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

In the Matter of	)	
	)	
Center for Communications Management Information, Econobill Corporation, and On Line Marketing Inc.,	)	
	)	
Complainants,	)	File No. EB-04-MD-008
	)	
v.	)	
	)	
AT&T Corporation,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2008 **Released: July 23, 2008**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a formal complaint[1] that Center for Communications Management Information, Econobill Corporation, and On Line Marketing Inc. (collectively, "CCMI" or "Complainants") filed against AT&T Corporation ("AT&T") pursuant to section 208 of the Communications Act of 1934, as amended ("Communications Act" or "Act").[2] In particular, we deny CCMI's claims that AT&T violated section 42.10 of the Commission's rules[3] and section 201(b) of the Act[4] by posting on its website insufficiently detailed and untimely information regarding the rates, terms, and conditions contained in its individually negotiated agreements for interstate, interexchange services.

[1] Formal Complaint of Center for Communications Management Information, Econobill Corporation, and On Line Marketing Inc., File No. EB-04-MD-008 (filed May 26, 2004) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 C.F.R. § 42.10 ("rule 42.10").

[4] 47 U.S.C. § 201(b).

II. BACKGROUND

A. The Parties

2. Complainants provide telecommunications consulting services to business clients.[5] They help their clients identify, select, negotiate, and/or manage telecommunications arrangements with selected carriers.[6]

3. When the Complaint was filed, AT&T was a non-dominant interexchange carrier providing interstate and intrastate interexchange services throughout the United States.[7] AT&T maintains an Internet web site on which it posts varying types and amounts of information about the rates, terms, and conditions of each of the regulated interstate interexchange services that it offers.[8]

B. The Governing Standards

4. Section 201(b) of the Act provides, in pertinent part, that all "practices … in connection with … communication service, shall be just and reasonable, and any such … practice … that is unjust or unreasonable is ... unlawful."[9] Section 42.10 of the Commission's rules provides, in relevant part:

> A nondominant interexchange carrier (IXC) shall make available to any member of the public … information concerning its current rates, terms and conditions for all of its international and interstate, domestic, interexchange services. Such information shall be made available in an easy to understand format and in a timely manner.… In addition, a nondominant IXC that maintains an Internet website shall make such rate and service information … available on-line at its Internet website in a timely and easily accessible manner, and shall update this information regularly.[10]

C. AT&T's Posting Practices

5. In its effort to comply with rule 42.10, AT&T maintains an Internet website with varying amounts of information about the rates, terms, and conditions of its numerous kinds of interstate, interexchange offerings.[11] AT&T's website provides precise and detailed descriptions of all of the specific rates, terms, and conditions of all of the plans that AT&T offers to mass market customers (*i.e.*, individual consumers).[12] AT&T's website also provides precise and detailed descriptions of all of the specific rates, terms, and conditions of all of the pre-packaged plans that AT&T makes available to business customers, including over 70 standard "business offers" and "a number" of "generic contract

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[5] Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues at 2, ¶¶ 1-3, File No. EB-04-MD-008 (filed Jul. 16, 2004) ("Joint Statement"); Complaint at 2-3, ¶¶ 3-4.

[6] *See*, *e.g.*, *id*.

[7] Joint Statement at 2, ¶ 4. *See SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005).

[8] Joint Statement at 2, ¶ 5.

[9] 47 U.S.C. § 201(b).

[10] 47 C.F.R. § 42.10.

[11] Joint Statement at 2, ¶ 5. *See* Amended Answer of AT&T Corp. ("Answer") at Attachment 1, Declaration of Richard Kurth ("Kurth Decl."), ¶ 4, File No. EB-04-MD-008 (filed July 2, 2004).

[12] *See*, *e.g.*, Joint Statement at 2, ¶ 6; Kurth Decl. at ¶ 5.

offers."[13] In addition, AT&T's website describes the individually negotiated agreements into which AT&T enters with a small percentage of its business customers, which agreements "customize," or vary, some of the generally available rates, terms, and conditions.[14]

6. From January 2001 to April 2003, AT&T posted on its website its individually negotiated agreements in full, with the customer's name omitted.[15] Starting in May 2003, AT&T stopped posting such agreements in full, and instead posted summaries of such agreements' rates, terms, and conditions.[16]

7. From May 2003 to July 2004, AT&T executed individually negotiated agreements with approximately 2,000 business customers.[17] During roughly that same period of time, AT&T had over 4 million business customers in total.[18]

