otherwise was restricted to arguments made in the parties' respective filings submitted in the above-captioned proceeding and in the attached documents.

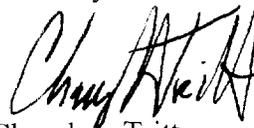
Number of Copies retained 022
DATE

MORRISON & FOERSTER LLP

Ms. Magalie Roman Salas
August 26, 1998
Page Two

Two copies of this letter have been submitted to the Secretary of the Commission for inclusion in the public record, as required by Section 1.1206(b)(2) of the Commission's rules.

Sincerely,



Cheryl A. Tritt
Counsel for Telecommunications
Management Information Systems Coalition

Attachments

cc: Kathryn Brown (w/o attachments)
Blaise Scinto (w/o attachments)
Andrea Kearney (w/o attachments)
Aaron Goldschmidt (w/o attachments)

TARIFF FORBEARANCE
CC Docket No. 96-61
AUGUST 25, 1998
EX PARTE PRESENTATION

TMIS and TRAC

- The Telecommunications Management Information Systems Coalition is composed of three companies formed for the purpose of participating in this proceeding -- Salestar, CCMI and Tele-Tech. These companies are small businesses of long standing that have provided essential pricing information to their customers for the past 10-25 years. They all gather on behalf of their customers publicly available pricing information and then abstract this information or create databases and various software pricing tools utilizing this information.
- Telecommunications Research Action Center is a tax-exempt consumer education and advocacy organization based in Washington, DC. For the last ten years, TRAC has published *Tele-Tips*, a periodic newsletter that provides comprehensive consumer information and rate comparisons on interstate long distance telephone service.

FCC ACTION SOUGHT

The Coalition and TRAC urge the Commission to reinstitute its earlier-adopted public disclosure requirement for mass market services.

- Elimination of the information disclosure requirement is contrary to the public interest.
- Without information, consumers cannot obtain sufficient information to make informed decisions about complex choices available from multitude of carriers.
- Small to medium-sized business and residential customers especially need this information given the difficulty of obtaining it independently.
- Information gathered and distributed to customers by the Coalition includes not only rates, but also charges such as the SLC, PICC, and Universal Service pass-through, which is helpful for both consumers and regulators, because without tariffs, these charges (and their calculation methodologies) are not always transparent on customer bills. TRAC collects and distributes similar information to consumers.

Contrary to FCC's conclusion, billing and marketing materials are not sufficient.

- Billing information is available only to existing customers, not potential customers making initial service decisions.
- Bills are notoriously inaccurate and difficult to understand -- a National Regulatory Research Institute study shows between 20-25% of survey respondents reported billing errors in past 12 months, with a majority involving long distance billing problems.
- Marketing materials are incomplete at best, because carriers advertise only the services they have targeted for specific customers.
- Marketing materials are inaccurate or confusing at worst. A National Consumers League study showed 71% of survey participants found telecommunications advertising to be "confusing," with 28% finding it "very confusing."

Without consumer disclosure information, the FCC will be unable to enforce Section 254(g).

- FCC's initial decision concluded that publicly available information was necessary for this purpose, and that carrier certifications were insufficient.
- Without additional information on record, FCC reversed course.
- Although FCC and state agencies can still obtain this information, they have limited resources and still rely upon public as guardians of complaint process.
- Many states that have implemented partial detariffing have continued to require some sort of price list, e.g., Delaware, Oregon, Arizona, New Mexico, Colorado, Washington, and Connecticut, which indicates that the availability of this information still serves important enforcement purposes.
- At same time as information is limited, FCC has raised the threshold for pleading formal complaints, further limiting likelihood of effective enforcement by public.

FCC concerns about price coordination are not eliminated by abandoning the information disclosure requirement.

- In a competitive market more information helps the market to function more efficiently. The FCC has long characterized the long distance market as robustly competitive.
- FCC also acknowledged that large and sophisticated competitors will still be able to obtain each other's pricing information. Elimination of information disclosure thus fails to address any threat (if any exists) of price collusion but definitely deprives consumers served by TRAC of access to this important information.
- Disclosure of actual current prices is highly unlikely to serve as a vehicle to coordinate prices in any event because it provides no advance assurance that competitors would follow any price increase. For example, when DOJ investigated and settled allegations of airline price fixing, the settlement prohibited the dissemination of pricing information for fares that were not currently for sale, but it permitted the continued dissemination of current fares.
- Any remaining hypothetical risk of collusive pricing is diminished by availability of Section 201 of the Act and federal and state antitrust laws, upon which the Commission has consistently relied. Reliance on these remedies can mute any remaining risks of collusion without depriving consumers of access to important information.

Consumer information disclosures do not implicate the filed rate doctrine.

- As the accompanying memo demonstrates, rates provided pursuant to a public disclosure requirement do not meet the definition of a tariff under Supreme Court analysis.

RECEIVED

AUG 20 1998

MORRISON & FOERSTER LLP

ATTORNEYS AT LAW

SAN FRANCISCO
LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
DENVER

2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
WASHINGTON, D.C. FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
LONDON
BRUSSELS
HONG KONG
SINGAPORE
TOKYO

August 20, 1998

Writer's Direct Dial Number
(202) 887-1510

Via Hand Delivery

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

STAMP
&
RETURN

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

MORRISON & FOERSTER LLP

ATTORNEYS AT LAW

SAN FRANCISCO
LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
DENVER

2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
WASHINGTON, D.C.
LONDON
BRUSSELS
HONG KONG
SINGAPORE
TOKYO

August 20, 1998

Writer's Direct Dial Number
(202) 887-1510

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*").

MORRISON & FOERSTER LLP

Christopher J. Wright

August 20, 1998

Page Two

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.").

Christopher J. Wright
August 20, 1998
Page Three

MORRISON & FOERSTER LLP

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.

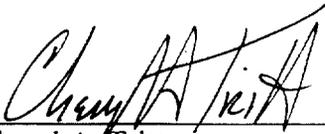
Christopher J. Wright
August 20, 1998
Page Four

MORRISON & FOERSTER LLP

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
Counsel for Telecommunications
Management Information Systems Coalition


Emmitt Carlton
Counsel for TRAC

cc: David Solomon
John Engle
Richard Welch
Kathryn Brown
Carol Matthey
Melissa Newman