

Federal Communications Commission

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

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)

SECOND ORDER ON RECONSIDERATION AND ERRATUM

Adopted: March 18, 1999

Released: March 31, 1999

By the Commission: Commissioners Ness and Tristani issuing separate statements;
Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. SECOND ORDER ON RECONSIDERATION

A. Overview

1. In this Second Order on Reconsideration, we consider again whether nondominant interexchange carriers (IXCs)¹ should be required to make available to the public information concerning the rates, terms, and conditions for all of their interstate, domestic, interexchange services.² Like other common carriers, IXCs historically have been required to file tariffs with the appropriate regulatory body (this Commission, in the case of interstate services) establishing the rates, terms, and conditions of service.³ The tariff does not simply serve as a public source of such information; under the judicially created "filed-rate" doctrine, the tariffed rate for a service is the only lawful rate that the carrier may charge for that service.⁴ Even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the tariffed rate.⁵ When a single carrier dominated the interstate, interexchange market, tariffing was an effective tool for ensuring compliance with various common carrier requirements, including rules that require nondiscrimination among customers.

¹ The rules established in this order, like those in the *Second Report and Order* in this proceeding, apply only to nondominant IXCs and do not apply to commercial mobile radio service (CMRS) providers. *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, Report and Order, 11 FCC Rcd 9564 (1996) (adopting rules implementing the rate averaging and rate integration requirements of section 254(g)) (*Rate Averaging and Rate Integration Requirements Order*), Second Report and Order, 11 FCC Rcd 20730 (1996) (*Second Report and Order*), stay granted, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997), Order on Reconsideration, 12 FCC Rcd 15014 (1997) (*Order on Reconsideration*). The Commission forbore from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers and temporarily forbore from requiring or permitting CMRS providers to file interstate access tariffs. *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Service*, GEN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480 (1994).

² In this order, we also refer to this requirement as the "public disclosure requirement."

³ See 47 U.S.C. § 203.

⁴ The United States Supreme Court recently held that the filed-rate doctrine preempted a carrier's state-law contract claims for provisioning and billing of tariffed services. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). For a discussion of the "filed-rate" doctrine, see *Second Report and Order*, 11 FCC Rcd at 20754, 20762, paras. 45 n.122, 55.

⁵ *Kansas City Southern R. Co. v. Carl*, 227 U.S. 639, 653 (1913). For a detailed discussion of the harmful effects of the "filed-rate" doctrine on consumers, see *Second Report and Order*, 11 FCC Rcd at 20762, para. 55. For arguments that complete detariffing would eliminate the possible invocation of the "filed-rate" doctrine, see, e.g., Ad Hoc Telecommunications Users Committee *Second Report and Order Reply* at 4-6; American Petroleum Institute *Second Report and Order Comments* at 8-9; General Services Administration *Second Report and Order Comments* at 8-9.

2. With the advent of competition in the provision of interstate, interexchange services, however, tariffing became less beneficial and, in some ways, harmful to consumers. The Commission previously has concluded that tariffing can discourage competitive pricing, restrict the flexibility of carriers seeking to offer service arrangements tailored to an individual customer's needs, and impose unnecessary regulatory costs on carriers.⁶ In view of these concerns as well as the potentially harsh consequences of the "filed-rate" doctrine for consumers, and pursuant to a statutory amendment contained in the Telecommunications Act of 1996,⁷ the Commission in the *Second Report and Order* required the complete detariffing⁸ of interstate, domestic, interexchange services offered by nondominant carriers.

3. At the same time, the Commission sought to retain the one aspect of tariffing that continued to serve the public interest, i.e., giving consumers access to information about the rates, terms and conditions of services offered by these carriers. Thus, in the same order in which the Commission eliminated tariffing of interstate, domestic, interexchange services, the Commission imposed a public disclosure requirement.⁹

4. Following a stay of the *Second Report and Order* by the Court of Appeals for the District of Columbia Circuit, and upon the petitions of a number of parties who claimed that the public disclosure requirement would lead to some of the same ills that prompted the Commission to order complete detariffing, the Commission eliminated the public disclosure

⁶ *Second Report and Order*, 11 FCC Rcd at 20761-62, para 53; see *Competitive Carrier Sixth Report and Order*, 99 FCC 2d 1020 at 1030-31, paras. 13-14. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981); *Second Further Notice of Proposed Rulemaking*, FCC 82-187, 47 Fed. Reg. 17,308 (1982); *Second Report and Order*, 91 FCC 2d 59 (1982); *Order on Reconsideration*, 93 FCC 2d 54 (1983); *Third Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 28,292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913, 113 S.Ct. 3020 (1993); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*Competitive Carrier Sixth Report and Order*).

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act). 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" or the "Act."

⁸ "Complete detariffing" refers to a policy of neither requiring nor permitting nondominant IXCs to file tariffs pursuant to section 203 of the Communications Act for their interstate, domestic, interexchange services. See, e.g., *Order on Reconsideration*, 12 FCC Rcd at 15016, para. 2 n.5.

⁹ *Second Report and Order*, 11 FCC Rcd at 20773-78, paras. 78-87.

requirement in the *Order on Reconsideration*.¹⁰ Acting on petitions for reconsideration of that order, we now conclude that in a detariffed and increasingly competitive environment, consumers should have ready access to information concerning the rates, terms, and conditions governing the provision of interstate, domestic, interexchange services offered by nondominant IXCs. We therefore reinstate the public disclosure requirement that was originally established in the *Second Report and Order*, and also require nondominant IXCs that have Internet websites to post this information on-line.

B. Procedural Background

5. On October 29, 1996, the Commission adopted the *Second Report and Order* in its proceeding reviewing the regulation of interstate, domestic, interexchange telecommunications services. Throughout this proceeding, the Commission's objective has remained constant: to foster increased competition in the market for interstate, domestic, interexchange telecommunications services by eliminating unnecessary regulation, in accordance with the goals established by Congress in the 1996 Act. The 1996 Act added section 10 to the Communications Act, which requires the Commission to forbear from applying any provision of the Communications Act, or any of the Commission's regulations, to a telecommunications carrier or telecommunications service, or class thereof, if the Commission makes certain specified findings with respect to such provisions or regulations.¹¹

6. For more than a decade prior to the 1996 Act, the Commission attempted to forbear from tariff regulation of nondominant IXCs, but was struck down by the courts.¹² Subsequently, the Commission requested, and Congress granted in section 10 of the Act, forbearance authority, with the express understanding that it would be used to effectuate interexchange detariffing. Exercising its forbearance authority, the Commission eliminated its

¹⁰ *Order on Reconsideration*, 12 FCC Rcd at 15047-54, paras. 59-73.

¹¹ Section 10 requires forbearance if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to 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). In making the public interest determination, the Commission must consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest. 47 U.S.C. § 160(b).

