WILMER, CUTLER & PICKERING

Washington • Baltimore • New York • London • Brussels • Berlin

May 17, 2000

TELECOMMUNICATIONS LAW UPDATES

IXCs Must Cancel Tariffs

Although its efforts to force long distance carriers to withdraw their tariffs were stymied for years, the FCC finally convinced the United States Court of Appeals for the District of Columbia Circuit that the agency has the authority to prohibit interexchange carriers ("IXCs") from filing tariffs (so-called "mandatory detariffing") for their domestic, interstate interexchange services. On April 28, 2000, the court found that the statutory "forbearance" provision added by the Telecommunications Act of 1996 empowered the FCC to order mandatory detariffing. The court rejected the IXCs' claims that, instead of mandatory detariffing, the FCC should have ordered "permissive detariffing" (i.e., permitting, but not requiring, IXCs to cancel their tariffs). As a result of the decision, the FCC's detariffing order likely will cause significant changes to the relationships between IXCs and their large corporate customers.

Although section 203(a) of the Communications Act of 1934 requires carriers to file tariffs, the FCC concluded in the early 1980s that tariffs were no longer necessary to ensure that most long distance carriers' rates were just and reasonable. Accordingly, the agency first implemented a permissive detariffing policy for nondominant IXCs, and in 1985 prohibited nondominant carriers from filing any tariffs at all. The D.C. Circuit invalidated the latter order, finding mandatory detariffing inconsistent with the Act. The Supreme Court subsequently struck down the FCC's permissive detariffing policy.

The FCC's detariffing policies were given new life by the 1996 Act, which includes a provision requiring the FCC to forbear from unnecessary regulations and statutory provisions. Shortly after the Act was adopted, the FCC relied on this provision to order IXCs to cancel their tariffs. The FCC concluded that because the long distance market is competitive, tariffs are no longer necessary to ensure that rates are just and reasonable or to protect consumers. The FCC also found that tariffs impede competition by removing incentives for carriers to lower prices, reducing carriers' ability to respond quickly to changes in cost and demand, imposing costs on carriers attempting to offer new services, and preventing consumers from obtaining service arrangements tailored to their needs. In addition, the FCC found that complete detariffing would serve the public interest by preventing carriers from invoking the "filed-rate" doctrine. Under that doctrine, courts have held that when a rate, term, or condition in a filed tariff differs from that otherwise agreed on by a carrier and a customer, the carrier must impose the tariffed rate, term, or condition. Thus, the filed-rate doctrine allowed carriers to trump more favorable terms negotiated as part of a contract.

On the other hand, the FCC also ordered IXCs to "make information on current rates, terms, and conditions for all of their interstate, domestic, interexchange services available to the public in an easy to understand format and in a timely manner." The FCC concluded that this public disclosure requirement would help to ensure that consumers can bring complaints to enforce requirements that IXCs charge customers in different areas the same rates and would make it easier for consumers to compare

carriers' service offerings.

The IXCs appealed the detariffing order and persuaded the D.C. Circuit to stay the FCC's order pending resolution of the appeal. During the pendency of the appeal, the FCC issued two reconsideration orders. In the first, the agency decided, among other things, to eliminate the requirement that IXCs make their rates, terms, and conditions available to the public, expressing concern that such disclosure might undermine the FCC's goals of deterring tacit price coordination and reducing the administrative burdens on IXCs. In the second reconsideration order, the FCC again reversed course and ordered IXCs to disclose publicly (and post on their web sites) rates, terms, and conditions for their services.

In its April 28, 2000, decision, the D.C. Circuit upheld the FCC's mandatory detariffing policy, rejecting arguments by the IXCs that the FCC should have adopted a policy of permissive detariffing. The court confirmed the FCC's broad authority under the forbearance provision, dismissing the IXCs' contention that the forbearance provision merely gave the FCC the discretion to decline to enforce the tariffing requirements and did not grant authority to forbid IXCs from filing tariffs. Most important, the court found that the FCC's concerns that the filed-rate doctrine might inhibit individualized contract negotiations were reasonable.

The transition from tariffs to contract-based relationships likely will lead over time to significant changes in the marketplace for telecom services purchased by large corporations. On May 9, 2000, the FCC issued a public notice proposing a nine-month transition to complete detariffing. One of the agency's proposals is that, while IXCs' "contract tariffs" may stay in place during that period if they remain unchanged, they must be cancelled if they are revised at all. Given the frequency with which large corporate users change their tariffs, it is likely that many contract tariffs will be cancelled long before the end of the nine-month period.

Unless carriers simply post their old tariffs on their web sites, detariffing is likely to reduce substantially the amount of carrier price and nonprice information that will be available to the public. Less information should increase uncertainty about competitors' prices, and that in turn should produce ever growing price and nonprice competition. Carriers no longer will be able to resist unique service arrangements by asserting that such arrangements would conflict with their tariffs or that, if they were included in their tariffs, the carriers would have to make these arrangements available to other customers.

John H. Harwood II
Mark S. Morelli

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

Lynn Charytan	**202-663-6455**	**LCharytan@wilmer.com**
John Harwood	**202-663-6333**	**JHarwood@wilmer.com**
William Lake	**202-663-6725**	**WLake@wilmer.com**
Daniel Phythyon	**202-663-6545**	**DPhythyon@wilmer.com**
William Richardson	**202-663-6038**	**WRichardson@wilmer.com**