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FEDERAL COMMUNICATIONS COMMISSION  
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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of  
  
Truth-in-Billing  
and  
Billing Format**

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**CC Docket No. 98-170**

**DOCKET FILE COPY ORIGINAL**

**Petition by USTA for an Expedited Waiver or Stay**

**UNITED STATES TELEPHONE ASSOCIATION**

**Lawrence E. Sarjeant  
Linda Kent  
Keith Townsend  
John Hunter  
Julie E. Rones  
Its Attorneys**

**1401 H Street, NW, Suite 600  
Washington, D.C. 20005  
(202) 326-7300**

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## SUMMARY

The United States Telephone Association ("USTA") respectfully request that the Federal Communications Commission ("FCC" or "Commission") waive one aspect of its new regulations on truth-in-billing and billing format ("TIB Order"), regarding the "monthly-service-provider" rule provision, pending reconsideration of that rule. In the alternative, USTA asks that the Commission stay the effectiveness of that rule. As argued in this instant pleading, it would be impossible for the industry to comply with this requirement by the July 26, 1999 date; or the purported, September 4, 1999 effective implementation date.

Compliance for USTA members with the "monthly-service-provider" rule will be costly, difficult and delayed. Moreover, the Commission's new rule would confuse consumers. A small modification to the rule's language would make compliance attainable, while still satisfying the Commission's objectives.

USTA believes a waiver or, alternatively, a stay, is in the public interest; and that the conditions for either a waiver or a stay can be met.

Additionally, ILEC implementation of the Commission's rule would divert USTA members' information system personnel from other efforts, including completing work to avoid any Y2K problems and from efforts to implement system changes to facilitate electronic interaction with competitors.

Further, USTA, on behalf of small and mid-size local exchange carrier (LECs) members, seeks a permanent waiver or stay of the entire TIB Order's provisions for small and mid-size ILECs, but especially with respect to rule provisions 64.2001(a)(2); and 64.2001(c)(regarding "Deniable" and "Non-deniable" charges).

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**Petition by USTA for an Expedited Waiver or Stay**

**I. INTRODUCTION**

The United States Telephone Association ("USTA")<sup>1</sup>, through counsel, respectfully request that the Federal Communications Commission ("FCC" or "Commission") waive one aspect of its new regulations on truth-in-billing and billing format ("TIB Order")<sup>2</sup>, regarding the "monthly-service-provider" rule provision, pending reconsideration of that rule. In the alternative, USTA asks that the Commission stay the effectiveness of that rule. As argued below, it would be impossible for the industry to comply with this requirement by the July 26, 1999 date; or the purported, September 4, 1999 effective implementation date.<sup>3</sup>

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<sup>1</sup>USTA is the principal trade association for the local exchange carrier industry ("LECs"). USTA represents more than 1,200 small, mid-size and large communications companies worldwide, the majority of which provide products and services in the United States. USTA active members are facilities-based carriers that serve end-users and endorse the concepts of universal telephone service and truth in billing.

<sup>2</sup>*In re Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170 (released May 11, 1999)("TIB Order")(also, relevantly, the further notice of proposed rulemaking portion of the TIB Order is hereinafter referred to as "Further Notice"), as published in the *Federal Register* ("Fed. Reg.") [CC Docket 98-170; FCC 99-72], 64 *Fed. Reg.* 34487-34498 (Jun. 25, 1999)(to be codified at 47 C.F.R. Part 64, Subpart U, Subsections 64.2000, 64.2001).

<sup>3</sup>As per an FCC staffer in informal discussions with USTA, by virtue of the Office of Management and Budget (OMB) action under OMB control number 3060-0857 in this instant matter, the July 26, 1999 expected compliance date may have been extended until seventy days from the date of the *Federal Register* ("Fed. Reg.") publication of the Truth-In-Billing and Billing Format *First Report and Order and Further Notice of Proposed Rulemaking* (TIB Order). The Fed. Reg. published the TIB Order on June 25, 1999. Therefore, assuming this staffer's statement is accurate, the final

## **II. A WAIVER OR, ALTERNATIVELY, A STAY FOR ALL USTA LEC MEMBERS IS NEEDED AND WOULD BE APPROPRIATE.**

Concerning the "monthly-service-provider" rule, compliance for USTA members will be costly, difficult and delayed. A small modification to the rule's language would make compliance attainable, while still satisfying the Commission's objectives.