8. Regarding the timing of AT&T's website disclosures, AT&T posts information on new rates, terms, and conditions before any customer receives a bill reflecting those new circumstances.[19] With respect specifically to an individually negotiated agreement, AT&T usually posts information about such an agreement more than 24 hours after the agreement has been signed by both parties, but before AT&T has completed the changes to back-office billing and provisioning systems necessary to compose a bill effectuating the agreement's rates, terms, and conditions.[20] AT&T's standard practice is to keep the information posted on its website for approximately 30 days.[21]

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[13] *See*, *e.g.*, Joint Statement at 2-3, ¶¶ 6-7; Kurth Decl. at ¶¶ 6, 8-19; Answer at Attachment 1, Declaration of Frederick Girouard ("Girouard Decl."), ¶ 6; Answer at Attachment 1, Declaration of Stephen Sobolevitch ("Sobolevitch Decl."), ¶ 15. "Generic contract offers" are offers to business customers that are more specific than AT&T's standard business plans, but still general enough to appeal to more than one end user. Typically, between 10 and a few hundred customers subscribe to a single generic contract offer, most of which offers are described in precise detail on AT&T's website. Kurth Decl. at ¶¶ 17-19.

[14] *See, e.g.*, Joint Statement at 2-3, ¶ 7; Kurth Decl. at ¶¶ 16, 20-22.

[15] Complaint at 8, ¶ 13; Joint Statement at 3, ¶ 8.

[16] Joint Statement at 3, ¶ 9.

[17] *See, e.g.*, Joint Statement at 3, ¶ 10; Kurth Decl. at ¶ 20; Sobolevitch Decl. at ¶ 16; Girouard Decl. at ¶ 3.

[18] *See* Reply Brief of Complainants at 8, n.15, File No. EB-04-MD-008 (filed Sept. 28, 2004) ("CCMI Reply Brief"). *See generally* Girouard Decl. at ¶¶ 3, 6-7; Sobolevitch Decl. at ¶¶ 15-16; Kurth Decl. at ¶ 20; Initial Brief of AT&T Corp. at 28, File No. EB-04-MD-008 (filed Aug. 31, 2004) ("AT&T Brief"). *See also* AT&T Corp. Form 10-K Annual Report, Part 1 (Mar. 31, 2003), *available at* 2003 WL 03626846 ("AT&T Business Services . . . offer[] a variety of global communications services to over 4 million customers..."); "What's Old is New; AT&T Spins Off Cable Unit and Returns to its Telephone Roots," The Bergen County, N.J. Record (Nov. 19, 2002), *available at* 2002 WLNR 11715614 (stating that AT&T has about 4 million corporate customers).

[19] Kurth Decl. at ¶¶ 27-30; AT&T Brief at Supplemental Declaration of Frederick Girouard ("Supp. Girouard Decl."), ¶¶ 12-13.

[20] Kurth Decl. at ¶¶ 27-32; Supp. Girouard Decl. at ¶¶ 12-13. Although the record contains conflicting evidence about exactly how many days it usually takes for AT&T to post information about its individually negotiated agreements, *compare* Complaint at 10, n.21, Ex. 6, and Attachment C, Declaration of David Rosenthal ("D. Rosenthal Decl."), ¶ 9, *with* Kurth Decl. at ¶¶ 27-32; Supp. Girouard Decl. at ¶¶ 12-20, CCMI does not take much issue with AT&T's evidence that AT&T's practice is to post such information before it has completed the changes to back-office billing and provisioning systems. *See* Complainants' Reply to the Amended Answer of AT&T Corp. at 7 n.21, File No. EB-04-MD-008 (filed July 8, 2004) ("Reply") ("Establishing the accuracy of all of the data in Exhibit 6 [of the Complaint] . . . is not imperative to resolving this dispute," given AT&T's admission that it usually posts summaries more than 24 hours after the effective date of the agreement).

[21] Joint Statement at 3, ¶ 10.

