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

In the Matter of )  
Tariff Filing Requirements for )  
Interstate Common Carriers )

Federal Communications Commission  
Office of the Secretary

CC Docket No. 92-13

COMMENTS OF  
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

American Telephone and Telegraph Company ("AT&T")  
hereby submits its comments on the Notice of Proposed  
Rulemaking in CC Docket No. 92-13, released January 28,  
1992 ("Notice").\*

The Commission commenced this proceeding "to  
address the lawfulness of [a] forbearance policy" (Notice,  
para. 8) under which "nondominant" carriers may provide  
interstate common carrier telecommunications services  
without filing tariffs, notwithstanding the requirements  
imposed by Section 203 of the Communications Act. The  
Notice states that this policy was adopted previously, and  
asks whether the Commission has the "authority" under the  
Act "to permit nondominant carriers not to file tariffs,"  
and if not, whether "all common carriers must file  
tariffs" (id., paras. 8(a), 8(b) (emphasis in original)).

As AT&T has demonstrated in support of its  
complaint against MCI Telecommunications Corporation,  
these are pure questions of law that have already been

\* In the Matter of Tariff Filing Requirements for  
Interstate Common Carriers, Notice of Proposed  
Rulemaking, CC Docket No. 92-13, FCC 92-35, released  
January 28, 1992.

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decided by the Supreme Court and Court of Appeals.\* Each has held that statutory tariff filing requirements are mandatory for all common carriers, and that regulatory agencies have no discretion to adopt policies or rules that order, sanction or excuse violations of them.

The Commission nevertheless incorrectly dismissed AT&T's complaint, claiming that it raised "policy" issues that should be decided in a rulemaking proceeding.\*\* The Notice appears to perpetuate this error by inviting comment both on the Commission's authority to modify or abrogate the tariffing obligations imposed on carriers by Section 203, and on the advisability from a "policy" perspective of so abrogating those obligations. Because this proceeding involves a mandatory provision of the Act, there manifestly is no question of statutory authority on which public comment could be material, and no "policy" issue for the Commission to address. In short, none of the comments that the Commission may receive as to policy

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\* See Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2765-71 (1990) ("Maislin"); MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191-96 (D.C. Cir. 1985) ("MCI v. FCC").

\*\* AT&T Communications v. MCI Telecommunications Corp., No. E-89-297, Memorandum Opinion and Order, FCC 92-36, released January 28, 1992. AT&T has filed with the Court of Appeals a petition for review of the Commission's decision, and the Court has granted AT&T's motion for expedited consideration. AT&T v. FCC, No. 92-1053 (D.C. Cir., slip op. decided March 17, 1992).

matters can have any bearing on the proper resolution of the fundamental threshold issue identified in the Notice: the "lawfulness" of "forbearance."

I. THE COMMISSION HAS NO AUTHORITY TO RELIEVE COMMON CARRIERS FROM THE MANDATORY PROVISIONS OF SECTION 203.

By its terms, Section 203 requires that "[e]very common carrier . . . shall . . . file with the Commission . . . schedules showing all charges for itself . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a) (emphasis added). Section 203 further provides that "[n]o common carrier shall . . . charge, demand, collect or receive a greater or less or different compensation for such communication . . . than the charges specified in the [tariff] schedule then in effect, . . . or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." *Id.* at § 203(c).

The plain language of Section 203 is controlling here,\* making it unlawful for any common carrier to offer service at rates or on terms and conditions that differ from those it has filed with the Commission. The

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\* E.g., Hallstrom v. Tillamook County, 110 S. Ct. 304, 310 (1989) (plain language controlling "absent a clearly expressed legislative intention to the contrary").