Section 64.2001(a)(2) of the Commission's rules adopted in this proceeding requires that telephone bills include "notification to the customer that a new provider has begun providing service." It goes on to define a "new service provider" as "any provider that did not bill for services on the previous billing statement."<sup>4</sup> USTA members have no problem notifying customers when changes in the customers' presubscribed carriers are made, and they already do so. The problem is with the requirement that the telephone bill also identify every other "provider that did not bill for services on the previous billing statement."<sup>5</sup>

The most logical way to satisfy this rule would be to require the service provider to notify the billing entity if it is "new." This is presumably what the Commission had in mind, because it said, "The guidelines adopted here apply to the carrier providing service to customers, not to those carriers' billing agents."<sup>6</sup> However, to do this would require a change to the industry EMI billing record standard to allow a service provider to send the billing entity a notification that it is a new

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implementation date might be extended until September 4, 1999. However, it is incumbent upon the FCC to formally clarify the matter for the public. Therefore, USTA urges the FCC to take appropriate action and clarify this date and OMB impact in a public notice to this effect.

<sup>4</sup> 47 C.F.R. § 64.2001(a)(2)(ii).

<sup>5</sup>As USTA and its members have indicated, we disagree that this sort of notification is necessary, appropriate or in the public interest and that the Commission has the authority to require it.

<sup>6</sup>TIB *Order* ¶25.

provider under this rule. It typically takes the industry months of consultation to agree to and implement such changes.

But, more important, a service provider will not necessarily know whether it is “new” as that term is defined in the rules — as “any provider that did not bill for services on the previous billing statement.” A service provider has no way of knowing exactly when its charges are included on a customer’s bill — it could be the day after it sends billing and collection LECs billing information or three weeks later. Therefore, a service provider will not know when it submits additional charges whether it “billed for services on the previous billing statement” or on some other billing statement.

A slight change in the definition of a “new service provider” would permit a service provider to know when it is “new.” Instead of basing “newness” on when a charge last appeared on an end user’s bill, the rule could define it in terms of when the service provider last submitted charges to be billed. To accomplish this, the Commission would have to change the sentence in section 64.2001(a)(2)(ii), for example:

“New service provider” is any provider that has not submitted any charges to be billed to the customer in the last six months.”

If the rule is changed, the industry could modify its billing records standard to accommodate it, and service providers and billing entities could implement those changes. After all that is done, service providers could pass this information to billing entities for inclusion on customer bills.

The other possible way to satisfy this requirement, as written, would be for the billing entity to compare every new bill with the customer’s previous month’s bill and then “highlight” new providers in some way. However, exchange carrier billing entities have no systems to do such a

comparison. New databases would have to be developed to contain the latest month's billing information for all their customers. As new bills are being prepared, the systems that do that work would have to stop the processing to check with these new databases to identify any new providers. The billing systems would also have to be modified to receive this information, process it and print it on the bill.

One of USTA's members estimates that it would take in the neighborhood of 200,000 person-hours to make these modifications for its six customer billing systems. According to that member, work of this type would have to be performed by (and detract from the efforts of) many of the same personnel who are working to ensure that telephone company systems are year 2000 compliant and who are implementing other systems changes to facilitate electronic interactions with competing local exchange carriers.<sup>7</sup>

**A. A Commission Waiver of the Relevant Rule for USTA members Would be Proper.** USTA believes that this case meets the standards for a waiver.<sup>8</sup> It is simply impossible to comply in the most logical way with the rule as written. The other possible way to comply would be

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<sup>7</sup>By the same token, other non-LEC companies covered by the TIB Order have suggested FCC relief due to Y2K issues in this instant docket is warranted, e.g., see "AT&T Comments on Further Notice of Proposed Rulemaking" at 6-7 (Jul.9, 1999).

<sup>8</sup>"Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule and such deviation serves the public interest." *In the Matter of Implementation of the Pay Telephone Reclassification Order and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128. Order at 12, ¶23 (released April 4, 1997), citing *Northwest Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); See also *In the Matter of Implementation of the Pay Telephone Reclassification Order and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order at 11-12, ¶23 (released Apr. 15, 1997).

extraordinarily costly and could not be accomplished by the effective date or anytime soon thereafter.