9. In CCMI's view, AT&T's disclosures regarding the rates, terms, and conditions of its individually negotiated contracts do not provide sufficient information to allow a productive comparison of AT&T's offerings with those of other carriers.[22] Moreover, according to CCMI, AT&T does not post its summaries with sufficient speed to allow a timely comparison of AT&T's offerings with those of other carriers.[23] On those bases, CCMI alleges that AT&T's posting practices with respect to individually negotiated agreements violate sections 201(b) and rule 42.10.[24]

D. Regulatory Background

10. In adopting rule 42.10, the Commission sought to balance carriers' need for substantial flexibility in the highly competitive long distance market, with consumers' need for sufficient information about carriers' long distance offerings to enable, *inter alia*, comparison shopping. To help achieve that balance, the Commission repeatedly and expressly refrained from iterating minimum content requirements or specifying either a level of detail that carriers must disclose or a particular disclosure format that carriers must use.[25] The Commission stated, instead, that in order to "minimize the burden on nondominant interexchange carriers of complying with" rule 42.10,[26] "carriers have flexibility in complying with the public disclosure requirement."[27] The Commission also stated that Internet informational postings must be "updated no later than 24 hours after the *effective date* of a *change* in the rates, terms, or conditions of a detariffed service."[28]

III. DISCUSSION

A. The Content of AT&T's Website Disclosures Regarding Its Individually Negotiated Agreements Satisfies Rule 42.10.

11. As explained below, we deny CCMI's claim that the contents of AT&T's website disclosures regarding individually negotiated agreements violate rule 42.10.[29] To ascertain how best to

[22] *See, e.g.*, Complaint at ¶¶ 9-10, 16, 18; Reply at ¶¶ 1, 4-7, 18, 21-23, 37, 39-41, 45-46, 48, 62, 71, 74, 76; CCMI Reply Brief at 2-4.

[23] *See, e.g.*, Complaint at ¶¶ 19-21; Reply at ¶¶ 7-9.

[24] *See, e.g.*, Complaint at ¶¶ 22-29. CCMI does not challenge the content or timing of AT&T's website disclosures regarding the rates, terms, and conditions of the numerous plans applicable to AT&T's individual customers. Reply at 18, n.61. CCMI also does not challenge the content or timing of AT&T's website disclosures regarding the rates, terms, and conditions of the many standard plans and generic contract offerings applicable to AT&T's business customers. *See generally* Reply at Appendix B, ¶ 10. CCMI only challenges the content and timing of AT&T's website disclosures regarding the rates, terms, and conditions of individually negotiated agreements.

[25] *See 2000 Biennial Regulatory Review*, Report and Order, 16 FCC Rcd 10647, 10669-70, ¶ 47 (2001) ("*Biennial Review Order*"); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Order on Reconsideration, 14 FCC Rcd 6004, 6015-16, ¶ 18 (1999) (subsequent history omitted) ("*Second Order on Reconsideration*"); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20777, ¶¶ 84, 86 (1996) (subsequent history omitted) ("*Second Report and Order*"). *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Order, 15 FCC Rcd 22321, 22328-29, ¶¶ 19, 21 (Com. Car. Bur. 2000) ("*Bureau Detariffing Order*").

[26] *Second Report and Order*, 11 FCC Rcd at 20777, ¶ 86.

[27] *Biennial Review Order*, 16 FCC Rcd at 10669-70, ¶ 47.

[28] *Bureau Detariffing Order*, 15 FCC Rcd at 22328, ¶ 17 (emphasis added), *incorporated by*, *Biennial Review Order*, 16 FCC Rcd at 10670, ¶ 48.

[29] For purposes of this Order only, we assume, without deciding, that a violation of rule 42.10 would constitute a violation of the Act cognizable under section 208 of the Act. *See generally Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S.Ct. 1513 (2007); *Alexander v. Sandoval*, 532 U.S. 275, 284

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interpret rule 42.10, we must examine the rule's text, history, purpose, and structure.[30] Towards that end, it is instructive to recognize at the outset that, although rule 42.10 establishes disclosure requirements to facilitate comparison-shopping, the rule was adopted as part of the Commission's detariffing program, which was implemented to replace regulation with competitive market forces as the primary constraint on carriers' conduct. Indeed, in affirming the Commission's detariffing order, the D.C. Circuit aptly observed:

> As we read the Commission's decision the *essence* of its reasoning was a desire to put the interexchange carriers under the same market conditions as apply to any other nonregulated provider of services in our economy.[31]

12. Consistent with that de-regulatory "essence," the Commission crafted rule 42.10 with a careful eye towards "minimiz[ing] the burden on nondominant interexchange carriers of complying with this [information disclosure] requirement,"[32] and maximizing carriers' "flexibility in complying with the public disclosure requirement."[33] The Commission believed and understood that, absent some unanticipated market failure, the highly competitive nature of the market for interstate interexchange services would operate to promote consumer welfare. Consequently, *by design*, the rule does not specify (i) a level of detail that must be disclosed, (ii) a particular time within which the information must be disclosed, or (iii) a format for disclosing information.[34] The rule simply states that carriers must disclose "information concerning [their] current rates, terms and conditions … in an easy to understand format and in a timely manner."[35]

13. To decide what the requirements of rule 42.10 entail here, we must first determine what market evidence to consider, if any. According to CCMI, we need not examine any market characteristics unique to the segment of individually negotiated agreements, because the Commission has held that rule 42.10 applies to all segments of the market for interstate interexchange services, including individually negotiated agreements.[36] We disagree with CCMI's argument.