D.C. Circuit interpreted Section 203 that way in MCI v. FCC. In that case, the Court of Appeals reviewed the Commission's Sixth Report and Order in the Competitive Carrier Proceeding which had purported to prohibit nondominant carriers from filing tariffs. The Court held that the tariff requirements of Section 203(a) are mandatory and apply to all common carriers. The Court held that "the Commission lacks authority to prohibit MCI and similarly situated common carriers from filing tariffs that, by statute, every common carrier shall file." 765 F.2d at 1188 (emphasis in original). The Court explained that "shall" was "'the language of command,'" and "'[a]bsent a clearly expressed legislative intention to the contrary,' courts ordinarily regard such statutory language as conclusive."\*

Significantly, the Court specifically rejected the Commission's argument that Section 203(b), cited in paragraph 8(a) of the Notice, authorized "the forbearance at issue" (id. at 1191). According to the Court, the

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\* Id. at 1191 (citations omitted). The Court specifically noted the holding of the Court of Appeals for the Second Circuit in AT&T v. FCC, 572 F.2d 17, 25 (2d Cir. 1978), in which that Court stated both that "[t]he Communications Act requires that common carriers . . . file their tariffs with the FCC, 47 U.S.C. § 203(a)" and that it was "aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met." 765 F.2d at 1192.

language of Section 203(b) "suggest[s] circumscribed alterations -- not, as the FCC would now have it, wholesale abandonment or elimination" of the tariff filing requirement.\* The Court likewise rejected the Commission's claim that it had "general authority to forbear" from regulation "in order to adapt its superintendence to changing circumstances as 'the public interest' indicates."\*\* As the Court explained, neither the Act nor any decision thereunder provides any "warrant for erasing the congressional instruction in Section 203(a) that every common carrier shall file tariffs."\*\*\*

The Supreme Court's decision in Maislin underscores the unlawfulness of forbearance. Maislin arose under tariff filing provisions of the Interstate Commerce Act on which Section 203 is based.\*\*\*\* Maislin held that these statutory filing requirements precluded

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\* Id. at 1192. See also id. at 1193 (concluding that "the FCC's new view [of its authority under Section 203(b)] departs from any plausible reading of the statute's text").

\*\* Id.

\*\*\* Id. (Emphasis in original.) This holding forecloses any claim that Section 4(i) of the Act, 47 U.S.C. § 154(i), authorizes the Commission to abrogate the tariff filing requirements imposed by Section 203. See Notice, para. 8(a).

\*\*\*\* Like Section 203(a) of the Communications Act, the Interstate Commerce Act requires any common carrier subject to the jurisdiction of the Interstate

the ICC from applying its Negotiated Rates policy -- which had been previously adopted in a 1986 rulemaking -- to excuse a carrier from collecting, or a shipper from paying, the filed rates. The Court reasoned that these filing provisions "incorporate[] the filed rate doctrine" and, accordingly, "forbid[] . . . the secret negotiation and collection of rates lower than the filed rate." Id. at 2768. Because the language of Section 203 imposes the same filing requirements, Maislin emphatically reaffirms that a common carrier violates Section 203 whenever it fails to file its rates for a service, or fails to charge and collect the rates it has filed.

Maislin likewise conclusively establishes that the Commission does not have authority to exempt or excuse any common carrier from compliance with the mandatory

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(footnote continued from previous page)

Commerce Commission to "publish and file with the Commission tariffs containing the rates . . . for transportation . . . it may provide." 49 U.S.C. § 10762(a)(1). Like Section 203(c) of the Communications Act, the Interstate Commerce Act provides that a carrier "may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." 49 U.S.C. § 10761(a). Both provisions derive from Section 6 of the original Interstate Commerce Act. See 24 Stat. 379, 380-81 (1887). Courts construing the Communications Act thus treat decisions construing the parallel provisions of the Interstate Commerce Act as controlling authorities. See, e.g., MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990); American Broadcasting Cos. v. FCC, 643 F.2d 818, 820-21 (D.C. Cir. 1980).

rate-filing requirements of Section 203. The issue in Maislin was whether the ICC had authority to relieve a shipper of the obligation to pay the filed rate when it had privately negotiated a lower, unfiled rate with the carrier. 110 S. Ct. at 2768. The Court held that the ICC "does not have the power to adopt a policy that directly conflicts with its governing statute." Id. at 2770. According to the Court, the ICC's policy, "by sanctioning adherence to unfiled rates, undermines the basic structure of the Act" and was therefore beyond the ICC's authority. Id. at 2769.

The Court acknowledged that the filed rate requirement may be "rigid" or "undeniably strict." Id. at 2766. As the Court made explicit, however, "if strict adherence to §§ 10761 and 10762 [of the ICA] as embodied in the filed rate doctrine has become an anachronism . . . it is the responsibility of Congress to modify or eliminate these sections." Id. at 2771. A fortiori, this same rule applies to the identical filed rate requirement embodied in Section 203.

II. NONDOMINANT CARRIERS THUS MUST COMPLY WITH  
SECTION 203, SUCH AS BY SATISFYING THE STREAMLINED  
PROCEDURES OF PART 61 OF THE COMMISSION'S RULES.

The Notice (para. 8(d)) raises a number of questions about the "implications" of changes in the Commission's "tariffing policies," ostensibly out of

concern about the effect of such changes on small interexchange carriers. No carrier more than AT&T supports the maximum possible streamlining or withdrawal of regulation in today's competitive interexchange market, or realizes the enormous additional costs unnecessary regulation imposes on carriers and their customers. The concerns raised in the Notice, however, are irrelevant to the lawfulness of forbearance. Section 203 amounts to the explicit directive by Congress that every common carrier shall file tariffs, and after Maislin, it could not be clearer that the Commission may not abrogate this statutory command, regardless of any "implications" or policy considerations.

In all events, the Commission already has in place a set of rules, designed explicitly "for nondominant carriers," that fully comply with Section 203 without unduly burdening carriers: the "streamlined procedures" adopted in the Competitive Carrier Proceeding.<sup>\*</sup> Under these rules, tariff filings by nondominant carrier take effect on 14 days' notice, are deemed "presumptively lawful," and may not be suspended unless a petitioner satisfies a stringent four-part test.<sup>\*\*</sup> The effect of

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<sup>\*</sup> See Competitive Carrier Proceeding, First Report and Order, 85 F.C.C.2d 1, 29-38 (1980).

<sup>\*\*</sup> Id. at 31-38; see also 47 C.F.R. § 61.58(a)(4); § 1.773(a)(ii).

these rules is to virtually guarantee that tariffs of nondominant carriers take effect without "undue delay" (85 F.C.C.2d at 35). Alternatively, nondominant carriers may file contract-based tariffs under the rules adopted in CC Docket No. 90-132.\* In either case, such carriers need not submit with their filings any of the cost support and other economic data specified in Section 61.38 of the Commission's Rules.\*\* As the Commission recently confirmed, the streamlined and contract-based tariff rules strike an appropriate balance between the requirements of Section 203 and the flexibility needed by carriers to respond to competitive market forces.\*\*\*

In sum, the concern raised in the Notice about the imposition of unwarranted costs is laudable, but misplaced. The Commission's attention in this regard should be focused on reducing the considerably more burdensome rules to which AT&T's non-streamlined services remain subject. Effective competition for these services is undeniable, yet the Commission continues to apply extensive cost support and notice requirements that benefit only AT&T's competitors, at the expense of

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\* See 47 C.F.R. § 61.3(m).

\*\* See Competitive Carrier Proceeding, 85 F.C.C.2d at 33-35.

\*\*\* In the Matter of Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5893-5903, recon. in part, 6 FCC Rcd. 7659 (1991), further recon. pending.

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consumers. Extending streamlined regulation to all services offered by interexchange carriers -- including AT&T -- is essential if consumers are to realize the lower prices, greater efficiencies, and other benefits that are the objectives of the Commission's procompetitive policies.

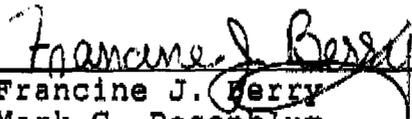
CONCLUSION

For all of the reasons set forth above, there can be no dispute that the requirements of Section 203 apply to all common carriers. Consistent with the statute, the Commission is obliged to require all carriers to file tariffs in accordance with procedures -- like the streamlined and contract-based tariff provisions now codified in Part 61 of the Commission's Rules -- that satisfy the fundamental mandate of Section 203.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By

  
Francine J. Berry  
Mark C. Rosenblum  
Roy E. Hoffinger

Its Attorneys

Room 3244J1  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920

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