**B. Absent Grant of a Waiver, USTA Members Would Meet the Requirements For a Stay in this Matter.** In the alternative to waiver relief, USTA asks the Commission to stay the effectiveness of this rule, as this petition meets the well established test for a stay.<sup>9</sup>

**USTA members are Likely to Prevail on the Merits.** First, the Commission's imposition of this requirement was arbitrary and capricious and was not supported by the record in this proceeding. It is, therefore, likely that a reviewing court will vacate this rule.

As described above, the Commission's conclusion that the rule it adopted "will be considerably more economical to implement" than the alternatives it rejected is without support in the record and is not correct. This alone would be grounds for a court to vacate this requirement.

Moreover, according to relevant Commission staff, the Commission made this requirement effective 70 days after publication of a summary in the *Federal Register*.<sup>10</sup> Nothing in the record remotely suggests that it would be possible to meet such a schedule either at the 30 day date (July 26, 1999) or the 70 day date (Sept. 4, 1999)(whichever actually applies), and it plainly would be impossible for USTA members to squeeze literally hundreds of thousands of hours of systems development work into this 30 or 70-day period.

Second, the Commission lacked statutory authority to adopt this regulation. The TIB Order indicates that the Commission found its authority to adopt its new rules in section 258 of the Act,

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<sup>9</sup>*Washington Metro Area Transit Comm'n*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

<sup>10</sup>See supra note3.

the section that requires the Commission to adopt carrier change verification procedures to combat slamming.<sup>11</sup> Slamming, of course, is the unauthorized change in a customer's presubscribed carrier, and the anti-slamming provisions of the Act cannot provide the basis for the Commission to adopt rules having to do with non-presubscribed carriers and other non-carrier service providers.<sup>12</sup>

Third, the rule raises serious First Amendment questions. The notification requirements amount to compelled speech, with the Commission dictating every aspect of the content of that speech. As such, they are subject, at a minimum, to heightened constitutional scrutiny.<sup>13</sup> And where, as here, there are numerous less burdensome and more closely tailored alternatives to address any legitimate concerns — alternatives that range from the one described above that was rejected by the staff to imposing the disclosure requirement directly on the entities whose conduct gives rise to the concerns — the rule simply cannot survive that heightened scrutiny.

**USTA Members Will Suffer Irreparable Harm Absent a Stay.** Absent a stay, USTA members will suffer irreparable harm of several types.

First, USTA members will have to spend millions of dollars to develop the systems necessary to comply with this rule. This harm is irreparable, as there does not appear to be a way for USTA members to recoup this money.

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<sup>11</sup>"[T]he truth-in-billing principles and guidelines adopted herein are justified as slamming verification requirements pursuant to section 258." Order ¶ 23.

<sup>12</sup>Section 201(b) does not give the Commission authority to impose any obligation on local exchange carrier billing services, as those services are not communications services subject to Title II of the Act. *Detariffing of Billing and Collection Services*, Report and Order, CC Docket No. 85-88, 102 F.C.C. 2d 1150 ¶ 31 (1986) ("we believe that carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act").

<sup>13</sup>See, e.g., *Pacific Gas & Electric v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

Second, this out-of-pocket expense is not the full extent of the harm to USTA members. Work to develop these systems would also require carriers to divert skilled information technology specialists from other projects designed to generate new revenues for USTA Members and to cut USTA members' costs. Although it is impossible to calculate this harm, the potential harm is very real. Absent a stay, there would be no way to return USTA members to the position they occupy now, after having spent millions of dollars and after diverting resources to a wasted effort.

Third, this rule would require USTA members to send misleading and confusing notifications to their customers.<sup>14</sup> Customers would be confused, blame USTA members for sending incorrect bills and call USTA members' service representatives to complain. This harm — the lost goodwill of our customers and the cost of dealing with these complaints — is irreparable<sup>15</sup> and supports a stay.

**A Stay Will Not Harm Others.** There is nothing to suggest that consumers will be harmed if they do not begin to receive this sort of new provider notification. In fact, as described above, implementation of the rule as written will actually confuse consumers.

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<sup>14</sup>The rule would require USTA members to "highlight" the presence of a "new provider" where there was no such provider in at least two instances. First, at least one major carrier has USTA members bill customers on a bi-monthly basis. Because there would never be a charge from this carrier on the customer's "previous billing statement," this provider would always be identified as "new," even where the customer had been using the provider for years. Second, many people do not make long distance calls every month. The next time such a person made a long distance call, even using the carrier to which she had been presubscribed for years, the Commission's rules would require USTA members to notify her that she had used a "new provider." Customers getting these bills would be justifiably confused, would blame USTA members for what they would view as a billing mistake and would call USTA members to complain, causing further irreparable harm.

