Note to paragraph (a)(47): Dates in parenthesis indicate the effective date of the federal rules that have been adopted by and delegated to the state or local air pollution control agency. Therefore, any amendments made to these delegated rules after this effective date are not delegated to the agency.

[FR Doc. 99–9606 Filed 4–21–99; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 42

[CC Docket No. 96–61; FCC 99–47]

Nondominant Interexchange Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this Second Order on Reconsideration, the Commission consider again whether nondominant interexchange carriers (IXCs) should be required to make available to the public information concerning the rates, terms, and conditions for all of their interstate, domestic, interexchange services. 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. 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. 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. 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.

EFFECTIVE DATE: May 24, 1999.

FOR FURTHER INFORMATION CONTACT: Andrea Kearney, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Order On Reconsideration and Erratum adopted March 18, 1999, and released March 31, 1999 (FCC 99–47). The full text of this Order is available for inspection and copying during normal business hours in the FCC Reference Center, 425 12th Street, SW, Washington, D.C. the complete text also may be obtained through the World Wide Web, at http:/www.fcc.gov/Bureaus/Common Carrier/Order/fcc9947.wp, or may be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th St., N.W., Washington, D.C. 20036.

Synopsis of Second Order on Reconsideration and Erratum Overview

A. Overview

1. In this Second Order on Reconsideration, we consider again whether nondominant interexchange carriers (IXCs) should be required to make available to the public information concerning the rates, terms, and conditions for all of their interstate, domestic, interexchange services. 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. 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. 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. 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.

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. 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, the Commission in the *Second Report and Order,* 61 FR 59340 (November 22, 1996) required the complete detariffing 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.

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 requirement in the *Order on Reconsideration.* 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.

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. 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 tariff filing requirements for nondominant IXCs 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. 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. 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. Moreover, the Commission concluded that tariffs can have negative effects that impair market efficiency and increase costs to consumers. The Commission found that, in particular, tariffs impede competition by permitting carriers to invoke the ''filed-rate'' doctrine and by not requiring carriers to provide rate and service information directly to consumers. The Commission also stated that tariffs provide a source of information that carriers can use to engage in tacit price coordination.

7. Although the Commission concluded that tariffs harm competition in the market for interstate, domestic, interexchange services, 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 Act or for choosing the particular rate plan that best suits their individual needs. 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. 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.

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. 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.

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. 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. 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 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. 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 Act, 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.

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. On February 13, 1997, the court granted these motions. 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.* 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. 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 both customers and competitors of IXCs. The Commission nevertheless concluded that the benefits of eliminating the public disclosure requirement would outweigh any adverse effects. 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. 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. The Commission stated, however, that it remained willing to revisit its decision regarding the elimination of the public disclosure requirement. 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.

12. Five parties filed petitions for further reconsideration asking the Commission to reinstate the public disclosure requirement. 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. The judicial stay of the Commission's rules adopted in this proceeding, therefore, remains in effect.

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, 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. 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. 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. 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. 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. We also note that MCI WorldCom recently ended its 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.

15. There is abundant evidence that making information available to consumers is beneficial to competitive markets. In addition to the evidence set forth 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.'' 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.'' 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. There are many examples of government mandating disclosure of information to protect and promote consumer interests.

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 requirement is sparse and indeterminate. Moreover, the growing number of competitors in this market substantially lessens the risk of tacit price collusion. 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. 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. In light of the ''conflicting and inconclusive'' evidence of tacit price collusion 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. Therefore, it is consumers who likely will experience the most harm in the absence of a meaningful public disclosure requirement. We 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.

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. 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. 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. Moreover, the Commission has long held that the ''filed-rate'' doctrine is harmful to competition and consumers, as noted.

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. We also require such carriers that have Internet websites to post this information on-line. Carriers should post rate and service information at their Internet websites in a timely and easily accessible 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, 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. 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. 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. We believe that our 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.

II. Erratum

20. This Erratum corrects a final rule in the *Order on Reconsideration*, which was released by the Commission on August 20, 1997 and published at 62 FR 46447, September 3, 1997. Rule changes 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 CFR 42.11. The corrected final rule is contained in this order.

III. Ordering Clauses

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* is 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.

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 CFR 42, *is amended* as set forth in the Rule Changes.

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.

Shirley S. Suggs,

Chief, Publications Branch.

Rules Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 42 as follows:

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. The undesignated center heading preceding § 42.11 is revised to read as follows:

Specific Instructions for Carriers Offering Interexchange Services

3. Section 42.10 is added to read as follows:

§ 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.

4. Section 42.11 is amended by revising paragraph (a) to read as follows:

§ 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 paragraph shall include documents supporting the rates, terms, and conditions of the carrier's interstate, domestic, interexchange offerings. The information maintained pursuant to this section shall be maintained in a manner that allows the carrier to produce such records within ten business days.

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[FR Doc. 99–10023 Filed 4–21–99; 8:45 am]

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