14. CCMI is correct (and AT&T does not dispute) that rule 42.10 *applies* to individually negotiated agreements.[37] Nevertheless, in determining *how* the rule applies to individually negotiated agreements, we cannot accept CCMI's argument that we ignore evidence regarding any variations across market segments in the utility of detailed disclosures.[38] What constitutes sufficiently useful "information

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(2001). AT&T argues strenuously to the contrary, *see, e.g.*, Reply Brief of AT&T Corp. at 1-13, File No. EB-04-MD-008 (filed Sept. 28, 2004), but we need not and do not reach AT&T's argument, because we rule in AT&T's favor on other grounds.

[30] *See*, *e.g.*, *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

[31] *MCI Worldcom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (emphasis in original).

[32] *Second Report and Order*, 11 FCC Rcd at 20777, ¶ 86.

[33] *Biennial Review Order*, 16 FCC Rcd at 10669-70, ¶ 47.

[34] *Biennial Review Order*, 16 FCC Rcd at 10669-70, ¶ 47; *Second Report and Order*, 11 FCC Rcd at 20777, ¶ 86; *Bureau Detariffing Order*, 15 FCC Rcd at 22328-29, ¶¶ 19, 21.

[35] 47 C.F.R. § 42.10.

[36] *See, e.g.*, Complaint at ¶¶ 8, 10; Reply at ¶¶ 15, 21-23, 28; CCMI Reply Brief at 13-16.

[37] *See Biennial Review Order*, 16 FCC Rcd at 10670; *Second Order on Reconsideration*, 14 FCC Rcd at 6015, n.60; *Bureau Detariffing Order*, 15 FCC Rcd at 22329.

[38] *See generally Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (affirming the Commission's consideration of market conditions in deciding whether certain conduct violates section 201(b)).

concerning … rates, terms and conditions" of individually negotiated agreements might not constitute sufficiently useful information regarding mass market or standard business arrangements, or vice versa, depending on whether there are material characteristics particular to each market segment. Therefore, we need not and should not reflexively adopt a wooden, one-size-fits-all construction of rule 42.10. Here, as in most instances of textual analysis, context matters.[39]

15. Taking into account the varying characteristics of different market segments is common Commission practice.[40] Indeed, with respect to the subject of disclosing information about interstate interexchange services, the Commission has recognized the need to apply different approaches to different market segments.[41] Accordingly, in deciding whether, under rule 42.10, AT&T's website discloses sufficiently detailed information regarding the rates, terms, and conditions of AT&T's individually negotiated agreements, we now examine rule 42.10 in the context of the salient characteristics of the market for individually negotiated agreements.

16. According to CCMI, because AT&T does not disclose all of the particulars of each specific rate, term, and condition of every individually negotiated agreement, "CCMI cannot adequately provide details to its clients about available services and their [AT&T's] rates, terms, and conditions. Consequently, CCMI's clients (and their end user customers) may be paying AT&T more for their telecommunications services than they would pay if they had full knowledge of the rates, terms and conditions of the needed services."[42] CCMI provides little market evidence to support this statement, however. By contrast, we find that AT&T has provided substantial and persuasive evidence to support its opposite assertion that the disclosures provided on AT&T's website supply ample information to permit the market for individually negotiated agreements to function well. We describe that evidence below.

17. As noted above, the market segment for individually negotiated agreements is small in comparison to the market segment for standard business offerings, and even smaller in comparison to the market for all offerings.[43] This minor market segment primarily consists of relatively large business

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[39] *See*, *e.g.*, *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (stating that "textual analysis is a language game played on a field known as 'context'").

[40] *See, e.g.*, *AT&T Corp. v. BellSouth Corp*., Memorandum Opinion and Order, 14 FCC Rcd 8515, 8528, ¶ 27, and 8533-34, ¶ 37 (1999) (BellSouth did not violate the prohibition against selling in-region interLATA service prior to section 271 approval when it sold pre-paid calling cards because it only offered them to a "unique and limited portion of the telecommunications market"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17061, ¶¶ 123-24, and 17062-63, ¶ 126 (2003) (subsequent history omitted); *Application of WorldCom and MCI Comm. for Transfer of Control of MCI Comm. to WorldCom*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18040-41, ¶ 26 (1998) (for merger reviews, mass market consumers are distinguishable from larger business consumers because of the types of services and volume discounts that larger business customers demand).