<sup>15</sup>See *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4<sup>th</sup> Cir. 1994); *Basicomputer Corp. v. Scott*, 973 F.2d 507 (6<sup>th</sup> Cir. 1992); *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8<sup>th</sup> Cir 1977).

**A Stay Is in the Public Interest.** As described above, the Commission's new rule would confuse consumers, and a stay is in the public interest. A stay is also in the public interest because implementation of the Commission's rule would divert USTA members' information system personnel from other efforts, including completing work to avoid any Y2K problems and from efforts to implement system changes to facilitate electronic interaction with competitors.<sup>16</sup>

**III. SMALL AND MID-SIZE USTA MEMBERS REQUIRE ADDITIONAL RELIEF THAN THAT REQUESTED IMMEDIATELY ABOVE IN SECTION II OF THIS INSTANT PLEADING.**

USTA, on behalf of small and mid-size local exchange carrier (LECs) members, believes it is necessary and appropriate for the Commission to address the distinct needs of this industry segment, accordingly. USTA's goal, in this respect, is to simply find some practical solution to the dilemma facing hundreds of these ILECs. In that regard, the small and mid-size LECs that USTA represents have different and distinct needs and require an indefinite waiver or stay of the entire TIB Order (as is appropriate as a subject for consideration under the Regulatory Flexibility Act of 1980;<sup>17</sup> and also as was discussed by the Office of Management and Budget (OMB) in light of the Paperwork Reduction Act of 1995, Pub. L. 104-13 ("PRA"), under OMB Control Number 3060-0857).<sup>18</sup> This portion of USTA's request seeks interim relief for this relevant segment, pending the FCC's resolution of the OMB's July 1, 1999, action in this matter; the Commission's final action on the Further Notice in this matter, as it pertains to all affected carriers in an overall sense, but

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<sup>16</sup>See infra note 20.

<sup>17</sup>See Regulatory Flexibility Act, Publ. L. No. 96-354, Section 2(b). Also, see generally, Exec. Order No. 12866, 58 F. Reg. 51735 (1993) reprinted in 5 U.S.C. § 601, et. seq. (1998).

<sup>18</sup>Citations omitted.

specifically with regard to USTA's comments concerning the FCC's RFA and the PRA analysis;<sup>19</sup> in light of Year 2000 remediation issues facing these companies;<sup>20</sup> and also pending reconsideration

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<sup>19</sup>USTA believes the Commission can address the concerns for small and mid-size LECs in this waiver/stay petition on an interim basis. In another aspect of this proceeding, USTA filed comments the Commission has not yet addressed: See, "The United States Telephone Association's Comments on the FCC's Initial Regulatory Flexibility Analysis; and Initial Paperwork Reduction Act of 1995 Analysis from the First Report and Order and Further Notice of Proposed Rulemaking in the Matter of Truth-in-Billing and Billing Format, CC Docket 98-170" (filed on July 9, 1999).

To the extent that USTA is requesting this relief in this petition for waiver or in the alternative for a stay on behalf of its small and mid-size companies, USTA is not seeking any action herein that would ultimately be inconsistent with its comments in the Further Notice. However, given that the FCC has not established a definition for small businesses in the TIB Order, USTA recommends that for the purpose of this instant/interim relief for small and mid-size local exchange carrier members that the FCC use the definition it established in its May 3, 1999, "Y2K Communications Sector Report: Executive Summary": "[Aside from] The seven largest local exchange carriers . . . [t]he remaining carriers, which we define as medium/small, . . . ." (<http://www.fcc.gov/year2000/y2kesres.html> at 3.).

To the extent that the FCC may take further action that directly affects small and mid-size local exchange carriers at the conclusion of the Further Notice, the earlier actions the FCC took to apply the TIB Order's provisions to small and mid-size carriers, at this time, may effectively not be final. See e.g., *Nor-Am Agricultural Products, Inc. v. Hardin*, 435 F.2d 1151 (7th Cir. 1970)(en banc), cert. dismissed, 402 U.S. 935 (1971). In that regard, the FCC has acknowledged that small entities possibly would be affected by the FCC's proposals made in its Further Notice, TIB Order at ¶108.

