

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

Joint Petition for Expedited Rulemaking Establishing )  
Minimum Notice Requirements for Detariffed Services ) CI Docket No. 02-22  
)  
)

**REPLY COMMENTS OF AMERICATEL CORPORATION**

I. INTRODUCTION

Americatel Corporation (“Americatel”),<sup>1</sup> through counsel, respectfully submits its reply comments in the above-captioned proceeding. Americatel continues to support the goal of the Petitioners<sup>2</sup>—to assist consumers in obtaining sufficient information about long distance services to make informed purchase decisions. However, we must strongly oppose the proffered solution—a mandatory 30-day, advanced, printed notice for any material changes in rates, terms and conditions for service—because it has not been demonstrated to be in public interest. Indeed, such a rule would contradict 20 years of regulatory precedent under which the Federal

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<sup>1</sup> Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services. Americatel also operates as an Internet Service Provider (“ISP”). Americatel specializes in serving Hispanic communities throughout the United States, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers.

<sup>2</sup> The nine petitioners are AARP, Consumer Action (“CA”), Consumer Federation of America (“CFA”), Consumers Union (“CU”), the Massachusetts Union on Public Housing Tenants (“MUPHT”), the National Association of Regulatory Utility Commissioners (“NARUC”), the National Association of Consumer Agency Administrators (“NACAA”), the National Association of State Utility Consumer Advocates (“NASUCA”), and the National Consumers League (“NCL”) (collectively as “Petitioners”).

Communications Commission (“FCC” or “Commission”) has successfully relied on market forces and its complaint process to discipline the market and protect against consumer abuse.<sup>3</sup>

Americatel makes two points in reply. First, the institution of a long advance notice requirement would dramatically reverse well-established FCC policies. According to the requirements of the Administrative Procedure Act (“APA”),<sup>4</sup> agencies can reverse long-established rules or policies only when they “provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”<sup>5</sup> The record in this proceeding simply does not contain sufficient facts for the Commission to make this demonstration, such that a change in policy would likely violate the APA. Second, Americatel agrees with those parties suggesting that, in the event that the FCC were to decide that a new notification rule is required, the Commission must also preempt the states from imposing their own notification rules.

## II. LONG STANDING ADMINISTRATIVE RULES CANNOT BE REVERSED BASED ON A MERE REQUEST FOR A NEW RULE

Section 706(2)(A) of the APA<sup>6</sup> requires courts to “hold unlawful and set aside agency action, findings, and conclusions, found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” While an administrative agency “concerned with furtherance of the public interest is not bound to rigid adherence to its prior

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<sup>3</sup> Verizon Comments at 3-4; SBC Comments at 1-4.

<sup>4</sup> 5 U.S.C. §§551-58, 701-06.

<sup>5</sup> *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

<sup>6</sup> 5 U.S.C. §706(2)(A).

rulings,”<sup>7</sup> it simply may not decide to change its long-standing rules and policies without “provid[ing] an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”<sup>8</sup> Moreover, “the Commission ‘must explain its reasons and do more than enumerate factual differences, if any, between \* \* \* [similar] cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act.’”<sup>9</sup>

If the Commission fails to meet this standard, its actions are subject to reversal on appeal. For example, a court reversed the FCC’s renewal of a broadcast license, which had been granted based solely on evidence of the license holder’s post-term improvements in its compliance with the Commission’s Equal Employment Opportunity (“EEO”) rules, when FCC precedent precluded the consideration of such post-term evidence.<sup>10</sup> The court found that the agency failed to provide a principled explanation for its “change of direction” in policy and remanded the matter to the FCC.

Courts have applied this rule even in rulemaking proceedings.<sup>11</sup> In the *Mobile Com* case, the FCC had established rules that would award radio licenses on a free-of-charge basis and without competing applicants, to parties that developed technology that would transmit information through the airwaves much faster than had been possible using existing equipment. This rule was often referred to as the “Pioneer Preference” rule. A company, *Mobile*

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<sup>7</sup> *Columbia Broadcasting System*, 454 F.2d at 1026.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, citing *Melody Music Corp. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

<sup>10</sup> *National Black Media Coalition v. FCC*, 775 F.2d 342 (D.C. Cir. 1985).