[41] *Bureau Detariffing Order*, 12 FCC Rcd at 22323, ¶ 4 (establishing a shorter detariffing transition period for contract services than for all other services, because "the likelihood of confusion with respect to business customers using such services is much less of a concern"); 22329, ¶ 22 (reiterating "the need for carriers to provide this information in a format which is 'easy to understand' by consumers in the business and *especially the residential mass market*") (emphasis added).

[42] Complaint at Attachment A, Declaration of William Goddard ("Goddard Decl."), ¶ 6. *See* Complaint at ¶¶ 17-18, 21; Attachment B, Declaration of Nissan Rosenthal ("N. Rosenthal Decl."), ¶¶ 4, 10 ; D. Rosenthal Decl. at ¶¶ 3, 6; Attachment D, Declaration of Roderick Cordiner ("Cordiner Decl."), ¶¶ 4, 5; Ex. 9, Declaration of Tom Garvey ("Garvey Decl."), ¶¶ 2, 4, 5; Ex. 11.

[43] *See, e.g.*, CCMI Reply Brief at 8, n.15; AT&T Brief at 28; Girouard Decl. at ¶¶ 3, 6-7; Sobolevitch Decl. at ¶¶ 15-16; Kurth Decl. at ¶ 20. CCMI argues that the affected market consists of not just the few thousand customers with

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customers with the savvy, sophistication, experience, incentive, and wherewithal to exercise significant bargaining power.[44] Consequently, the record establishes that these businesses do not rely on AT&T's website as an important source of potential contract information.[45] Instead, these businesses usually engage in some form of proposal solicitation and negotiation process with multiple carriers that depends little, if at all, on comparisons to the details of others' contracts.[46] This is especially true because individually negotiated agreements (i) are designed to meet the specific, and often unique, needs of particular customers, and (ii) increasingly include a mix/bundle of both regulated and non-regulated services.[47] Consequently, if used for comparison purposes, even detailed disclosures regarding the rates, terms, and conditions of the regulated services provided in an individually negotiated agreement might be uninformative, at best, and misleading, at worst.[48] In addition, any potential business customer that may wish to use AT&T's agreements with other customers as a starting point or benchmark for negotiations can look not only to the website's information regarding individually negotiated agreements,[49] but also to the website's detailed disclosures of the specific rates, terms, and conditions of over 70 standard business plans and numerous generic contract offerings, which form the basis of AT&T's agreements with millions of business customers.[50]

18. The foregoing record evidence strongly indicates that requiring AT&T to disclose each specific rate, term, and condition of every individual transaction in the interstate interexchange market –

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individually negotiated agreements, but rather "all business customers, especially small-to-medium sized business customers … that would potentially be interested in and benefited by these custom arrangements if they were adequately disclosed." CCMI Reply Br. at 5-6**.** *See id.* at 8. CCMI's argument lacks merit, because CCMI fails to adduce any evidence that (i) more small-to-medium sized business customers negotiated individual agreements when AT&T disclosed such agreements in their entirety, or (ii) potential customers cannot obtain meaningful information from AT&T through the negotiation process.

[44] *See, e.g.*, Girouard Decl. at ¶¶ 3, 9-11, 13; Sobolevitch Decl. at ¶ 9; Kurth Decl. at ¶ 26; Supp. Girouard Decl. at ¶¶ 4-8 and Ex. A. The parties present conflicting evidence about just how big these business customers generally are. *Compare id. with* Reply at Appendix A, Supplemental Declaration of David Rosenthal ("Supp. D. Rosenthal Decl."); Appendix E; Appendix F; CCMI Reply Brief at Ex. 1, Second Supplemental Declaration of David Rosenthal (Second Supp. D. Rosenthal Decl."), ¶¶ 7-11. The best read of such evidence is that most of AT&T's customers with individually negotiated agreements purchase annually at least hundreds of thousands of dollars of services from AT&T, and a significant percentage of them purchase millions of dollars of services.

[45] *See* Girouard Decl. at ¶¶ 5, 16-17; Sobolevitch Decl. at ¶¶ 9, 17; Supp. Girouard Decl. at ¶ 9.