Thus, USTA believes that the FCC's action in the TIB Order as to small and mid-size carriers is arguably not final. Therefore, USTA reserves the right to take all appropriate action once the Order can be considered final as to these carriers. Notwithstanding 47 C.F.R. §1.103, finality also may be contingent upon the FCC's response to OMB's conditions or questions; or alternatively, a Commission majority override of OMB's action (citation omitted).

<sup>20</sup>See e.g., OMB's initial comments submitted in this instant docket, as cited by the FCC in the TIB Order at ¶76; OMB Memorandum 99-17: "Minimizing Regulatory and Information Technology Requirements That Could Affect Progress Fixing the Year 2000 Problem" (<http://www.cio.gov/minregi.htm>); and Securities and Exchange Commission, Release Nos. 33-7568;34-40377; 35-26912; IA-1749; IC-23416: "Commission Statement of Policy on Regulatory Moratorium to Facilitate the Year 2000 Conversion", *Fed. Reg.* (Vol. 63, No. 171; Sept. 3, 1998)(imposing a moratorium on the implementation of new Commission rules requiring major reprogramming by companies regulated by the SEC. The moratorium is effective between June 1, 1999 and March 31, 2000); and the FCC's Y2K Communications Sector Report: Executive Summary at 3-4 (Mar. 31, 1999)(recognizing the status of preparation by smalls and mid-size LECs).

of the one issue that is the primary subject of this instant pleading, as to all USTA members.<sup>21</sup>

Ideally, USTA seeks a permanent waiver or stay of the TIB rules as to the entire TIB Order, but especially with respect to 64.2001(a)(2); and 64.2001(c)(regarding "Deniable" and "Non-deniable" charges).

The economic penalties of having to implement both of these TIB Order rules in any time frame will be compounded because of the small and mid-size LECs' lack of economies of scale and scope. It may even drive some of them out of billing and collection altogether, which for some has been a lucrative aspect of their business.

Many of these ILECs and the ILECs who use billing service agents (but remain liable under the TIB Order) are just beginning to be able to investigate the resources needed to implement these requirements. It is arguable that the cost per customer bill will be excessive relative to any value added to customer benefit. Therefore, USTA believes that the elements justifying either a waiver or, alternatively, a stay for small and mid-size carriers can be met easily. Small and mid-size members

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Further, according to *Telecommunications Reports*, on August 4, 1999, the Network Reliability and Interoperability Council will release findings on industry efforts to ensure telecommunications networks will function properly when confronted by the Y2K date change.

<sup>21</sup>The FCC has granted another USTA petition for waiver which sought different relief based on status of the LEC as being either large or small/mid/rural. See In the Matter of Request of the United States Telephone Association for Waiver of the Commission's Requirements In CC Docket No. 96-128 (Payphone Compensation); In the Matter of Implementation of the Pay Telephone Reclassification Order and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, *Report and Order* (released Sept. 20, 1996); *Order on Reconsideration* (released Nov. 8, 1996); and see also, In the Matters of Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, TDS Telecommunications Corporation Petition for Waiver of Coding Digit Requirement, International Telecard Association Petition for Reconsideration of Payphone Compensation Obligation, AirTouch Pagine Petition for Waiver of Payphone Compensation Obligation, *Memorandum Opinion and Order*, CC Docket No. 96-128 (released Mar. 9, 1998) at ¶¶ 73-78.

are likely to prevail on the merits; they would suffer irreparable harm if the stay were not granted; the public interest would be served and no party would be harmed by the grant of a stay.

On the other hand, the public could be harmed absent a stay, if these businesses were left faltering economically or due to having to divert resources from Y2K remediation efforts.

Therefore, USTA urges the FCC to take specific action addressing the issues of the small and mid-size LECs.

#### IV. CONCLUSION

Wherefore, based on the matters USTA raised in this instant pleading, USTA urges the Commission to grant this requested waiver petition or alternatively the petition for stay and/or all other appropriate and relative relief sought on behalf of USTA members.

Respectfully submitted,  
UNITED STATES TELEPHONE ASSOCIATION

By: Julie E. Rones

Lawrence E. Sarjeant  
Linda Kent  
Keith Townsend  
John Hunter  
Julie E. Rones  
Its Attorneys

1401 H Street, NW, Suite 600  
Washington, D.C. 20005  
(202) 326-7300

Dated: July 16, 1999

Charles Carbone  
Michael Shames  
Utility Consumer Action Network  
1717 Kettner Blvd. - Suite 105  
San Diego, CA 92101

Walter Steimel, Jr.  
Hunton & Williams  
(Pilgrim Telephone, Inc.)  
1900 K Street, NW  
Washington, DC 20006

Mark C. Rosenblum  
Richard H. Rubin  
AT&T  
295 North Maple Avenue  
Room 325213  
Basking Ridge, NJ 07920

Pamela J. Riley  
AirTouch Communications, Inc.  
1818 N Street, NW  
Suite 800  
Washington, DC 20036

Albert H. Kramer  
Robert F. Aldrich  
Valerie M. Furman  
Dickstein Shapiro Morin & Oshinsky, LLP (APCCI)  
2101 L Street, NW  
Washington, DC 20037

Larry A. Peck  
John Gockley  
Bruce Becker  
Ameritech  
2000 West Ameritech Center Drive-Room 4H86  
Hoffman Estates, IL 60196

John T. Scott, III  
Crowell & Moring, LLP  
(Bell Atlantic Mobile)  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004

Jim Hurt  
Jeannette Mellinger  
Consumers' Utility Counsel Division  
Two Martin Luther King, Jr. Drive  
Plaza Level East  
Atlanta, GA 30334

Emily M. Williams  
ALTS  
888-17th Street, NW  
Suite 900  
Washington, DC 20036

Douglas D. Leeds  
AirTouch Communications, Inc.  
One California Street  
29<sup>th</sup> Floor  
San Francisco, CA 94111

Robert M. McDowell  
ACTA  
8180 Greensboro Drive  
Suite 700  
McLean, VA 22102

Judith L. Harris  
Brenda K. Pennington  
Reed Smith Shaw & McClay, LLP (AmericaTel Corp.)  
1301 K Street, NW  
Suite 1100-East Tower  
Washington, DC 20005

Mary Liz Hepburn  
Bell Atlantic  
1300 Eye Street, NW  
Suite 400W  
Washington, DC 20005

M. Robert Sutherland  
Richard M. Sbaratta  
Helen A. Schockey  
BellSouth  
1155 Peachtree Street, NE - Suite 1700  
Atlanta, GA 30309

Edwin N. Lavergne  
Shook, Hardy and Bacon, LLP  
(The Billing Reform Task Force)  
1850 Connecticut Avenue, NW  
Suite 900  
Washington, DC 20006

Rachel J. Rothstein  
Cable & Wireless USA, Inc.  
8219 Leesburg Pike  
Vienna, VA 22182

Eliot J. Greenwald  
Swidler Berlin Shereff Friedman, LLP  
(CenturyTel)  
3000 K Street, NW  
Suite 300  
Washington, DC 20007

John Prendergast  
Susan J. Bahr  
Blooston, Mordkofsky, Jackson & Dickens  
(CommNet Cellular, Inc.)  
2120 L Street, NW - Suite 300  
Washington, DC 20037

Genevieve Morelli  
Competitive Telecommunications Assn.  
1900 M Street, NW  
Suite 800  
Washington, DC 20036

Matthew C. Ames  
Miller & Van Eaton, PLLC  
(Education and Library...)  
1150 Connecticut Avenue, NW  
Suite 1000  
Washington, DC 20036

Michel J. Shortley, III  
Frontier  
180 South Clinton Avenue  
Rochester, NY 14646

Michael F. Altschul  
Randall S. Coleman  
Cellular Telecommunications Industry Assn.  
1250 Connecticut Avenue, NW  
Suite 200  
Washington, DC 20036

Peter Arth, Jr.  
Lionel Wilson  
Gretchen Therese Dumas  
Public Utilities Commission - State of California  
505 Van Ness Avenue  
San Francisco, CA 94102

Gary D. Slaiman  
Kristine DeBry  
Swidler Berlin Shereff Friedman, LLP  
(Coalition to Ensure Responsible Billing)  
3000 K Street, NW - Suite 300  
Washington, DC 20007

Russell M. Blau  
Eliot J. Greenwald  
Swidler Berlin Shereff Friedman, LLP  
(Commonwealth Telco.)  
3000 K Street, NW - Suite 300  
Washington, DC 20007

