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**Before the
FEDERAL COMMUNICATIONS COMMISSION
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
FAIRCHILD COMMUNICATIONS SERVICES COMPANY**

Fairchild Communications Services Company ("Fairchild") submits the following comments in response to the Commission's Notice of Proposed Rulemaking^{1/} in the above captioned proceeding.

I. INTRODUCTION

Fairchild is a provider of shared telecommunications service ("STS")^{2/}. The STS concept was developed in the early 1980s, in response to market changes following the divestiture of the Bell Operating Companies from AT&T^{3/}. Since that time, the underlying concept has become widely accepted in the marketplace. From Fairchild's perspective, STS

^{1/} FCC 92-35, adopted January 24, 1992, released January 28, 1992 (mimeo number 38335)("Notice").

^{2/} See generally Policies Governing the Provision of Shared Telecommunications Services, 102 FCC 2d 1421 (1986); 3 FCC Rcd 6931 (1988).

^{3/} See, e.g., United States v. Western Electric Company, 627 Fed. Supp. 1090, 1098 n.31 (1986).

consists of the provision of telephone equipment (hand sets, consoles, wiring, etc.) and telecommunications service (voice and data) to individual tenants in discrete commercial office buildings. STS is provided via private branch exchange (PBX) switches located within such buildings. Fairchild's ability to offer STS is governed by individually negotiated contracts (or leases) with the owner (or landlord) of such buildings. Customer service agreements are negotiated on a case-by-case basis with each tenant in the building^{4/} who selects Fairchild for service. Fairchild is not the exclusive provider of services in any building. Rather, tenants have the option to lease or purchase telephone equipment from various vendors and to obtain local and long distance services from common carriers of their choice.

From the inception of its STS operations in 1985, Fairchild has provided services under the Commission's tariff forbearance policies^{5/}. Fairchild remains convinced that such policies have increased price competition, stimulated service innovation and facilitated the ability of competitive suppliers of telecommunications services to react quickly to market trends^{6/}. Nevertheless, we recognize that the Commission must carefully weigh the obvious

^{4/} In certain limited circumstances, Fairchild also offers telecommunications service (interexchange service) to customers at locations not served by Fairchild PBXs. See discussion infra at 5. Such services are also provided pursuant to individually negotiated contracts.

^{5/} Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities, 91 FCC 2d 59 (1982)("Second Report and Order"); 95 FCC 2d 554 (1983)("Fourth Report and Order"); 98 FCC 2d 1191 (1984)("Fifth Report and Order").

^{6/} See Second Report and Order, 91 FCC 2d at 69.

benefits of a good public policy against the statutory dictates of the Communications Act as required under the Maislin^{7/} decision.

II. DISCUSSION

The Commission's objective in this proceeding should be to accommodate as much of its forbearance policy as possible within the boundaries of the statutory mandate. If the policy itself cannot be sustained, the Commission should at the very least seek to preserve the positive practical effect forbearance has had in the competitive interstate marketplace. The Commission has "substantial discretion in determining both what and how it can properly regulate"^{8/} As the Commission has suggested, this discretion can obviously be exercised through various alternatives to forbearance^{9/}.

The Commission has identified at least one approach to the tariff filing issue which is of particular relevance to Fairchild and may, in fact, have broader application to a variety of other telecommunications service providers. In the Competition in the Interstate

^{7/} Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990). It might be argued that the holding of the Court focused on the obligation of a common carrier to charge only those rates which are contained in a "filed rate" and thus did not directly rule on the question of whether common carriers must file tariffs. However, dicta would appear to suggest that rates must be filed. "[T]he statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the legal rates, that is those which must be charged to all shippers alike." 110 S. Ct. at 2779, citing Arizona Grocery Co. v. Atchison, T.&S.F. R.R., 284 U.S. 370, 384 (1932).

^{8/} Second Report and Order, 91 FCC 2d at 65.

^{9/} Notice at 4. While the so-called "definitional approach" was discussed by the Commission during the early stages of the Competitive Common Carrier proceeding (See 84 FCC 2d 445, 478-91 (1981)), its relevance has diminished as competition in the interstate telecommunications market has increased (i.e., under the definitional approach, Title II rate regulation should be applied only to "monopoly firms providing an essential service").

Interexchange Marketplace proceeding^{10/} the Commission discussed the concept of "private carriage" as an alternative to the more traditional tariff filing requirement^{11/}. According to the Commission, "private carriage would place single-customer offerings voluntarily entered into by carriers and customers outside the purview of Title II"^{12/}. While the Commission did not pursue this approach in subsequent stages of the proceeding^{13/} and thus did not develop a record to support adoption of a private carriage regime, the discussion surrounding the concept led the Commission to certain tentative conclusions which have direct application in this proceeding. First the Commission noted "that telecommunications services may be provided by means other than traditional common carrier offerings."^{14/} Second, the Commission pointed to a well established principle that "communications carriers may act as common carriers with respect to only a portion of their services"^{15/}.

Finally, the Commission recognized that it had "significant leeway in determining whether a particular service should be provided on a common or private carriage basis"^{16/}. In exercising its discretion, the Commission recognized that "the touchstone for distinguish-

^{10/} 5 FCC Rcd 2627 (1990)

^{11/5} Id. at 2644.

^{12/} Id.

^{13/6} FCC Rcd 5880, 5897 (1991)

^{14/5} FCC Rcd at 2644.

^{15/} Id.

^{16/} Id.

ing between private and common carriage ... is whether the service is of a 'quasi-public character', that is, whether the carrier undertakes to carry for all people indifferently"^{17/}.

For a variety of reasons, the Commission's tentative conclusions regarding private carriage were not finalized. However, the time is now ripe for the Commission to revisit the concept of private carriage as it pertains to the issues raised in this proceeding. A wide variety of telecommunications services provided by a large number of providers may qualify as "private carriage" services. The providers of such private carriage services would be outside the purview of Title II and thus not subject to tariff filing requirements.

Fairchild recognizes the validity of the Commission's observation that certain services may be classified as common carrier services even if the primary focus of the provider is on private carriage services^{18/}. With respect to such common carrier services, however, the Commission retains "ample legal authority to implement maximum streamlined regulation"^{19/}. For example, the Notice made reference to a recently enacted statute which permits a class of common carriers to file "informational tariffs"^{20/}. Under appropriate

^{17/} Id. at 2645, citing National Assn. of Regulatory Utility Comm'rs v. FCC, 525 F. 2d 630 (D.C. Cir.), cert. denied 425 U.S. 992 (1976). The D.C. Circuit Court noted "... a carrier will not be a common carrier where its practice is to make individual decisions, in particular cases, whether and on what terms to deal." 525 F. 2d at 642.

^{18/} For example, a provider engaged primarily in private carriage might also provide international telecommunications services on a resale basis subject to tariff filing requirements. Cf. Fairchild Communications Services Company, 3 FCC Rcd 5902 (1988). Such bifurcation does not, however, mean that the private carriage services offered by such providers would fall under Title II requirements.

^{19/} Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5896 (1991).

^{20/} CF. Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. §226(h)(1)(A).

circumstances, other carriers could also be subject to a similar informational tariff filing requirement.

The Commission has also authorized the filing of "contract-based tariffs" containing the following information:

- (1) The term of the contract, including any renewal options;
- (2) A brief description of each of the services provided under the contract;
- (3) Minimum volume commitments for each service;
- (4) The contract price for each service or services at the volume levels committed to by the customers;
- (5) A general description of any volume discounts built into the contract rate structure; and
- (6) A general description of other classifications, practices and regulations affecting the contract rate.^{21/}

However, under either of these approaches, tariffs would still be required in some abbreviated form. If universally applied, this result could impose burdensome requirements on individual providers of telecommunications services, reduce the timeliness of competitive reactions to marketplace changes and produce a staggering amount of paperwork for Commission attention^{22/}. These results clearly do not produce any economic benefit for the provider, for the Commission or end user of telecommunications services.

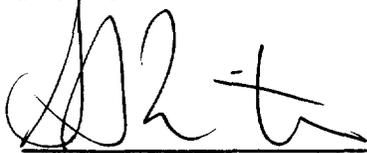
^{21/} Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5902. It is not necessary, however, that the precise filing requirements imposed in that proceeding need be imposed uniformly, if the record developed in this proceeding justifies additional streamlining. Indeed, it would appear to be within the Commission's discretion to further "streamline" such tariff filing requirements to a bare minimum.

^{22/} The Commission estimates that there are "in excess of four hundred nondominant IXCs that offer common carrier services". Notice at 2. This estimate is almost certainly conservative.

III. CONCLUSION.

The Commission should thoroughly reexamine the rationale behind the tariff forbearance policy to determine whether and to what extent its past exercise of discretion is restricted by the Maislin decision. In the event the Commission concludes that its forbearance policy is constrained by Maislin, it should turn its focus toward other alternatives. For example, a fully developed record concerning the private carriage concept will enable the Commission to conclude whether and to what extent the tariff filing requirements of Title II are inapplicable to particular classes of service providers. The Commission should also consider whether and to what extent it can further streamline "informational" and "contract-based" tariff requirements to limit the adverse impact on both carriers and the resources of the Commission.

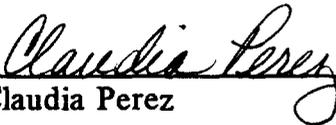
Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of March, 1992, an original and five copies of the foregoing Comments were served, by hand, with the Secretary, Federal Communications Commission, that two copies of the foregoing Comments were served by hand with the Policy and Program Planning Division, Common Carrier Bureau, and that one copy of the foregoing Comments was served by hand with The Downtown Copy Center.



Claudia Perez