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FEDERAL COMMUNICATIONS COMMISSION MAR 30 1992
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Tariff Filing Requirements for) CC Docket No. 92-13
Interstate Common Carriers)

COMMENTS OF COMMONWEALTH LONG DISTANCE COMPANY

Commonwealth Long Distance Company ("Commonwealth"), by its undersigned counsel, respectfully submits the following comments in response to the Notice of Proposed Rulemaking ("*NPRM*"), FCC 92-35, released in this docket on January 28, 1992.

Commonwealth opposes any modification of the Commission's highly successful and well-justified policy of forbearance from tariff regulation for non-dominant common carriers. As discussed below, there is no legal necessity to depart from this policy; to the contrary, forbearance has been recognized by Congress as an appropriate regulatory tool. In addition, the Commission's underlying policy reasons for adopting its forbearance policy in the 1980s remain valid today. This rulemaking proceeding should therefore be dismissed.

Assuming *arguendo*, however, that the current forbearance policy were held to be unlawful, then Commonwealth would respectfully urge the Commission to do everything within its power to minimize the burden of tariff filing on non-dominant carriers. Excessive regulation of carriers that lack market power would not fulfill any

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public interest purpose and would thwart the Commission's longstanding and highly successful goal of encouraging competition in the interstate long-distance marketplace.

I. INTRODUCTION AND STATEMENT OF INTEREST

Commonwealth is a non-dominant common carrier, providing domestic intrastate and interstate, as well as international, long distance services to business and residential customers, primarily in Pennsylvania.¹ Commonwealth operates exclusively as a reseller; that is, it does not own or operate any interstate or international transmission facilities, but instead resells the interstate and international communications services of facilities-based common carriers.

As a non-dominant carrier, Commonwealth is subject to the Commission's forbearance policy and therefore, under those regulatory requirements, is not required to file interstate tariffs for its domestic services.² That regulatory scheme has worked well and has materially contributed to the development of vibrant competition in the domestic interexchange market. Commonwealth therefore has a direct and substantial

¹ Commonwealth has been authorized by the Commission to resell international switched voice services, and maintains a tariff on file with this Commission for those services. *Commonwealth Long Distance Co.*, File No. I-T-C-90-125, 5 FCC Rcd. 5490 (Int'l Facilities Div. 1990).

² "Dominant" carriers are defined as those that possess market power, and all other carriers are considered "non-dominant." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor ("Competitive Carrier Rulemaking")*, First Report and Order, 85 FCC 2d 1, 20-21 (1980). The Commission has forbore from regulating the domestic interstate services of non-dominant carriers. *Id.*, Second Report and Order, 91 FCC 2d 59, 64 *et seq.* (1982), *recon. denied*, Third Report and Order, 93 FCC 2d 54 (1983), Fourth Report and Order, 95 FCC 2d 554, 577-79 (1983), *recon. denied*, Fifth Report and Order, FCC 84-394, 49 Fed. Reg. 34824, 34829-30 (September 4, 1984). *See also* the background discussion in paras. 3-5 of the *NPRM*.

interest in this proceeding, which threatens to reverse the pro-competitive effects of the forbearance policy and impose substantial and unnecessary regulatory burdens on Commonwealth, along with scores of other non-dominant carriers.

II. THERE IS NO LEGAL REASON TO ABANDON TARIFF FORBEARANCE

The Commission initiated this rulemaking docket as the result of a complaint filed by AT&T against MCI, in which AT&T argued that the tariff forbearance policy is contrary to the Communications Act, and therefore that MCI's practice (consistent with that policy) of offering service outside of its filed tariffs is unlawful. *See AT&T v. MCI*, E-89-297, FCC 92-36 (released Jan. 28, 1992); *NPRM*, paras. 1-2. AT&T, relying on a recent U.S. Supreme Court decision construing the "Filed Rate Doctrine" as applied under the Interstate Commerce Act, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S Ct 2759 (1990), argues that the Commission has no authority to relieve common carriers from their statutory duty to file tariffs for all interstate communications services.