¹² *Competitive Carrier Fourth Report and Order*, 95 FCC 2d 554 (1983), vacated *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), cert. denied *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); *Competitive Carrier Sixth Report and Order*, 99 FCC 2d 1020, vacated *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

tariff filing requirements for nondominant IXC's in the *Second Report and Order*. While tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market, the Commission concluded that such tariffs had become unnecessary for this purpose in an increasingly competitive market.¹³ The Commission found that it is highly unlikely that interexchange carriers that lack market power could successfully charge rates, or impose terms and conditions, for interstate, domestic, interexchange services that violate sections 201 and 202 of the Communications Act because consumers could simply switch to a competing provider that offered better rates, terms, and conditions.¹⁴ Instead of tariffs, the Commission found that it could rely on market forces, the section 208 complaint process, and its ability to reimpose tariff requirements, if necessary, to fulfill its mandate under the Communications Act to ensure that rates are just and reasonable and not unreasonably discriminatory, and to protect consumers.¹⁵ Moreover, the Commission concluded that tariffs can have negative effects that impair market efficiency and increase costs to consumers.¹⁶ The Commission found that, in particular, tariffs impede competition by permitting carriers to invoke the "filed-rate" doctrine¹⁷ and by not requiring carriers to provide rate and service information directly to consumers.¹⁸ The Commission also stated that tariffs provide a source of information that carriers can use to engage in tacit price coordination.¹⁹

7. Although the Commission concluded that tariffs harm competition in the market for interstate, domestic, interexchange services,²⁰ it also acknowledged that in the absence of some rate disclosure requirement, even in a competitive market, consumers might not have access to sufficient information about such services for purposes of bringing complaints under section 254(g) of the Act²¹ or for choosing the particular rate plan that best

¹³ See, e.g., *Second Report and Order*, 11 FCC Rcd at 20738-68, paras. 14-66; *Competitive Carrier First Report and Order*, 85 FCC 2d 1 at 1-5, paras. 1-8; *Competitive Carrier Sixth Report and Order*, 99 FCC 2d 1020 at 1027-35, paras. 11-25.

¹⁴ *Second Report and Order*, 11 FCC Rcd at 20750, para. 36.

¹⁵ *Second Report and Order*, 11 FCC Rcd at 20742-47, 20750-53, paras. 21-28, 36-43.

¹⁶ *Second Report and Order*, 11 FCC Rcd at 20760-68, paras. 52-66.

¹⁷ See *supra* para. 1.

¹⁸ *Second Report and Order*, 11 FCC Rcd at 20745-46, 20751, 20765, paras. 25, 39, 59.

¹⁹ *Second Report and Order*, 11 FCC Rcd at 20752, 20761, 20766, paras. 41, 53, 61; *Competitive Carrier Further Notice*, 84 FCC 2d at 454, para. 26.

²⁰ *Second Report and Order*, 11 FCC Rcd at 20760-68, paras. 52-66.

²¹ 47 U.S.C. § 254(g). Section 254(g) requires that a provider of interexchange telecommunications services charge its subscribers in rural and high cost areas rates that do not exceed the rates that the carrier charges subscribers in urban areas (i.e., that rates be geographically averaged). Section 254(g) also requires that

suits their individual needs.²² Yet the Commission also recognized that requiring carriers to make such information publicly available for these purposes may be at odds with its goals to reduce regulatory burdens on nondominant IXCs and to foster additional competition in the interstate, domestic, interexchange market.²³ In addition, an information disclosure requirement may detract from the Commission's goal of deterring any tacit price coordination that might exist because rate and service information would be collected and made available in a single, central location.²⁴

8. The Commission determined in the *Second Report and Order* that the statutory forbearance criteria in section 10 of the Communications Act were met for complete detariffing of the interstate, domestic, interexchange services offered by nondominant IXCs.²⁵ The Commission concluded that complete detariffing would foster increased competition without failing to protect consumers by eliminating the possible invocation of the "filed-rate" doctrine in ways that would otherwise lead to harsh results for consumers, establishing market conditions that more closely resemble an unregulated environment, and deterring any potential for tacit price coordination.²⁶

9. The Commission also adopted a public disclosure requirement in the *Second Report and Order* because it recognized that, even in a competitive market, nondominant IXCs might not provide complete information about the rates, terms, and conditions of their interstate, domestic, interexchange services to enable customers to bring to the Commission's attention violations of the Communications Act and to choose the calling plan that best suits their individual needs.²⁷ For example, nondominant IXCs might engage in targeted advertising concerning particular discounts and rate plans that might be the most appropriate plan for some, but not all, consumers.²⁸ The Commission required nondominant IXCs to disclose to the public information about the rates, terms, and conditions of all of their interstate, domestic, interexchange services, in at least one location during regular business

providers of interexchange telecommunications services charge subscribers in each State rates that do not exceed the rates it charges subscribers in another State (i.e., that rates be integrated). *Id.*, see *Rate Averaging and Rate Integration Requirements Order*, 11 FCC Rcd 9564 (1996), *recon.*, 12 FCC Rcd 11812 (1997).

²² *Second Report and Order*, 11 FCC Rcd at 20776-77, paras. 84-85.

²³ *Second Report and Order*, 11 FCC Rcd at 20777, para. 86.

²⁴ *Second Report and Order*, 11 FCC Rcd at 20760-61, 20777, paras. 53, 86.

²⁵ *Second Report and Order*, 11 FCC Rcd at 20738-73, paras. 14-77; see also 47 U.S.C. § 160.

²⁶ *Second Report and Order*, 11 FCC Rcd at 20733, 20744, 20760, paras. 4, 23, 52.

²⁷ *Second Report and Order*, 11 FCC Rcd at 20745-46, para. 25.

²⁸ *Second Report and Order*, 11 FCC Rcd 20746, para. 25 n.74.

hours. The Commission did not, however, require that public disclosure be made in any particular format or at any particular location, although it encouraged nondominant IXCs to consider ways to make this information more widely available to the public, for example, posting such information on-line, mailing relevant information to consumers, or responding to inquiries over the telephone.²⁹ In addition to adopting the public disclosure requirement, the Commission required nondominant IXCs 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 Act³⁰ and (2) maintain supporting documentation on the rates, terms, and conditions of all of their interstate, domestic, interexchange services that they could submit to the Commission and to state commissions within ten business days upon request.³¹

10. Several parties filed petitions for review of the *Second Report and Order* in the District of Columbia Circuit and filed motions requesting that the court stay the *Second Report and Order* pending judicial review.³² On February 13, 1997, the court granted these motions.³³ In addition, a number of parties filed petitions requesting that the Commission reconsider or clarify the rules it adopted in the *Second Report and Order*.

11. On August 15, 1997, the Commission adopted the *Order on Reconsideration*.³⁴ The Commission placed more weight on its concern that making available rate and service information to the public may detract from its objectives of deterring tacit price coordination and allowing market forces rather than regulation to discipline carriers.³⁵ The Commission recognized that elimination of the public disclosure requirement could make the access to rate and service information more difficult for businesses, including consumer groups that offer their analyses of the rates and services of IXCs to the public, as well as for resellers that are

²⁹ *Second Report and Order*, 11 FCC Rcd at 20773-78, paras. 78-87.