Robert J. Aamoth  
Kelley Drye & Warren, LLP  
(CompTel)  
1200-19th Street, NW  
Suite 500  
Washington, DC 20036

Garret G. Rasmussen  
Patton Boggs, LLP  
(Electronic Commerce Assn.)  
2550 M Street, NW  
Washington, DC 20037

Barry Pineles  
GST Telecom, Inc.  
4001 Main Street  
Vancouver, WA 98663

John F. Raposa, **HQE03J27**  
GTE  
600 Hidden Ridge  
P.O. Box 152092  
Irving, TX 75015

Kenneth T. Burchett  
GVNW  
P.O. Box 2330  
8050 S.W. Warm Springs Street  
Suite 200  
Tualatin, OR 97062

David W. Zesiger  
Donn T. Wonnell  
Independent Telephone & Telecommunications Alliance  
1300 Connecticut Ave  
Suite 600  
Washington, DC 20036

Mary L. Brown  
MCI  
1801 Pennsylvania Avenue, NW  
Washington, DC 20006

Hubert H. Humphrey, III  
Garth M. Morrisette  
Amy Brendmoen  
Minnesota Office of Attorney General  
1200 NCL Tower - 445 Minnesota Street  
St. Paul, MN 55101

Elisabeth H. Ross  
Birch, Horton, Bittner and Cherot  
(Missouri PUC)  
1155 Connecticut Avenue, NW  
Suite 1200  
Washington, DC 20036

Susan Grant  
National Consumers League  
1701 K Street, NW  
Suite 1200  
Washington, DC 20006

Andre J. Lachance  
GTE  
1850 M Street, NW  
Suite 1200  
Washington, DC 20036

Charles H. Helein  
Helein & Associates, PC  
(Global Telecompetition...)  
8180 Greensboro Drive  
Suite 700  
McLean, VA 22102

David L. Nace  
B. Lynn F. Ratnavale  
Lukas, Nace, Gutierrez & Sachs, Chtd.  
(Liberty Cellular, Inc.)  
1111-19th Street, NW - Suite 1200  
Washington, DC 20036

Susan M. Eid  
Richard A. Karre  
MediaOne Group, Inc.  
1919 Pennsylvania Avenue, NW  
Suite 610  
Washington, DC 20006

George M. Fleming  
Mississippi PSC  
P.O. Box 1174  
Jackson, MS 39215

Kenneth V. Reif  
NASUCA  
1580 Loga Street  
Suite 610  
Denver, CO 80203

Glenn S. Richards  
David S. Konczal  
Fisher, Wayland, Cooper, Leader and Zaragoza, LLP  
(NevadaCom, Inc.)  
2001 Pennsylvania Avenue, NW - Suite 400  
Washington, DC 20006

Bruce A. Kushnick  
New Networks Institute  
826 Broadway  
Suite 900  
New York, NY 10003

Anne F. Curtin  
Douglas W. Elfner  
State Consumer Protection Board  
Five Empire State Plaza - Suite 2101  
Albany, NY 12223

Jodi J. Bair  
Ohio PUC  
30 East Broad Street  
Columbus, OH 43215

Terrence J. Buda  
Frank B. Wilmarth  
Bohdan R. Pankiw  
Pennsylvania PUC  
P.O. Box 3265  
Harrisburg, PA 17105

Mary McDermott  
Todd B. Lantor  
PCIA  
500 Montgomery Street  
Suite 700  
Alexandria, VA 22314

Marjorie K. Conner  
Francine Matthews  
Michelle Walsh  
Hunton & Williams (Pilgrim Telephone)  
1900 K Street, NW  
Washington, DC 20006

Tiki Gaugler  
Qwest  
4250 North Fairfax Drive  
Arlington, VA 22203

Timothy S. Carey  
Ann Kutter  
Michael P. Sasso  
State Consumer Protection Board  
Five Empire State Plaza - Suite 2101  
Albany, NY 12223

Robert S. Foosaner  
Lawrence R. Krevor  
Laura L. Holloway  
Nextel Communications, Inc.  
1450 G Street, NW - Suite 425  
Washington, DC 20005

Teresa S. Werner  
Piper & Marbury, LLP  
(Omnipoint Comms.)  
1200-19th Street, NW  
Seventh Floor  
Washington, DC 20036

Katherine M. Harris  
Stephen J. Rosn  
John P. Stanley  
Wiley, Rein & Fielding (PCIA)  
1776 K Street, NW  
Washington, DC 20006

Richard S. Myers  
William R. Layton  
Myers Keller Communications Law Group  
(Petroleum Comms.)  
1522 K Street, NW - Suite 1100  
Washington, DC 20005

Luisa L. Lancetti  
Wilkinson, Barker, Knauer & Quinn, LLP  
(PrimeCo)  
2300 N Street, NW  
Washington, DC 20037

Sylvia Lesse  
Marci Greenstein  
Kraskin, Lesse & Cosson, LLP  
(Rural Cellular Assn.)  
2120 L Street, NW - Suite 520  
Washington, DC 20037

Michael R. Bennet  
Edward D. Kania  
Bennet & Bennet, PLLC  
(Rural Telecommunications)  
1019-19th Street, NW - Suite 500  
Washington, DC 20036

L. Marie Guillory  
R. Scott Reiter  
NTCA  
(Rural Telephone Coalition)  
2626 Pennsylvania Avenue, NW  
Washington, DC 20037

Robert M. Lynch  
Durward D. Dupre  
Barbara R. Hunt  
SBC Comms.  
One Bell Plaza - Room 3026  
Dallas, TX 75202

Carl K. Oshiro  
Small Business Alliance for Fair Utility Regulation  
100 First Street  
Suite 2540  
San Francisco, CA 94105

Leon M. Kestenbaum  
Jay C. Keithley  
Norina T. Moy  
Sprint  
1850 M Street, NW - Suite 1110  
Washington, DC 20036

Charles C. Hunter  
Catherine M. Hannan  
Hunter Communications Law Group (T RA)  
1620 Eye Street, NW  
Suite 701  
Washington, DC 20006

Philip L. Verveer  
Gunnar D. Halley  
Willkie Farr & Gallagher (Teligent)  
Three Lafayette Centre  
1155-21st Street, NW  
Washington, DC 20036

Margot Smiley Humphrey  
Koteen & Naftalin, LLP  
(Rural Telephone Coalition)  
1150 Connecticut Avenue, NW  
Washington, DC 20036

Stuart Polikoff  
Stephen Pastorkovich  
OPASTCO  
21 Dupont Circle, NW  
Suite 700  
Washington, DC 20036

Irene A. Etzkorn  
Siegel & Gale  
Ten Rockefeller Plaza  
New York, NY 10020

Carole C. Harris  
Christine M. Gill  
Anne L. Fruehauf  
McDermott, Will & Emery (Southern Communications Services)  
600-13th Street, NW  
Washington, DC 20005

Jonathan M. Chambers  
Sprint  
1801 K Street, NW  
Suite M112  
Washington, DC 20006

Laurence E. Harris  
David S. Turetsky  
Stuart H. Kupinsky  
Teligent, Inc.  
8065 Leesburg Pike - Suite 400  
Vienna, VA 22182

Texas Citizen Action  
P.O. Box 10231  
Austin, TX 78756

Kenan Ogelman  
Texas Office of Public Utility Counsel  
1701 N. Congress  
Suite 9-180  
P.O. Box 12397  
Austin, TX 78711

Rick Guzman  
Texas Office of Public Utility Counsel  
1701 N. Congress  
Suite 9-180  
P.O. Box 12397  
Austin, TX 78711

Mitchell F. Brecher  
Fleischman and Walsh, LLP  
(Time Warner Telecom)  
1400-16th Street, NW  
Washington, DC 20036

Kathryn Marie Krause  
U S WEST  
1020-19th Street, NW  
Suite 700  
Washington, DC 20036

Peter M. Connolly  
Koteen & Naftalin, LLP  
(US Cellular Corp.)  
1150 Connecticut Avenue, NW  
Washington, DC 20036

Leslie A. Cadwell  
Vermont Department of Public Service  
112 State Street  
Drawer 20  
Montpelier, VT 05620

Christine O. Gregoire  
Shannon E. Smith  
WUTC  
1400 S. Evergreen Park Drive, SW  
P.O. Box 40128  
Olympia, WA 98504

ITS  
1231-21st Street, NW  
Washington, DC 20036

**CERTIFICATE OF SERVICE**

I, Nicole Shackelford, do certify that on July 16, 1999, Petitions for an Expedited Waiver or Stay of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

  
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Nicole Shackelford