

the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

49 U.S.C. § 6(3)(1906) (emphasis added). On its face, this would appear to allow the ICC to forbear from enforcing the tariffing requirement as to certain carriers by general order as the Communications Act allows the FCC.¹²

In later versions, however, while the Communications Act maintained its permissive language to allow modification of "any requirement" of the tariffing section "by general order," the ICA's reference to a general order was deleted and it now reads:

The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

49 U.S.C. § 10762(d)(1). Thus, even if it were determined that, under the ICA, the ICC could not adopt a broad-based industry forbearance policy, such a finding

¹² Note that the ICA's notice period, unlike that of the Communications Act, could not (and still cannot) be lengthened.

would stem from a crucial distinction in the comparative provisions of the statutes, namely the ICA's omission of language permitting tariff regulation modification by "general order."

Moreover, while the tariff filing requirement of the ICA has been described as "utterly central" to the regulatory scheme under the ICA, see Maislin, 110 S. Ct 2759, 2769 (citing Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (1986)), the courts have not applied that interpretation to Section 203 of the Communications Act. Furthermore, the legislative history of Section 203 from its 1934 adoption and 1976 amendment does not demonstrate any intention by Congress to impose an absolute requirement, unchangeable by the FCC, that carriers must file tariffed rates for interstate services.

Congress intended for the Communications Act and the Interstate Commerce Act to address different industries and to respond to changes in those industries as appropriate. See, e.g., pp. 18-19 supra. Clearly, under the plain meaning rule of statutory construction, differences between the language and interpretation of the statutes are meaningful. Indeed, it should be viewed as only natural that the differences between the regulat-

ed industries, and thus the regulation itself, has become and will continue to become greater as time goes on. It would be illogical -- and against the specific legislative history cited above -- to assume that Congress expected the transportation and communications industries and associated regulation to remain in lockstep forever, especially since Congress specifically enacted separate legislation in the form of the Communications Act to overcome the shortcomings of the ICA as to communications regulation.

B. Maislin's Holding Depends On Its Facts.

The issue in Maislin was whether a motor common carrier can, under the ICA, negotiate binding rates with a customer that differed from the applicable rates in an effective tariff. The Maislin Court held that the ICC could not, under the ICA, exempt a carrier from charging a customer the rate filed with the agency simply because the carrier had negotiated a lower, unfiled rate with that customer. In reaching this decision, the Supreme Court relied on the "filed rate doctrine" requiring carriers to charge -- and customers to pay -- the rates contained in effective, filed tariffs unless the ICC finds that the tariffs are unreasonable. See Maislin, 101 S. Ct. 2759, 2766-67.

Contrary to the FCC's findings with respect to nondominant carriers in the Competitive Carrier proceeding, the ICC had not found any special circumstances unique to the carrier in question for which modification of the general tariff filing requirement would further the goals of the ICA. The ICC found only that the carrier had negotiated a separate charge with one of its customers without explaining how permitting such a practice furthered the goals of ICA.¹³ Thus, the Maislin case presents essentially the same case -- and with the same result -- as was addressed by the D.C. Circuit in American Broadcasting Co. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) (existing tariff cannot be modified by unfiled contract). That is, carriers' tariffs always prevail over inconsistent customer-carrier contracts. Inasmuch as ABC v. FCC had been decided well before Competitive

¹³ In the Competitive Carrier cases, however, the Commission found that forbearance would in fact best facilitate the Communication's Act's primary goal of fostering communications service to the public. See e.g., Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (the words of a statute must be interpreted "in light of the purposes Congress sought to serve"); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1427-28 (D.C. Cir. 1983) (interpreting FCC's regulatory reach under the "public interest" standard in light of the "purposes of the regulatory legislation").

Carrier, and Maislin does little more than reiterate the holding of ABC, there is no reason to believe that Maislin would suddenly become an obstacle to the continuation of the Commission's forbearance policy.

The Competitive Carrier rulemaking does not address a case where carriers will be charging different rates than are in their applicable tariffs. The Commission has clearly complied with Section 203(b)(2) of the Communications Act by identifying special circumstances in freeing non-dominant carriers from tariff regulation while ensuring just and reasonable rates under the provisions of Title II and protecting consumers from monopolistic practices. To the extent Maislin is applicable to FCC regulatory policies, it is consistent with Commission policy that requires a carrier who files a tariff (required or permissive) to abide by the terms of that tariff.¹⁴

The present proceeding does not question negotiated deviation from previously filed rates or interpre-

¹⁴ To the extent that AT&T's complaint against MCI which gave rise to this proceeding is based upon either MCI's or the FCC's failure to adhere to this policy, the Commission should simply require that nondominant carriers who choose to file tariffs adhere to their filed rates unless amended or deemed unreasonable by the FCC.

tation of the Interstate Commerce Act. The ICA and the Communications Act are neither facially identical nor to be interpreted identically; the tariff filing requirement of the Communications Act is not "utterly central" to the Act's administration. The FCC can ensure just and reasonable rates for nondominant carriers, a carefully defined "special circumstance," in the absence of filed rates by relying on market competition, investigation of formal and informal complaints filed with the Commission, and other impetus leading to FCC investigation.

C. Cases Clarifying the Limits of the FCC's Discretion Under Section 203 Do Not Prohibit the Application of the Forbearance Policy

In AT&T v. FCC (Special Permission), 487 F.2d 865 (2d Cir. 1973), the Second Circuit held that the FCC could not displace the statutory scheme of carrier-initiated rates by prohibiting AT&T from filing tariff amendments without special permission pending completion of an investigation into AT&T's rate structure. In MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), the D.C. Circuit held that the FCC could not prohibit carriers from filing tariffs completely -- again leading to displacement of the carrier-initiated rates structure.

These cases in effect provide that the Commission may not eliminate entirely a carrier's right under

the Act to file a tariff; they do not prohibit the Commission from modifying a carrier's burden under the Act (i.e., making tariff filing voluntary on behalf of certain carriers), provided that it makes the requisite public interest findings. Dicta in AT&T v. FCC appears to read Section 203(b)(2) quite narrowly, restricting the FCC's discretionary power to the modification only of requirements "as to the term of, and information contained in, tariffs . . ." 487 F.2d 865, 879. This language is also quoted in MCI v FCC, 765 F.2d 1186, 1192. However, this narrow interpretation is not relevant to the holdings in AT&T v FCC and MCI v FCC which focus on a carrier's right to file tariffs and not the Commission's discretionary selection of regulatory tools. Neither is it required by the language or purpose of the Act. See Section II.A. supra.

In contrast, when directly addressing the issue of whether the FCC may refuse carriers the right to file tariffs, the D.C. Circuit stated that the word "modify" in Section 203(b)(2) cannot be taken to mean the wholesale abandonment or elimination of a requirement, as would be the case with a prohibition on filing tariffs. 765 F.2d 1186, 1192. Permissive forbearance is not such an abandonment of the FCC's responsibility to execute and

enforce Title II of the Communications Act. The Commission continues to ensure that its underlying duty to require just and reasonable rates is met through the complaint and other provisions of Title II and the carefully considered reliance upon market forces in a competitive market.

The Commission's permissive forbearance policy fully comports with the carrier-initiated rate regulatory structure by which Congress granted carriers the right to determine initially what is a just and reasonable rate. The FCC's role is to act as a check to ensure that the carrier-initiated rates are indeed just and reasonable. Under this scheme, the FCC's role is not active, but reactive.

As discussed above, industry conditions are vastly different now from what they were in 1934 (or even 1974, when the government litigation resulting in the break-up of AT&T began). The number of long distance carriers has increased incredibly to over 400 from the one (AT&T) that existed in 1934. Under these conditions, it is entirely reasonable and appropriate for the FCC to conserve its resources and decide that no initial response is necessary when the carrier-initiated rates are tested by competition. Such a resource-conserving ap-

proach is particularly appropriate in times of vastly increasing numbers of tariffs, declining resources available for regulation and the continued availability of the complaint process as a check on aberrational filings. In fact, if the Commission were to require every interexchange carrier to file original and amended tariffs, its limited resources would be so inundated that its reactive role in regulating rates and practices would probably be severely impeded and more limited than under any forbearance scheme.

IV. THE "DEFINITIONAL APPROACH" PREVIOUSLY CONSIDERED BY THE COMMISSION IS ANOTHER VALID MEANS TO REDUCE REGULATION WHERE APPROPRIATE

A deregulatory alternative to the forbearance policy is the "definitional approach" considered by the Commission in the Competitive Carrier proceeding. Because it concluded that the forbearance approach gave it the authority it sought, the Commission did not pursue this definitional theory at the time. Policy and Rules Concerning Rates for Competitive Services, Second Report and Order, 91 F.C.C.2d 59 (1982).

Under the definitional approach, all carriers deemed "common carriers" would continue to file tariffs and be subject to Title II of the Act. Entities deemed not to be common carriers would neither file tariffs nor

be subject to any other Title II provisions, including those requiring tariff filings and just and reasonable rates; they would, however, continue to be subject to the FCC's ancillary jurisdiction under Title I. If the Commission now seeks to reconsider its various deregulatory options, the definitional approach also warrants revisiting.

The premise of this approach is that "common carriers" do not exist in nature as some identifiable entity with specific characteristics. Instead, common carriers are simply certain artificially classified carriers to which the FCC determines a set of regulations should apply. Congress has not defined "common carrier" clearly in the communications context; rather, it has left that task to the Commission.¹⁵

In NARUC I, 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976), the court traced a

¹⁵ Section 3(h) of the Act begs the question by defining "common carrier" as "a person engaged as a common carrier for hire[.]" 47 U.S.C. § 153(h). The circularity of this statutory definition obviously leaves significant room for the Commission to clarify the ambiguous term. Cf. Computer II, 77 F.C.C.2d 384 (1980), mod. on recon., 84 F.C.C.2d 50 (1981), mod. on further recon., 88 F.C.C.2d 512 (1981), aff'd sub nom., Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) (defining "common carrier services" to determine which services would be subject to certain regulatory requirements).

history of Commission decisions and concluded that a "common carrier" could be found where the entity voluntarily holds itself out to the general public indifferently to provide service at a profit. In the Competitive Carrier proceeding, however, the Commission found that it was not bound by NARUC I in that the "holding out" standard is not compelled by the Communications Act and thus need not be the only basis of determination.¹⁶ Further Notice at 468-470.

The Commission proposed in Competitive Carrier to define common carrier as an entity which satisfies the NARUC test and also has market power. Further Notice at 465. Title II of the Act would apply to such a carrier. On the other hand, a carrier without market power, or, in other words, a nondominant carrier, would not be a common carrier and, while subject to the Commission's Title I

¹⁶ Of course, the Commission does not have unfettered discretion in defining "common carrier", but must have a principled basis for any definition flowing from the congressional intent discernible from the Communications Act. See Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 300 (D.C. Cir. 1966) (Commission decision not to treat cable television system as common carrier "seems . . . a rational and hence permissible choice by the agency"); Id. at n.5 ("the Commission's assertion of jurisdiction over CATV systems . . . is substantial enough to serve as a basis for declining to regulate them as common carriers").

ancillary jurisdiction, would be completely free of the provisions of Title II. This definition is supported by the Communications Act's goal to increase the availability and selection of services by furthering competition among service providers and its longstanding and original purpose to prevent monopoly abuses.

If the Commission should determine that the forbearance policy is no longer appropriate for deregulation, it should reconsider adopting a definitional approach consistent with its findings in Competitive Carrier.

V. RESALE CARRIERS IN PARTICULAR SHOULD NOT BE SUBJECT TO RATE REGULATION

The least controversial of the Commission's Competitive Carrier deregulatory proposals at the time the proposals were introduced and then implemented was the proposal to deregulate resale carriers.¹⁷ Even though resellers such as OCOM are currently considered

¹⁷ In fact, resellers were regulated in the late 1970s only after considerable debate and controversy. Even then the Commission recognized that deregulation may be in the public interest later. Regulatory Policies Concerning Resale and Shared Use of Common Carrier Service and Facilities, 60 F.C.C.2d 261 (1976), recon., 62 F.C.C.2d 588 (1977), aff'd sub nom., AT&T v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 895 (1978).

common carriers, they simply do not require significant regulatory oversight to ensure just and reasonable rates.

Resellers operate by definition in a competitive environment. Their rates are necessarily constrained by the rates of carriers from whom they obtain service. Even if retariffing is deemed necessary for some carriers, resellers should not be tarified because such a requirement would be redundant and burdensome without any associated benefit. As long as underlying carriers are charging just and reasonable rates, resellers, especially in the present competitive environment, will also charge just and reasonable rates. Thus, resellers a fortiori are regulated sufficiently to satisfy the provisions of Title II by the nature of their business.

Conclusion

The Commission's decision in the Competitive Carrier proceeding to forbear from requiring certain nondominant carriers to file tariffs was within its congressionally mandated authority; the current regulatory structure for such carriers is lawful and should be maintained.

The forbearance policy has been very successful in nurturing competition and the public benefits that go

with competition -- lower rates, more diverse and higher quality services, etc. To change the policy now would necessarily suppress or cause the loss of these benefits because, as the Competitive Carrier rulemaking determined in 1982, the advance notice and administrative burdens of a full regulatory regime would interfere with the further development of competition and cost-based pricing.

Neither legislative nor court action in the 12 years since the development of the forbearance policy warrant its repeal. Rather, the deregulatory approach is justified more than ever by the current highly competitive environment.

For these and the above-stated reasons, OCOM urges the Commission not to alter its current regulatory scheme, especially for resellers, whose rates are constrained by those of the underlying carrier. The only

modification to the current structure that OCOM could recommend would be to require nondominant carriers that choose to file tariffs to abide by them unless amendments to the tariffs are filed to reflect any later negotiated changes.

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