³⁰ *Second Report and Order*, 11 FCC Rcd at 20775, para. 83. See *supra* note 22.

³¹ *Second Report and Order*, 11 FCC Rcd at 20777-78, para. 87; *Order on Reconsideration*, 12 FCC Rcd at 15052, para. 69.

³² Parties argued, among other things, that the Commission: (1) lacked statutory authority to order complete detariffing and (2) acted arbitrarily and capriciously in relying on deterrence of tacit price coordination as one of the reasons to order complete detariffing and at the same time requiring public disclosure, which could be used as a mechanism to coordinate prices. See, e.g., Motion for Stay Pending Judicial Review and for Expedited Consideration and a Briefing Schedule (*MCI Telecommunications Corp. v. FCC*), No. 96-1459 (Jan. 7, 1997).

³³ *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

³⁴ *Order on Reconsideration*, 12 FCC Rcd 15014.

³⁵ *Order on Reconsideration*, 12 FCC Rcd at 15050-54, paras. 66-73.

both customers and competitors of IXCs.³⁶ The Commission nevertheless concluded that the benefits of eliminating the public disclosure requirement would outweigh any adverse effects.³⁷ The Commission determined that elimination of the public disclosure requirement would decrease the regulatory burden on nondominant IXCs and deter any tacit price coordination that might exist.³⁸ The Commission also found that, in all likelihood, consumers would still receive the information they need to ensure that they have been correctly billed and to bring to the Commission's attention possible violations of section 254(g) and other provisions of the Act.³⁹ The Commission stated, however, that it remained willing to revisit its decision regarding the elimination of the public disclosure requirement.⁴⁰ The Commission did not modify the requirements adopted in the *Second Report and Order* that nondominant IXCs file an annual certification and that they maintain supporting documentation on their interstate, domestic, interexchange services that they could submit to the Commission and to state regulatory commissions within ten business days upon request.⁴¹

12. Five parties filed petitions for further reconsideration asking the Commission to reinstate the public disclosure requirement.⁴² The D.C. Circuit subsequently deferred the briefing schedule in the appeal of the *Second Report and Order* to allow the Commission to act on these petitions.⁴³ The judicial stay of the Commission's rules adopted in this proceeding, therefore, remains in effect.⁴⁴

³⁶ *Order on Reconsideration*, 12 FCC Rcd at 15050-54, paras. 66-73.

³⁷ *Order on Reconsideration*, 12 FCC Rcd at 15053-54, paras. 71-72.

³⁸ *Order on Reconsideration*, 12 FCC Rcd at 15051-52, paras. 68-69.

³⁹ *Order on Reconsideration*, 12 FCC Rcd at 15051-54, paras. 68-72.

⁴⁰ *Order on Reconsideration*, 12 FCC Rcd at 15053-54, para. 71.

⁴¹ *Order on Reconsideration*, 12 FCC Rcd at 15052, para. 69.

⁴² Two of those parties ask the Commission to reinstate the public disclosure requirement for "mass market" services. See The Utility Reform Network (TURN)/Telecommunications Management Information Systems Coalition (TMISC) Petition at 3; Telecommunications Research and Action Center (TRAC)/Consumer Action/Consumer Federation of America (CFA) Petition at 2. The other three parties ask the Commission to reinstate the public disclosure requirement for individually-negotiated service arrangements. See Econobill Petition at 1; Harmony Petition at 1; Abe's Electronics Petition at 1. Thirteen parties filed oppositions to those petitions or comments, and two of the petitioners filed replies. See Appendix A for a list of these parties.

⁴³ *MCI Telecommunications Corp. v. FCC*, No 96-1459 (D.C. Cir. Feb. 9, 1998).

⁴⁴ See *Order on Reconsideration*, 12 FCC Rcd at 15017-18, 15074, paras. 4, 117; *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Public Notice, DA 97-493 (rel. Mar. 6, 1997).

13. The single issue raised on reconsideration is whether the Commission should require nondominant IXCs to make available to the public information on the rates, terms, and conditions of their interstate, domestic, interexchange services. For the reasons set forth below, we reinstate the public disclosure requirement that was originally specified in the *Second Report and Order* and also require that carriers make this information publicly available on-line at their Internet websites.

C. Discussion

14. The parties who filed the petitions for reconsideration that are before us today express grave concerns about the effects on consumers of the Commission's decision to eliminate the public disclosure requirement. These parties generally disagree with the Commission's finding in the *Order on Reconsideration* that consumers will have access to the information they need to select a telecommunications carrier and to bring to the Commission's attention possible violations of the Communications Act without a specific public disclosure requirement.⁴⁵ Eighty-five percent of consumers believe that the public disclosure requirement will serve their interests, according to a study commissioned by one of the members of petitioner TURN/TMISC.⁴⁶ Consumers find that IXCs' billing information often is "inaccurate and difficult to understand" and that their marketing information is "confusing," according to findings of other studies cited by petitioners.⁴⁷ Consumers find it impossible to obtain accurate and detailed information directly from carriers concerning their calling plans, according to TURN/TMISC and TRAC, on the basis of their own experiences in attempting to obtain such information directly from IXCs.⁴⁸ These petitioners claim that carrier representatives: (1) provided information that was generally incomplete or inaccurate; (2) referred callers to their filed tariffs rather than provide information verbally; (3) withheld information about lower-cost calling plans; and (4) provided information verbally, but only reluctantly confirmed it in writing.⁴⁹ We also note that MCI WorldCom recently ended its

⁴⁵ See Abe's Electronics Petition at 1; Econobill Petition at 1-2; Harmony Petition at 1; TRAC/Consumer Action/CFA Petition at 2-6; TURN/TMISC Petition at 4-10; see also, e.g., Colorado Commission Comments at 2-4; Colorado Consumer Counsel Comments at 2; Market Dynamics Comments at 2; Maryland People's Counsel Comments at 1-3; National Consumer League Comments at 1-2; Rural Telephone Coalition Comments at 3; South Carolina Department of Consumer Affairs; Utility Consumers Action Network Comments at 1-3; West Virginia Consumer Advocate Comments at 2.

⁴⁶ TURN/TMISC Petition at 5.

⁴⁷ Letter from Andy Schwartzman and Cheryl Leanza, Media Access Project, Counsel for TRAC; Cheryl A. Tritt, Morrison & Foerster, L.L.P., Counsel for TMISC; and Emmitt Carlton, Counsel for TRAC; to Magalie Roman Salas, Secretary, Federal Communications Commission (Dec. 23, 1998).

⁴⁸ TURN/TMISC Petition at 7-9, TRAC Petition at 2-4.

⁴⁹ TRAC Petition at Attachment B, Declaration of Geoffrey T. Mordock; TURN/TMISC Petition at Attachment C, Declaration of Kimberly Sierk.

cooperation with TRAC to provide information that TRAC summarizes in its comparative chart of long distance calling plans, citing the "time-consuming nature of gathering and confirming information," and referred the organization to its filed tariffs.⁵⁰

15. There is abundant evidence that making information available to consumers is beneficial to competitive markets. In addition to the evidence set forth above and in prior orders in this proceeding, several of our recent decisions clearly recognize the beneficial effects of publicly available information on competitive markets and consumers. For instance, we proposed rules in the *Truth-in-Billing Notice* to make telephone bills more readable and accurate, because we believe that "consumers must have adequate information about the services they are receiving, and the alternatives available to them, if they are to reap the benefits of a competitive market."⁵¹ In 1998, we adopted a price disclosure requirement for long distance carriers providing service at public phones that "more readily enables consumers to obtain valuable information necessary in making the decision whether to have that [carrier] carry the call at the identified rates, or to use another carrier."⁵² We took these actions to address concerns that consumers were not receiving sufficient information to protect themselves against fraud and misinformation, and to select telecommunications services and providers that best suit their individual needs.⁵³ There are many examples of government mandating disclosure of information to protect and promote consumer interests.⁵⁴

16. In comparison with abundant evidence in this proceeding of the benefits of information to competition and consumers, the anticompetitive effect of a public disclosure

⁵⁰ *Telephony*, Vol. 18, No. 245, Communications Daily (Dec. 22, 1998). TRAC states that it is a non-profit, tax-exempt, membership organization that, among other things, publishes *Tele-Tips*, a periodic newsletter that provides comprehensive consumer information and rate comparisons to help consumers make informed decisions regarding their long distance options. TRAC Petition at 1 n.1.

⁵¹ *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Proposed Rulemaking, 13 FCC Rcd 18176 (1998) (*Truth-in-Billing Notice*).

⁵² *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122 (1998) (*Billed Party Preference Second Report and Order*).

⁵³ *Truth in Billing Notice; Billed Party Preference Second Report and Order*.

⁵⁴ See, e.g., Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181 (1992), codified at 47 U.S.C. § 228 (requiring the Commission to adopt rules that, among other things, require separate disclosure of rate and service information on pay-per-call services); Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968), as amended, codified at 15 U.S.C. §§ 1601 *et seq.* (imposing minimum disclosure requirements for credit card bills in order to enable the consumer to compare more readily the various credit terms available to him and to protect the consumer against inaccurate and unfair credit billing and credit card practices); Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990), codified at 21 U.S.C. § 343(l), (q) and (r) (requiring food makers to adopt uniform labels for products that give consumers information about the foods' nutritional content and limit the health and other claims that can be made).

requirement is sparse and indeterminate. Moreover, the growing number of competitors in this market substantially lessens the risk of tacit price collusion.⁵⁵ As antitrust law recognizes, tacit price collusion is more likely to occur where there are only a few competitors who have an oligopoly in the market.⁵⁶ Where there are greater numbers of competitors and low barriers to entry, as in the long distance market, the likelihood of such coordinated behavior is marginal.⁵⁷ In light of the "conflicting and inconclusive" evidence of tacit price collusion⁵⁸ and the competitive nature of the market, we now are convinced that the public availability of pricing information presents only the slimmest opportunity for collusion and thus a public disclosure requirement need not be eliminated on that basis. Consequently, in light of the very positive public benefits of a limited public disclosure requirement, we believe that the Commission erred in previously eliminating that requirement in the *Order on Reconsideration*. In addition, the growth of competition in the long distance market means that consumers have more choices and, in turn, need more information in order to choose the long distance service plan that best suits their needs. We also note that IXCs have superior resources and incentives to stay informed of the rate plans of their competitors whether or not rate and service information is made publicly available.⁵⁹ Therefore, it is consumers who likely will experience the most harm in the absence of a meaningful public disclosure requirement.⁶⁰ We

⁵⁵ See *Long Distance Market Shares Third Quarter 1998*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission (Dec. 1998).

⁵⁶ F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (1990).

⁵⁷ F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (1990); see *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18047-70, paras. 36-76 (concluding that the merger will not make coordinated action more likely to occur in the interstate, domestic, interexchange market because the market has become progressively less concentrated over the past decade and because barriers to deploying excess long distance transmission capacity are low).

⁵⁸ *Second Report and Order*, 11 FCC Rcd at 20795-96, paras. 123-25; *Motion of AT&T Corp. to be Reclassified as a Nondominant Carrier*, Order, 11 FCC Rcd 3271, 3305-07 (1995), *recon.*, 12 FCC Rcd 20787 (1997).

⁵⁹ See Econobill Petition at 1-2; TRAC Petition, Attachment A at 4; TURN/TMISC Petition at 16 n.35, 17-18; Market Dynamics, Inc. Comments at 3; Econobill Reply at 8.

⁶⁰ And, in order for this disclosure requirement to be meaningful, it must apply to all arrangements, including mass market services and individually-negotiated service arrangements. See Econobill Petition (stating that many of its clients are small- and medium-sized businesses that were paying basic rates for mass market services and obtained lower prices by using an existing individually-negotiated service arrangement for another customer with a similar calling pattern). For this reason, we disagree with the argument raised in the Ad Hoc Nov. 24, 1998 *ex parte* letter that there is a greater risk of anticompetitive behavior with respect to individually-negotiated service arrangements of large users. See Letter from Henry D. Levine and Valerie Yates, Levine Blaszak, Block & Boothby, LLP, Counsel for the Ad Hoc Telecommunications Users Committee, the California Bankers Clearinghouse Association, The New York Clearing House Association L.L.C., ABB Business Services,

clearly recognize that tacit price collusion is one of the grounds on which the Commission relied in choosing to forbear from the tariffing requirement and that basis is incongruous with our current holding. Nonetheless, we emphasize that the Commission substantially rested its detariffing decision on grounds other than collusion that remain compelling; thus, we find no conflict between the Commission's decision to order complete detariffing and our decision to require public disclosure.⁶¹

17. We agree with Ad Hoc that the "filed-rate" doctrine that the courts have applied to the tariff filing requirement should not apply to the public disclosure requirement.⁶² The "filed-rate" doctrine is applied to the rates, terms, and conditions of services specified in tariffs that are "duly filed" with the Commission in accordance with section 203 of the Communications Act.⁶³ The "filed-rate" doctrine is inapplicable to the public disclosure requirement because it is not a filing requirement within the meaning of section 203, but rather simply requires carriers to make information available to the public.⁶⁴ Moreover, the Commission has long held that the "filed-rate" doctrine is harmful to competition and consumers, as noted above.⁶⁵

18. In the face of opposing positions on whether public disclosure should be required, we strike the balance once again in favor of consumer concerns. We therefore reinstate the public disclosure requirement as originally established in the *Second Report and Order*. Specifically, we require nondominant IXCs to make information available to the public concerning current rates, terms, and conditions for all of their interstate, domestic, interexchange services, in at least one location during regular business hours.⁶⁶ We also require such carriers that have Internet websites to post this information on-line.⁶⁷ Carriers should post rate and service information at their Internet websites in a timely and easily

and The Prudential Insurance Company of America, to William E. Kennard, Chairman, Federal Communications Commission (Nov. 24, 1998) (Ad Hoc Nov. 24, 1998 *ex parte* letter).