<sup>11</sup> *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (subsequent history omitted).

Telecommunications Corp. (“Mtel”) received such a Pioneer Preference, which entitled it to a radio license for narrowband personal communications service (“PCS”) spectrum.

Before Mtel’s license was issued, however, Congress amended Section 309 of the Communications Act of 1934, as amended (“Act”)<sup>12</sup> to award many radio licenses through a competitive bidding process, under which applicants would pay market rates for a radio spectrum license. In adopting rules to comply with the new statutory auction requirement, the FCC initially excepted Mtel from the obligation to pay for its radio license, but later reversed itself and determined that Mtel would be required to pay 90% of the lowest winning bid for a narrowband PCS license.

Mtel appealed the FCC’s decision to impose a payment obligation on the Pioneer Preference license on the grounds that the FCC lacked statutory authority to impose a payment obligation and that the Commission failed to engage in reasoned decision-making. The court determined that, while the FCC had the statutory authority to impose license fees on Mtel, the agency nevertheless failed to justify its change of position.

The *Columbia Broadcasting System* case has strong applicability to the current situation. Several commenting parties<sup>13</sup> in this proceeding have documented the 20-year history of the FCC’s use of market forces and its complaint process to control non-dominant long distance carriers. They also demonstrated how those processes, rather than long notice periods, have served to benefit consumers. Accordingly, this long-standing regulatory policy cannot be

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<sup>12</sup> 47 U.S.C. §309.

<sup>13</sup> *E.g.*, Verizon Comments at 3-4; SBC at 1-4.

reversed simply because the Petitioners believe that the current rule is inadequate or might result in more complaints to state agencies, without first providing probative evidence of market failure. The imposition of a 30-day, advanced written notice requirement for any significant change in rates, terms, and conditions for long distance service flies in the face of these well-established Commission findings, conclusions and policies and would violate the principles of the *Columbia Broadcasting System* case.

Not only have Petitioners failed to provide any hard evidence of actual consumer harm and market failure, but they have also failed to address the harmful impact of their long notice requirement on a competitive marketplace. For example, AT&T notes<sup>14</sup> that the imposition of such a requirement would invite price signaling or price coordination back to the marketplace. Americatele submits that such a result would harm consumers and contravene the public interest. The Commission should, therefore, decline to initiate a new rulemaking proceeding.

### III. IN THE EVENT THAT THE COMMISSION ADOPTS A NOTICE RULE, IT SHOULD DO SO ONLY ON A PREEMPTIVE BASIS

Several parties<sup>15</sup> filed comments that urge the FCC, in the event that it decides to propose a mandatory notice rule, to do so on a preemptive basis such that states may not impose notification rules of their own. Americatele strongly supports that position.

The Petitioners have proposed that the FCC promulgate a national rule for notifying customers of material changes in rates, terms, and conditions for interstate services. Implicit in that request is the assumption that multiple states' rules are insufficient to protect

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<sup>14</sup> AT&T Comments at 5, n.10.

<sup>15</sup> WorldCom Comments at 2; Qwest Comments at 2-6; AT&T Comments at 2.

consumers properly. Accordingly, this same logic compels one to conclude that the existence of various states' rules would likely negate the value to consumers of a single national rule.

Moreover, it would be extremely costly, if not outright impossible, for carriers to comply with two sets of notification rules—one federal and one state—for the same customers located within a single state. Therefore, the FCC should preempt the states from applying their own rules in the event that the Commission were to adopt any disclosure rule.

#### IV. CONCLUSION

For the reasons set forth above and in Americatel's initial comments, the FCC should decline to open a new rulemaking proceeding as requested by the Petitioners. Rather, the Commission should continue to monitor the long distance market and address any carrier-specific problems on a case-by-case basis if and when they arise.

Respectfully submitted,  
AMERICATEL CORPORATION

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Dated: March 26, 2002

**CERTIFICATE OF SERVICE**

I, Lila A. Myers, do hereby certify that the foregoing **REPLY**  
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