The Commission, of course, addressed this very issue a decade ago in the *Competitive Carrier Rulemaking*, and concluded that the Communications Act allows it to exercise "'substantial discretion in determining both what and how it can properly regulate,' so long as it is exercised in a manner that effectuates rather than frustrates the overriding statutory goals." 91 FCC 2d at 66, quoting *Shapiro v. United States*, 335 US 1, 31 (1948). It determined that tariff regulation of domestic resellers would not advance the statutory goals and would impose unnecessary and unreasonable burdens upon this class of carriers (a conclusion extended in later orders, after careful analysis, to other

classes of non-dominant carriers). As the expert agency in this field, the Commission's interpretation of its enabling statute is entitled to substantial deference. The courts may not substitute their own interpretation for that of the Commission unless Congress has expressly required a contrary result. *See Chevron USA Inc. v. National Resources Defense Council, Inc.*, 467 US 837 (1984).

In this case, not only has Congress not mandated tariffing for most domestic interstate communications services, but to the contrary it has implicitly incorporated the Commission's forbearance policy into the statute. As the *NPRM* notes, Congress recently adopted the Telephone Operator Consumer Services Improvement Act of 1990, which, among other things, included an "informational tariff" requirement for a limited subset of interstate common carrier services; *i.e.*, operator services. *See* 47 USC § 226(h). The Commission was given authority, subject to certain conditions, to "waive" this tariff filing requirement after four years from the adoption of the section. *Id.*, § 226(h)(1)(B).

Quite simply, there would have been no reason for Congress to mandate the filing of informational tariffs for operator services unless it recognized that, until 1990, non-dominant providers of those services were exempt from filing tariffs under the forbearance policy. The "informational tariff" requirement is a carefully crafted Congressional limitation on the Commission's forbearance discretion, which necessarily implies that Congress accepted the fact that such discretion exists in the first place. If Congress had believed that the forbearance policy were unlawful, as AT&T contends, it undoubtedly would have instructed the Commission to comply with the existing statute

rather than enact a new and inconsistent statutory obligation. Moreover, it is inconceivable that Congress would have authorized the Commission to waive the filing of informational tariffs under *any* circumstances, unless it concurred with the Commission's practice of forbearing from tariff regulation where appropriate.

Based upon this Congressional ratification of forbearance, the Commission should reject AT&T's more restrictive interpretation of the statute. Since there is no legal infirmity in the Commission's existing policy, this rulemaking proceeding should be dismissed.

III. TARIFF FORBEARANCE IS SOUND PUBLIC POLICY

The *NPRM* only requested comment on the legal basis for forbearance, and did not indicate that the Commission has in any respect reconsidered its original policy reasons for adopting this policy tool. Commonwealth urges the Commission to expressly reaffirm the underlying policy concerns that led it to adopt forbearance, as set forth in the *Competitive Carrier Rulemaking*. In particular, forbearance eliminates burdensome and unnecessary regulatory requirements, allows smaller, non-dominant entities to operate more efficiently and to be more responsive to consumer demand by eliminating the delay and cost inherent in the tariff process, and results in lower prices and a wider array of service offerings for customers.

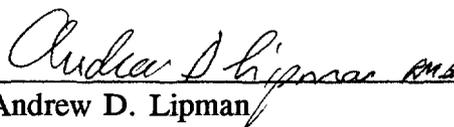
The Commission's predictions of a decade ago as to the effects of forbearance have proven accurate; this policy has been a remarkable success. Hundreds of non-dominant carriers have emerged, serving both the broad nationwide long-distance market

as well as many specialized, niche markets (including regional carriers, such as Commonwealth, who focus on particular geographic areas, and other carriers who provide specialized types of communications services). Market forces have, as the Commission expected, generally induced these carriers to offer just and reasonable rates, and to refrain from unreasonable discrimination, without the need for active regulatory oversight. Therefore, any departure from forbearance would be a step backwards, imposing unnecessary regulatory burdens on a vibrantly competitive market, without any apparent public interest benefits.

CONCLUSION

For the foregoing reasons, the Commission should determine that its existing policy of forbearing from tariff regulation of the domestic interstate services of non-dominant carriers is consistent with the Communications Act, and should dismiss this proceeding.

Respectfully submitted,

A handwritten signature in cursive script, reading "Andrew D. Lipman", is written over a horizontal line.

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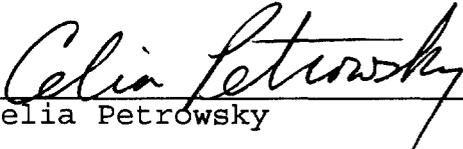
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 1992, copies of Comments of Commonwealth Long Distance Company were served by hand on the following:

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