⁶¹ See *infra* para. 19.

⁶² Ad Hoc Nov. 24, 1998 *ex parte* letter at 4 (alleging that MCI attempted to create impression that rate and service information maintained at its Washington, D.C., office in accordance with the public disclosure requirement in the *Second Report and Order* was a "tariff" to which the "filed-rate" doctrine applied).

⁶³ See, e.g., *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998).

⁶⁴ See *Second Report and Order*, 11 FCC Rcd at 20777, para. 86.

⁶⁵ See *supra* para. 6; *Second Report and Order*, 11 FCC Rcd at 20762, para. 55.

⁶⁶ *Second Report and Order*, 11 FCC Rcd at 20775-78, paras. 83-87.

⁶⁷ The Commission merely encouraged IXCs to do so in the *Second Report and Order*. See *Second Report and Order*, 11 FCC Rcd at 20777, para. 86 n.236.

accessible⁶⁸ manner and update such information regularly. We agree with TRAC and Ad Hoc that an on-line public disclosure requirement will make rate and service information more readily available and beneficial for consumers directly, as well as for businesses and consumer organizations that collect and analyze rate and service information and offer their analyses to the public,⁶⁹ particularly in view of the tremendous growth in usage of the Internet since the adoption of the *Second Report and Order* in 1996 and forecasts for additional growth.⁷⁰ We find that an on-line requirement is not unduly burdensome, because the growth of Internet usage has increased the benefits of an on-line requirement to consumers, and the costs of maintaining an Internet website and posting the information on-line for carriers are moderate.⁷¹ We exempt from the Internet posting requirement nondominant IXCs that do not have Internet websites, to avoid imposing undue burdens on such carriers.

19. Our decision to reinstate the public disclosure requirement can be reconciled with our previous decision to implement complete detariffing. The Commission's decision to forbear from applying the tariff filing requirements to nondominant IXCs and require complete detariffing is amply supported by evidence of numerous concerns that are independent of, and more compelling than, tacit price coordination. These concerns, as set forth in the *Second Report and Order* and the *Order on Reconsideration*, include promoting competitive market conditions, eliminating problems resulting from the "filed-rate" doctrine, and preserving the public's reasonable commercial expectations.⁷² We believe that our

⁶⁸ For example, the availability of the rate and service information should be prominently and clearly announced on the carrier's homepage with a link.

⁶⁹ See, e.g., TRAC Petition at 6, Attachment A at 4, Mordock Affidavit at 2; Ad Hoc Nov. 24, 1998 *ex parte* letter).

⁷⁰ See, e.g., Cheri Paquet, *Report Counts 147 Million Global Net Users*, The Industry Standard, Feb. 10, 1999 (Computer Industry Almanac reports that the number of people who accessed the Internet at least once a week from their businesses and homes grew to 147 million worldwide in 1998, up from 61 million in 1996 The United States' lead in Internet access accounted for almost 52 percent of Internet users worldwide in 1998); *Growth of Internet*, Practical Accountant, Aug. 19, 1998 (survey results estimate that the number of PCs that use the Internet has grown more than 140% from 18.6 million two years ago); *Ovum Posts Global Internet Growth Forecasts*, M2 Presswire, Dec. 16, 1998 (forecasts 206 million dial-up connections and 17.5 million permanent connections to the Internet by 2005, representing a four-fold increase on current figures).

⁷¹ See, e.g., Paul Cox, *Serving It Up: Before Buying Hardware To Put a Business Online, Some Questions Should Be Answered*, The Wall Street Journal, Dec. 7, 1998 (estimating that "for as little as \$25 per month, a small business owner can have a few pages in cyberspace, touting products and services"); *MindSpring Introduces LAN On Demand; Cost-Effective, High-Speed Internet Connectivity for Small Businesses*, Business Wire, Oct. 6, 1998.; Thomas L. Friedman, *Amazon.you*, The New York Times, Feb. 26, 1999.

⁷² *Second Report and Order*, 11 FCC Rcd at 20738-68, paras. 14-66; *Order on Reconsideration*, 12 FCC Rcd at 15019-26, paras. 6-17. We note that Sprint argues that the public disclosure requirement "effectively impose[s] a tariff filing obligation," but does not argue that the "filed-rate" doctrine applies to the public

decision to reinstate the public disclosure requirement retains the one positive aspect of tariffing, making information on the rates, terms, and conditions of interstate, interexchange services available to the public, without the negative aspects of tariffing.⁷³

II. ERRATUM

20. This Erratum corrects a final rule in the *Order on Reconsideration*, which was released by the Commission on August 20, 1997. In order to comply with the formal requirements of the Office of the Federal Register, Appendix B to the *Order on Reconsideration* is corrected to include a reference to state regulatory commissions that was contained in the text of paragraph 69 of the *Order on Reconsideration*, but was inadvertently not included in the rule to be codified at 47 C.F.R. § 42.11.⁷⁴ The corrected final rule is contained in Appendix B to this order.

III. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, that, pursuant to sections 1-4, 10, 201-205, 215, 218, 220, 226, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 215, 218, 220, 226, and 254, the SECOND ORDER ON RECONSIDERATION AND ERRATUM are hereby ADOPTED. The requirements adopted in this Second Order on Reconsideration shall be effective 30 days after publication of a summary thereof in the Federal Register or on the date when the requirements adopted in the Second Report and Order in this proceeding become effective, whichever is later. The collections of information contained within are contingent upon approval by the Office of Management and Budget.

22. IT IS FURTHER ORDERED that the Petitions for Further Reconsideration filed in this proceeding ARE GRANTED to the extent described in this order.

23. IT IS FURTHER ORDERED that Part 42 of the Commission's rules, 47 C.F.R. § 42, IS AMENDED as set forth in Appendix B hereto.

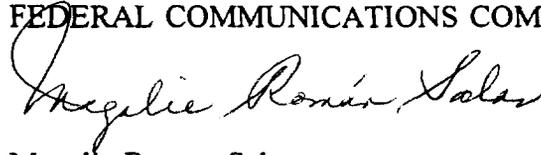
disclosure requirement. Sprint Opposition at 4.

⁷³ See *supra* para. 6.

⁷⁴ 12 FCC Rcd at 15052, 15078; see also 62 Fed. Reg. 59583 (Nov. 4, 1997) (summarizing the *Order on Reconsideration*).

24. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Second Order on Reconsideration, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

**APPENDIX A
LIST OF PARTIES**

List of Petitioners

Abe's Cameras and Electronics
Econobill Corp.
Harmony Computer and Electronics, Inc.
The Utility Reform Network/Telecommunications Management Information Systems Coalition
(TURN/TMISC)
Telecommunications Research and Action Center/Consumer Action/Consumer Federation of
America (TRAC/Consumer Action/CFA)

List of Parties Filing Oppositions and Comments

Ad Hoc Telecommunications Users Committee/ California Bankers Clearing House
Association/ New York Clearing House Association/ ABB Business Services, Inc./ The
Prudential Insurance Company of America (Ad Hoc Users Committee)
Colorado Office of Consumer Counsel
Consumer Advocate Division, State of West Virginia Public Service Commission
Market Dynamics, Inc.
Maryland People's Counsel
MCI Telecommunications Corp.
National Consumers League
Public Utilities Commission of the State of Colorado (Colorado Commission)
Rural Telephone Coalition
South Carolina Department of Consumer Affairs
Sprint Corp.
United States Telephone Association (USTA)
Utility Consumers Action Network

List of Parties Filing Reply Comments

Econobill Corp.
The Utility Reform Network/Telecommunications Management Information Systems Coalition
(TURN/TMISC)

APPENDIX B - FINAL RULES**AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS
PART 42 -- PRESERVATION OF RECORDS OF
COMMUNICATIONS COMMON CARRIERS**

1. The authority citation for part 42 continues to read as follows:

AUTHORITY: Sec. 4(i), 48 Stat. 1066, as amended, 47 U.S.C. § 154(i). Interprets or applies secs. 219 and 220, 48 Stat. 1077-78, 47 U.S.C. § 219, 220.

2. New section 42.10 and a preceding centered heading are added to read as follows:

Specific Instructions for Carriers Offering Interexchange Services**§ 42.10 Public availability of information concerning interexchange services.**

(a) A nondominant interexchange carrier (IXC) shall make available to any member of the public, in at least one location, during regular business hours, information concerning its current rates, terms and conditions for all of its interstate, domestic, interexchange services. Such information shall be made available in an easy to understand format and in a timely manner. Following an inquiry or complaint from the public concerning rates, terms and conditions for such services, a carrier shall specify that such information is available and the manner in which the public may obtain the information.

(b) In addition, a nondominant IXC that maintains an Internet website shall make such rate and service information specified in paragraph (a) of this section available on-line at its Internet website in a timely and easily accessible manner, and shall update this information regularly.

3. Section 42.11 is amended by revising paragraph (a). Paragraph (b) is unchanged.

§ 42.11 Retention of information concerning interexchange services.

(a) A nondominant IXC shall maintain, for submission to the Commission and to state regulatory commissions upon request, price and service information regarding all of the carrier's interstate, domestic, interexchange service offerings. The price and service information maintained for purposes of this subparagraph shall include documents supporting the rates, terms, and conditions of the carrier's interstate, domestic, interexchange offerings. The information maintained pursuant to this subsection shall be maintained in a manner that allows the carrier to produce such records within ten business days.

APPENDIX C - PROCEDURAL ISSUES**A. Supplemental Final Regulatory Flexibility Analysis**

1. As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice*.⁷⁵ The Commission sought written public comments on the proposals in the *Notice*. In addition, pursuant to section 603, a Final Regulatory Flexibility Analysis (FRFA) was incorporated in the *Second Report and Order* and a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) was incorporated in the *Order on Reconsideration*.⁷⁶ These analyses conform to the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).⁷⁷ The Supplemental FRFA in this Second Order on Reconsideration also conforms to the RFA.

1. Need for and Objectives of this Second Order on Reconsideration and the Rules Adopted Herein

2. In this Second Order on Reconsideration, we grant the petitions filed for reconsideration of the *Order on Reconsideration*, to further the same needs and objectives as those discussed in the FRFA in the *Second Report and Order* and the Supplemental FRFA in the *Order on Reconsideration*.⁷⁸ We reinstate the public disclosure requirement for all interstate, domestic, interexchange services offered by nondominant IXCs, as originally specified in the *Second Report and Order*.⁷⁹ In addition, we require nondominant IXCs that have Internet websites to post this information on-line in a timely and easily accessible manner, and to update such information regularly.⁸⁰

⁷⁵ *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*).

⁷⁶ *Second Report and Order*, 11 FCC Rcd at 20798-809, paras. 129-58; *Order on Reconsideration*, 12 FCC Rcd at 15062-72, paras. 88-113.

⁷⁷ 5 U.S.C. §§ 601 *et seq.* The SBREFA is Title II of the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

⁷⁸ *Second Report and Order*, 11 FCC Rcd at 20798-99, paras. 130-31; *Order on Reconsideration*, 12 FCC Rcd at 15062, para. 89.

⁷⁹ *See supra* para. 18.

⁸⁰ *See supra* para. 18.

2. Analysis of Significant Issues Raised in Response to the Supplemental FRFA

3. Although not in response to the Supplemental FRFA in the *Order on Reconsideration*, several parties argue that consumers, some of which are small businesses, will not have access to information they need to select a telecommunications carrier and to bring to the Commission's attention possible violations of the Communications Act without a specific public disclosure requirement.⁸¹ As discussed in the Second Order on Reconsideration, we reinstate the public disclosure requirement as originally specified in the *Second Report and Order*.⁸² In addition, we require nondominant IXCs that have Internet websites, some of which are small entities, to make such rate and service information available on-line in a timely and easily accessible manner, and to update this information regularly.⁸³ We exempt from this requirement nondominant IXCs that do not have Internet websites. We believe that the rules adopted in the *Second Report and Order* and as re-established and modified in this Second Order on Reconsideration, will benefit consumers, some of which are small entities, and will minimize the regulatory burdens on nondominant IXCs, including small IXCs.

3. Description and Estimates of the Number of Small Entities Affected by this Second Order on Reconsideration

4. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁸⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸⁵ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and

⁸¹ See, e.g., Abe's Electronics Petition at 1; Econobill Petition at 1-2; Harmony Petition at 1; TURN/TMISC Petition at 3, 8, 17; see also, e.g., Colorado Commission Comments at 2-4; Colorado Consumer Counsel Comments at 1-2; Market Dynamics Comments at 1-4; Maryland People's Counsel Comments at 2; National Consumer League Comments at 1-2; Rural Telephone Coalition Comments at 1-3; South Carolina Department of Consumer Affairs Petition at 1; Utility Consumers Action Network Comments at 2; West Virginia Consumer Advocate Comments at 2.

⁸² See *supra* para. 18.

⁸³ See *supra* para. 18.

⁸⁴ 5 U.S.C. § 601(6).

⁸⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*." 5 U.S.C. § 601(3).

(3) satisfies any additional criteria established by the Small Business Administration (SBA).⁸⁶ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁸⁷ As of 1992, there were approximately 275,800 small organizations nationwide.⁸⁸ "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."⁸⁹ As of 1992, there were approximately 85,000 such jurisdictions in the United States.⁹⁰ This number includes 38,978 counties, cities, and towns, of which 37,566 (96 percent) have populations of fewer than 50,000.⁹¹ The Census Bureau estimates that this ratio is basically accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

5. The most reliable source of information regarding the total numbers of certain common carriers and related providers nationwide, appears to be data the Commission publishes annually in its Telecommunications Industry Revenue report, regarding the TRS.⁹² According to data in the most recent report, there are 3,459 interstate carriers.⁹³ These carriers include, among other things, local exchange carriers, wireline carriers and service providers, IXCs, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers. The SBA has designated companies engaged in providing "Radiotelephone Communications" and "Telephone Communications, Except Radiotelephone" as small businesses if they employ no more than 1,500 employees.⁹⁴

⁸⁶ Small Business Act, 15 U.S.C. § 632 (1996).

⁸⁷ 5 U.S.C. § 601(4).

⁸⁸ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁸⁹ 5 U.S.C. § 601(5).

⁹⁰ U.S. Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

⁹¹ U.S. Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

⁹² Federal Communications Commission, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Fig. 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1996) (*Telecommunications Industry Revenue*).

⁹³ *Telecommunications Industry Revenue*.

⁹⁴ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813. See also Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987).

6. *Total Number of Telephone Companies Affected.* The U.S. Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.⁹⁵ This number contains a variety of different categories of carriers, including local exchange carriers, IXCs, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications services providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not independently owned and operated.⁹⁶ For example, a PCS provider that is affiliated with an IXC that has more than 1,500 employees would not meet the definition of a small entity. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms that may be affected by this Second Order on Reconsideration.

7. *IXCs.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to IXCs. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.⁹⁷ According to the most recent Telecommunications Industry Revenue data, 143 carriers reported that they were engaged in the provision of interexchange services.⁹⁸ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees. Thus, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the rule changes herein.

4. **Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements**

8. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* In the *Second Report and Order*, we required nondominant IXCs, among other things, to make information on current rates, terms, and conditions for all of their interstate, domestic, interexchange services available to the public in at least one location during regular business hours.⁹⁹ We also required carriers to inform the public that this information is available when responding to consumer inquiries or complaints and to specify the manner in

⁹⁵ U.S. Dept. of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (*1992 Census*).

⁹⁶ See generally 15 U.S.C. § 632(a)(1).

⁹⁷ 13 C.F.R. § 121.201, SIC Code 4813.

⁹⁸ *Telecommunications Industry Revenue*, Fig. 2.

⁹⁹ *Second Report and Order* at 20777, para. 86.

which the consumer may obtain the information.¹⁰⁰ We eliminated these requirements in the *Order on Reconsideration*.¹⁰¹

9. In this Second Order on Reconsideration, we reinstate the public disclosure requirement as originally specified in the *Second Report and Order*.¹⁰² In addition, we require nondominant IXC's that have Internet websites, some of which are small entities, to make such rate and service information available on-line in a timely and easily accessible manner, and to update this information regularly.¹⁰³ Compliance with this obligation may require the use of accounting, billing, computer, and legal skills.

5. Steps Taken To Minimize the Significant Economic Impact of this Order on Reconsideration on Small Entities, Including the Significant Alternatives Considered and Rejected

10. The Second Order on Reconsideration finds that an on-line disclosure requirement will be beneficial to consumers, particularly in light of the tremendous growth in usage of the Internet since the adoption of the *Second Report and Order*.¹⁰⁴ To avoid undue burdens on nondominant IXC's that do not have Internet websites, many of which are small entities, the Second Order on Reconsideration exempts such IXC's from the on-line public disclosure requirement.¹⁰⁵

11. Although not included in this Supplemental FRFA because they are not directly subject to the requirements in the Second Order on Reconsideration,¹⁰⁶ we recognize that such requirements should make the collection of information less costly for businesses, including consumer groups that analyze and compare the rates and services of IXC's and offer their

¹⁰⁰ *Second Report and Order* at 20777, para. 86.

¹⁰¹ *Order on Reconsideration*, 12 FCC Rcd at 15050-54, paras. 66-72.

¹⁰² *See supra* para. 18.

¹⁰³ *See supra* para. 18.

¹⁰⁴ *See supra* para. 18.

¹⁰⁵ *See supra* para. 18.

¹⁰⁶ This Supplemental FRFA is required to include only the effects of this Second Order on Reconsideration on entities that are directly subject to its requirements. *See Mid-Tex Electric Cooperative, Inc., v. FERC*, 773 F.2d 327, 340-43 (D.C. Cir. 1985), *aff'd*, *Motor & Equipment Manufacturers Ass'n. v. EPA*, 142 F.3d 449 (D.C. Cir. 1998).

analyses to the public for a fee, as well as for resellers that are both customers and competitors of IXCs.¹⁰⁷ Some of these businesses and resellers are small entities.¹⁰⁸

5. Report to Congress

12. The Commission shall send a copy of the Second Order on Reconsideration, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, a copy of the Second Order on Reconsideration and Supplemental FRFA (or summaries thereof) will be published in the Federal Register. *See* 5 U.S.C. § 604(b).

B. Supplemental Final Paperwork Reduction Analysis

13. The *Notice* from which this Second Order on Reconsideration issues proposed changes to the Commission's information collection requirements.¹⁰⁹ As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (PRA),¹¹⁰ the *Notice* invited the general public and the Office of Management and Budget (OMB) to comment on the proposed changes.¹¹¹ On June 12, 1996, OMB approved all of the proposed changes to our information collection requirements in accordance with the PRA.¹¹²

14. This Second Order on Reconsideration contains two new proposed collections: (1) nondominant IXCs must make available to the public information concerning the rates, terms, and conditions of all interstate, domestic, interexchange services, in at least one location during regular business hours, as originally specified in the *Second Report and Order*; and (2) nondominant IXCs that have Internet websites also must post this rate and service information on-line in a timely and easily accessible manner, and must update this information

¹⁰⁷ *See Order on Reconsideration*, 12 FCC Rcd at 15053-54, paras. 71-72.

¹⁰⁸ *Second Report and Order*, 11 FCC Rcd at 20805-06, paras. 146-47; *Order on Reconsideration*, 12 FCC Rcd at 15066-67, paras. 98-99.

¹⁰⁹ *Notice*, 11 FCC Rcd at 7193-94.

¹¹⁰ 44 U.S.C. §§ 3501 *et seq.*

¹¹¹ *Notice*, 11 FCC Rcd at 7193-94.

¹¹² *Notice of Office of Management and Budget Action*, OMB No. 3060-0704 (June 12, 1996). In approving the proposed changes, OMB "strongly recommend[ed] that the [Commission] investigate potential mechanisms to provide consumers, State regulators, and other interested parties with some standardized pricing information," which "could be provided as part of the certification process or could be made available to the public in other ways." *Id.*

regularly.¹¹³ These requirements are new collections of information within the meaning of the PRA.¹¹⁴ Implementation of these requirements is subject to approval by the OMB, as prescribed by the PRA.

¹¹³ See *supra* para. 18.

¹¹⁴ 44 U.S.C. §§ 3501-3520.

SEPARATE STATEMENT
OF
COMMISSIONER NESS

Re: Policy and Rules Concerning the Interstate, Interexchange Marketplace; and Implementation of Section 254(g) of the Communications Act of 1934, as amended.

This Second Order on Reconsideration ensures that consumers will have information they need to make informed choices about the services they choose in a competitive marketplace.

The long distance marketplace is substantially competitive. As a result of this competition, many consumers are calling more and paying less. This is good.

But there have been two major problems that have limited the benefits consumers have enjoyed. One is the filed rate doctrine, under which a tariff deposited in some obscure corner of this agency is deemed to trump whatever arrangement the consumer makes directly with the carrier. The second is the confusing array of rate schedules and calling plans and surcharges that interexchange carriers have established.

The Commission has sought to attack the first problem, the filed rate doctrine, by preventing nondominant carriers from filing tariffs. When the courts rebuffed our initial efforts, we sought and obtained explicit forbearance authority from the Congress. I hope this order will clear the way for the court to lift its stay of the complete detariffing regime, so that carriers are compelled to honor the terms of the deals they strike with their customers, and no longer can circumvent them by invoking the entirely fictional "approval" of this agency for a tariff that no one has ever read, much less approved.

The Commission is attacking the second problem, public information about the terms of offerings, through today's order (and through a forthcoming "truth-in-billing" item). Carriers will now be required to provide reliable information upon reasonable request to consumers and to consumer advocates. They will also make the same information available on their Websites, if they have them (all major carriers do). The result is likely to be a more informed buying decision on the part of consumers, and fewer unpleasant surprises when the bill arrives.

In an earlier phase of this proceeding, I voted with all of my colleagues to establish the public disclosure requirement, and I later dissented when three of my colleagues voted to eliminate this requirement. In the second decision, the Commission was wrestling with a perceived conflict between maintaining a public

disclosure requirement, on the one hand, and invoking concern about the dangers of "tacit price collusion" as a reason for requiring detariffing, on the other. I acknowledged that conflict but resolved it differently, because for me there was ample justification for complete detariffing independent of the price collusion rationale.

Frankly, I don't really think it is all that likely that the absence of tariffs – or of a public disclosure requirement – will keep AT&T from finding out about MCI's "Five Cent Sundays." Indeed, common sense tells me that carriers are likely to be able to learn the terms of their major competitors' offerings, regardless of tariffs or public disclosure requirements. The question is whether *consumers* will have the information they need to make informed decisions. Today's ruling ensures that they will.

I also want to note that the public disclosure requirement was initially established at the specific request of Senators Stevens and Inouye, who felt it was useful to ensure that interexchange carriers honor their rate averaging and rate integration obligations under Section 254(g) of the Communications Act. Although today's order will be good for consumers throughout the country, I believe the citizens of Alaska and Hawaii will particularly benefit from the action we are taking today.

**Separate Statement of
Commissioner Gloria Tristani**

Re: Policy and Rules Concerning the Interstate, Interexchange Marketplace; and Implementation of Section 254(g) of the Communications Act of 1934, as amended.

I am pleased to support today's decision requiring long distance carriers to disclose their rates on their websites. This will increase the availability of information to consumers who want to see for themselves what other carriers are offering. This will be a very useful tool for consumers who are on-line and who want to shop around.

Today's decision also ensures that long distance rate information will continue to be available to those entities that organize this information and make it available to customers who want to quickly sift through the offerings of hundreds of long distance companies. In short, this decision is about providing more information to consumers. As any economist will tell you, markets operate best when buyers and sellers have more information, not less.

Although requiring greater public disclosure is a positive step, it does not eliminate the confusion that is sometimes involved in choosing a long distance carrier. Even with today's decision to reinstate the public disclosure requirement, most consumers are likely to encounter practical difficulty in comparing the rates of two or more long distance carriers. The reason is that many long distance carriers use incomplete or misleading descriptions for the new charges they are placing on phone bills. To address that problem, the FCC is moving rapidly toward completion of the truth-in-billing proceeding. I expect that proceeding will ultimately result in much clearer phone bills for consumers. More comprehensible phone bills, in combination with the public disclosure requirement, should make it much easier for consumers to shop for long distance service.

Although today's decision is limited to reinstatement of the information disclosure requirement, I wish to register my strong support for the prior Commission's decision to forbid tariffing by long distance carriers.

Tariffs filed by long distance carriers served a useful purpose in the past, but in today's long distance market, tariffs give carriers unfair control over the terms under which they provide service to customers. In what other line of business can a seller tell its customers one thing, then turn around and file a tariff with the government that legally overrides what the seller just promised its customers? Long distance carriers

can – and have – done that. It's called the "filed rate doctrine" and it's perfectly legal *if* the FCC allows long distance carriers to file tariffs.

Without tariffs, carriers must establish agreements with each of their customers, just like any other type of company. And without tariffs, carriers must inform customers *directly* of changes to the rates or terms of service. That puts buyers and sellers of long distance on the same footing as buyers and sellers of all other products in a free market. So I applaud the prior Commission's decision to do away with tariffs and I hope the D.C. Court of Appeals upholds that decision.

**DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; (CC Docket No. 96-61).

I dissent from today's Second Order on Reconsideration establishing requirements that long distance carriers disclose their rates even after these services are detariffed. The long distance market today is extremely competitive, as evidenced by the Commission's own decision to detariff these services. Yet the Commission today has imposed new disclosure requirements that are not only overly regulatory, but may even undermine some of the benefits of detariffing.

American consumers are familiar with how competitive markets work. They purchase groceries, clothes and a number of goods and services. Practically all of these purchases are made without the overbearing review of a federal nanny charged with the sole responsibility of making sure that the seller discloses the price to the consumer. In competitive markets, federal nannies and federal regulation are unnecessary to protect consumers; indeed consumers ultimately pay the high cost of meddlesome regulation. In competitive markets, sellers serve customers; sellers fall over themselves to help customers; sellers tell customers their prices constantly in the hope of wooing new customers and in an effort to retain existing ones.

Under section 10, the Commission must forbear from regulating companies as industries become more competitive. There is no dispute that the long distance industry is competitive. Indeed, the Commission acknowledges that it "determined in the Second Report and Order that the statutory forbearance criteria in section 10 of the Communications Act were met for complete detariffing of the interstate, domestic, interexchange services offered by nondominant IXCs."¹ The industry is more competitive today than it was at that time; indeed it is more competitive today than it was last month. Despite increasing long distance competition, however, the Commission uses a section 10 proceeding to justify expanding regulation as it imposes new regulatory requirements on carriers. By any reading of the statute, today's action is diametrically opposed to Congressional intent. Congress did not say that when the section 10 criteria are met that the Commission should forbear from statutory-based regulation and adopt other requirements that it prefers. I fear that future Commissions may see this as a precedent: rather than forbearing entirely from regulation in the face of competition, we have created new regulation. This precedent is bad for the Commission and worse for consumers who will surely suffer.

¹ Second Order on Reconsideration, at para. 8.