[46] *See* Girouard Decl. at ¶¶ 4, 10, 14, 16-17; Answer at Attachment 1, Declaration of Susan M. Gately ("Gately Decl."), at ¶¶ 27-28; Sobolevitch Decl. at ¶¶ 17, 21 26, 28-29; Supp. Girouard Decl. at ¶ 9. CCMI presents some evidence suggesting that the phenomenon of a prospective business customer simply opting in to the custom agreement of an existing business customer – without any solicitation or negotiation process – is not as rare as AT&T avers. *See* Second Supp. D. Rosenthal Decl. at ¶¶ 3-6. We credit AT&T's evidence, however, for two reasons. First, CCMI did not submit its evidence until its Reply Brief, which deprived AT&T of an opportunity to respond. Second, CCMI's evidence is derived by extrapolation from a sample of CCMI's clients with AT&T custom agreements, whereas AT&T's evidence rests on its employees' experience with all AT&T custom agreements.

[47] *See, e.g.*, Girouard Decl. at ¶ 9; Sobolevitch Decl. at ¶¶ 19, 29; Gately Decl. at ¶¶ 4, 11-22. The parties agree, correctly, that rule 42.10 does not require disclosures regarding non-regulated services, even if such services are provided pursuant to a contract concerning regulated services, as well. *See, e.g.*, Reply at 19, n.66.

[48] *See* Gately Decl. at ¶¶ 4, 8-21; Sobolevitch Decl. at ¶ 29; Answer at Ex. 1, Declaration of Michael Pelcovits ("Pelcovits Decl."), ¶¶ 32-33.

[49] *See* Sobolevitch Decl. at ¶ 25; Kurth Decl. at ¶¶ 21-22.

[50] *See* Girouard Decl. at ¶¶ 3, 7; Sobolevitch Decl. at ¶¶ 10-11, 15, 25; Kurth Decl. at ¶ 22.

including transactions involving a mix of regulated and non-regulated services and highly customized offerings designed to meet the particular needs of a single customer – is not necessary to provide useful information to the public. The information disclosed by AT&T does not preclude productive participation by prospective business customers in the market for individually negotiated agreements. Consequently, with respect to its individually negotiated agreements, we conclude that AT&T complies with rule 42.10 by disclosing (i) the services covered; (ii) the length of the contract; (iii) the minimum revenue commitment, if any; (iv) the credits given, if any; (v) the waiver policy, if any; (vi) the discontinuance policy, if any; (vii) the range of applicable rates for each covered service; and (viii) the range of applicable discounts for covered services. Such disclosures constitute "information concerning [AT&T's] current rates, terms and conditions … made available in an easy to understand format" within the meaning of rule 42.10.[51]

19. This conclusion is further supported by CCMI's failure to present evidence of any market failure or other ill effect arising from AT&T's practice of disclosing less than all of the specific rates, terms, and conditions of every individually negotiated agreement. For example, CCMI has adduced no evidence that fewer businesses enter into individually negotiated agreements with AT&T now than when AT&T disclosed such agreements in full. Indeed, the record evidence shows the absence of any marketplace problems.[52] According to unchallenged evidence presented by AT&T, prices in the interstate, interexchange market have continued to fall;[53] and AT&T has continued to engage in detailed discussions with any potential customer who shows meaningful interest in AT&T's business services.[54]

20. Moreover, in a market segment where the customers are expecting to negotiate with the carriers, requiring carriers to make detailed disclosures of every rate, term, and condition of every custom contract could actually harm those customers in the long run. In particular, detailed disclosure requirements in this unique context could unduly interfere with market-based negotiations and create a "ratcheting effect" that chills the offering of discounts and specialized terms.[55] For example, detailed disclosure requirements could unduly "plac[e] a thumb on the negotiating scales" by forcing only one party to the negotiation to "state its reservation price, so that bargaining begins from there,"[56] thereby prompting carriers to reduce the frequency and/or scale of discounting and special arrangements.

21. The two cases on which CCMI relies do not support its position.[57] In *Southwestern Bell*

[51] 47 C.F.R. § 42.10.

[52] *See generally* Gately Decl. at ¶¶ 3, 6; Pelcovits Decl. at ¶¶ 8-11; Sobolevitch Decl. at ¶ 7; Girouard Decl. at ¶¶ 11-14; *Section 272(d) Biennial Audit of Verizon Comm*., Memorandum Opinion and Order, 18 FCC Rcd 25496, 25501, ¶ 15 (2003) (the long distance market is highly competitive); *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, Report and Order, 19 FCC Rcd 5102, 5120, ¶ 28 (2004) (the long distance market is substantially competitive).

