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Federal Communications Commission
Office of the Secretary

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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

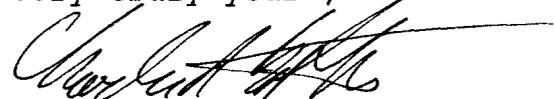
Re: CC Docket No. 92-13

Dear Ms. Searcy:

Transmitted herewith, on behalf of Alascom, Inc., are an original and nine copies of its Comments of Alascom, Inc. in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,


Charles R. Naftalin

Enclosure

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MAR 30 1992

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF ALASCOM, INC.

Alascom, Inc. ("Alascom"), by its attorneys, hereby submits its comments concerning the Notice of Proposed Rulemaking, FCC 92-35 (released January 28, 1992) ("NPRM") in the above-captioned proceeding.

As it states, the NPRM seeks comments as part of the Commission's review of the lawfulness and future application of its forbearance rules and policies. Those rules and policies were developed in the Competitive Carrier rulemaking proceeding (CC Docket No. 79-252). In Competitive Carrier, the Commission defined "non-dominant" and "dominant" telecommunications common carriers and applied greatly different levels of regulation to them. For several years, the Commission has "forborne" application of its tariff filing rules, as set forth in Part 61, to non-dominant carriers. Carriers classified as "dominant," such as Alascom, still must comply with the full scope of the Commission's tariff rules even though most or all of its relevant competitors do not.

The Commission now has recognized that the legality of the forbearance policy is subject to question, and indeed, effectively has been declared unlawful by Maislin Industries, U.S., Inc. v. Primary Steel, Inc., _____ U.S. _____, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990) ("Maislin"). In Maislin, a carrier subject to the Interstate Commerce Act, which requires the filing and

maintenance of tariffs, had negotiated a rate with a shipper lower than the relevant tariffed charge.¹ The Interstate Commerce Commission ("ICC") had issued its Negotiated Rates decisions expressly permitting a negotiated rate not contained within a tariff. Subsequently, the carrier went bankrupt and its trustee sued the shipper to recover the difference between the tariffed rate and the negotiated amount charged.

In reversing the ICC and lower courts, the Supreme Court held that the ICC had been without authority to permit carriers to charge rates which were not contained within an effective tariff. The Court held that:

"Although the ICC argues that the Negotiated Rates policy does not 'abolis[h] the requirement in Section 10761 that carriers must continue to charge the tariff rate,' ... the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of unfiled rates. ... Thus, although we agree that the Commission may have discretion to craft appropriate remedies for violation of the statute ... the 'remedy' articulated in the Negotiated Rates policy effectively renders nugatory the requirements of Section 10761 and 10762 and conflicts directly with the core purposes of the Act."²

The Commission itself recognized that the Supreme Court has held that the tariffing requirement was "utterly central" to the administration of the Interstate Commerce Act. (NPRM, ¶ 6) Indeed, the Court stated that:

"Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments

¹ The requirements of Title II of the Communications Act, including Section 203, derived from the Interstate Commerce Act. See S. R. Ep. Mo. 781, 73rd, Cong., 2d Sess. 2 (1934).

² Maislin at 110 S. Ct. 2769, citations omitted.

in the industry ... it does not have the power to adopt a policy that directly conflicts with its governing statute."³

"If strict adherence to Sections 10761 and 10762 as embodied in the Filed Rate Doctrine has become an anachronism ... it is the responsibility of Congress to modify or eliminate the sections."⁴

The Supreme Court in Maislin found it unlawful for the ICC to permit common carriers to ignore the specific requirements of the Act. The ICC was not at liberty to contravene those requirements even if based upon reasonable views of the industry. Therefore, when Section 203(a) of the Communications Act requires that:

"Every common carrier ... shall ... file with the Commission and print and keep open for public inspection schedules showing all charges for itself ... for interstate and foreign wire or radio communication ..."

the Commission lacks authority to permit an entire class of carriers to forego this mandate.

The requirements of Section 203 are simple and not necessarily burdensome -- maintaining and adhering to a schedule of charges. This statute does not require the various tariff rules which the Commission has evolved over time including transmittals, applications, publications, and cost support.

We believe that because of Maislin the Commission must find its current forbearance policy to be unlawful. But this may be accomplished as a positive benefit to the efficient and competitive market structure which has evolved since Competitive Carrier was initiated by

³ Maislin at 2770, citations omitted.

⁴ Maislin at 2771. In Telecommunications Workers Union v. CRTC and CNCP Telecommunications, 2 F.C. 280 (1989) the Canadian forbearance policy was disallowed, and subsequently, curative legislation was introduced.

equalizing common carrier regulation. Even though the Commission must require all common carriers to publish their rates and adhere to them, this does not have to be a great burden. Other aspects of tariff regulation are subject to the Commission's reasonable discretion.

Enforcing the minimal requirements of Section 203(a) would support the public interest and promote competition. It has been fundamentally unfair and inequitable to require one class of carriers to publish rates in advance of service offerings while competitors, who may choose to publish rates, do not have to do so. Customers will have a central source of rate information from which they will be able to make informed decisions. Customers and the Commission will be able to detect carrier abuses more efficiently. These are the reasons that Congress created Section 203 and they still apply today.

Alascom suffers competitive disadvantage because it must file interstate tariffs and under the present Commission rules its competitor, General Communication, Inc. ("GCI"), need not. GCI regularly uses, and misuses, the Commission's regulatory processes to inhibit price and service competition from Alascom. It uses Alascom's tariff filings for competitive advantage while Alascom has no comparable source of information. And, we believe, GCI discriminates unlawfully among customers but generally succeeds in remaining undetected because it does not publish a schedule of charges.⁵

The Commission should enforce the simple requirements of Section 203(a) of the Communications Act and require all common carriers to publish their charges and adhere to them. The Commission should do this in the least burdensome way possible. Such an action

⁵ An exception to this is GCI's unlawful discrimination among large traffic aggregators in Alaska, a subject of Alascom's Cross Complaint in General Communication, Inc. v. Alascom, Inc., File No. E-91-85.

would be legally correct, would go a long way toward leveling the competitive playing field among carriers and provide customers with greater protections and access to information.

Respectfully submitted,

ALASCOM, INC



By /s/ Alan Y. Naftalin
Alan Y. Naftalin



By /s/ Charles R. Naftalin
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Its Attorneys

March 30, 1991

CERTIFICATE OF SERVICE

I, Barbara Frank, a secretary in the law firm of Koteen & Naftalin, do hereby certify that copies of the foregoing "COMMENTS OF ALASCOM, INC." were mailed first-class U.S. Mail, postage prepaid, this 30th day of March 1992 to the following:

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Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554
(two copies)

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/s/ Barbara Frank
Barbara Frank