[53] *See* Girouard Decl. at ¶ 12; Gately Decl. at ¶¶ 3, 7; Sobolevitch Decl. at 5, 13-14, 27; Pelcovits Decl. at ¶ 11. *See generally* "Trends in Telephone Service," Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau at 9-1 and Table 9-4 (May 2004), *available at* www.fcc.gov/wcb/iatd/trends.html.

[54] *See, e.g.*, Sobolevitch Decl. at ¶¶ 10-11, 20, 26. The foregoing evidence also refutes Complainants' assertions that AT&T's conduct diminishes their ability to assist clients meet their telecommunications needs. *See, e.g.*, Goddard Decl. at ¶ 6; N. Rosenthal Decl. at ¶¶ 4,10; D. Rosenthal Decl. at ¶¶ 3, 6; Cordiner Decl. at ¶¶ 4, 5; Garvey Decl. at ¶¶ 2,4-5; Complaint at Ex. 11. *See also* Answer at 27, n.27; AT&T Brief at 27, n.25; Gately Decl. at ¶¶ 11, 27-28.

[55] *See* Answer at 38-39; Pelcovits Decl. at ¶¶ 32-35. *See generally Orloff v. FCC*, 352 F.3d at 421.

[56] *Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003).

[57] Complaint at ¶ 10; Reply at 5, n.12; Complainants' Opening Brief at 9-11, File No. EB-04-MD-008 (filed Aug. 31, 2004).

Corp. v. FCC,[58] the court reversed the Commission's pre-forbearance determination that section 203 of the Act permitted tariffs to contain ranges of rates rather than the specific rates themselves. That decision is inapposite here, because the court relied solely on the specific language and history of section 203 of the Act. Section 203 applies only to tariffs, and not to any other modes of disclosure; moreover, the pertinent language in section 203 – "schedules showing all charges" – has no close corollary in rule 42.10. In any event, it would be unusual, at best, to apply a court's construction of section 203 to a rule adopted by the Commission in conjunction with *forbearing* from applying section 203 to interstate interexchange services.

22. Similarly, in *Review of Policies and Rules Concerning Unauthorized Charges of Consumer's Long Distance Carriers*,[59] the Commission held that a carrier acquiring another carrier's subscriber base must provide advance notice to the acquired subscribers of "detailed" information on the rates, terms, and conditions of the services the acquiring carrier will provide.[60] That case, too, is inapposite, because the Commission required detailed disclosures due to the "involuntary nature" of the carrier/subscriber relationship (from the subscriber's point of view), and the possibility that the subscriber might wish to terminate its relationship with the disclosing carrier. Here, by contrast, rule 42.10 applies to precisely the opposite situation – where the customer is *voluntarily* seeking to *initiate* a relationship with the disclosing carrier. The information disclosure needs in the former situation have no bearing on the information needs in the latter.

23. In sum, the content of AT&T's website disclosures regarding the rates, terms, and conditions of its individually negotiated agreements is lawful. Thus, CCMI's claims that the content of those disclosures violates rule 42.10 and section 201(b) are denied.

B. The Timing of AT&T's Website Disclosures Regarding Its Individually Negotiated Agreements Satisfies Rule 42.10.

24. We also deny CCMI's claim that the timing of AT&T's website postings regarding individually negotiated agreements violates rule 42.10 and section 201(b). AT&T acknowledges that its individually negotiated agreements typically indicate on their face that their "effective date" is the date the agreement is signed by both parties.[61] AT&T also acknowledges that it rarely, if ever, posts on its website information regarding the rates, terms, and conditions of an individually negotiated agreement within 24 hours of the date the agreement is signed by both parties.[62] Based on those undisputed facts, CCMI asserts that AT&T fails to post its disclosures in a "timely" manner under rule 42.10, because the Commission has construed "timely" to mean "no later than 24 hours after the effective date of a change in the rates, terms, or conditions of a detariffed service."[63]

25. We disagree with CCMI. Even assuming, *arguendo*, that a "24-hour" standard is

[58] *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

[59] *Review of Policies and Rules Concerning Unauthorized Charges of Consumer's Long Distance Carriers*, First Order on Reconsideration, 16 FCC Rcd 11218 (2001), *aff'd*, Fourth Order on Reconsideration, 19 FCC Rcd 13432 (2004).

[60] *See* 47 C.F.R. § 64.1120(e)(3).

[61] *See, e.g.*, AT&T Brief at 9-11.

[62] *See, e.g.*, Answer at 42-43, 48; AT&T Brief at 5, 7.

[63] *Bureau Detariffing Order*, 15 FCC Rcd at 22328, ¶ 17. *See Biennial Review Order*, 16 FCC Rcd at 10670, ¶ 48. *See also* Reply at ¶¶ 7-8, 19.

applicable,[64] AT&T's posting practices do not violate it, for the following reasons.

26. The resolution of this issue hinges on when the 24-hour clock begins to run. The applicable orders state that the clock starts running on the "effective date of a change" in the terms of service. The applicable orders neither define nor explain that phrase, however. In addition, rule 42.10 does not mention that phrase or provide a specific deadline for disclosing information. The rule itself simply states that disclosures must be "timely." Therefore, here we determine what is the "effective date of a change" based on, *inter alia*, how the specific circumstances attendant to individually negotiated agreements affect how fast information can and should be disclosed.

27. CCMI asserts that the "effective date of a change" is the effective date specified in the agreement, which usually is the date by which both parties have signed the agreement. We disagree. Although AT&T's individually negotiated agreements usually refer to an "effective date," and tie such date to execution of the agreement, this is not the kind of "effective date" referenced by our orders. The orders refer not to the effective date of a contract, but rather to the effective date of a "change" in rates, terms, and conditions of a carrier's service. Here, the rates, terms, and conditions do not actually change until adjustments are made in AT&T's back-office billing and provisioning systems such that the new rates, terms, and conditions can be reflected in a customer's bill. Consequently, with respect to rates, terms, and conditions contained in an individually negotiated agreement, the "effective date of a change" is the date on which new contract rates, terms, and conditions are actually implemented in AT&T's back-office billing and provisioning systems.

28. Applying that standard to the facts here, CCMI has failed to meet its burden of proving that the timing of AT&T's disclosures violates rule 42.10. Specifically, CCMI has not shown by a preponderance of the evidence that AT&T's postings occur after AT&T makes the requisite changes in its back-office billing and provisioning systems. Although CCMI submitted with its Complaint a "Posting History" chart purporting to indicate that AT&T took on average 30 days to post disclosures,[65] once AT&T acknowledged in its Answer that postings occur more than 24 hours after an agreement is signed, CCMI stated that verification of the chart to establish its accuracy was not imperative to a resolution of the parties' dispute.[66] Moreover, AT&T submitted two affidavits declaring that it posts its summaries before it has completed necessary changes to back-office billing and provisioning systems.[67] Accordingly, CCMI's claims that the timing of those postings violates rule 42.10 and section 201(b) are denied.

IV. CONCLUSION

29. In sum, we deny CCMI's complaint in its entirety. Examining the text, history, purpose,

[64] AT&T asserts, as a defense, that the 24-hour requirement, if applied to individually negotiated agreements involving domestic services, was adopted with insufficient notice and comment under the Administrative Procedure Act. *See, e.g.*, AT&T Brief at 15-18. We need not reach that defense, however, because we rule in AT&T's favor on other grounds, as described above.

[65] *See* Complaint, Exhibit 6.

[66] Answer at 41, n.38 ("Particularly in light of the fact that Complainants did not raise the timeliness argument prior to filing the complaint, AT&T has not had the opportunity to investigate fully the validity and accuracy of this attachment or the dates on which these thousands of disclosures were posted.… AT&T should be permitted to supplement its answer after discovery and further investigation of the [Posting History chart]."); Reply at 7, n.21 ("Establishing the accuracy of all of the data in Exhibit 6 [of the Complaint] . . . is not imperative to resolving this dispute," given AT&T's admission that it usually posts summaries more than 24 hours after the effective date of the agreement).

[67] Kurth Decl. at ¶¶ 27-32; Supp. Girouard Decl. at ¶¶ 12-13.

and structure of rule 42.10, we interpret it as imposing only the least restrictive requirements needed to ensure that carriers provide useful information to the public. CCMI has presented no persuasive evidence that the disclosures on AT&T's website fail to provide sufficient information to permit the market for individually negotiated contracts to function properly. Thus, CCMI's claims that the content of those disclosures violate rule 42.10 and section 201(b) are without merit. Moreover, because AT&T's practice is to post changes in rates, terms and conditions before those changes are actually implemented, we deny CCMI's claims that the timing of AT&T's postings violates rule 42.10 and section 201(b).

V. ORDERING CLAUSE

30. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, and sections 1.720-1.736, and 42.10 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 42.10, that the formal complaint filed by the Center for Communications Management Information, Econobill Corporation, and On Line Marketing Inc. is **DENIED**, and this proceeding is hereby **TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary