

Nowhere does the Communications Act require the Commission to implement the same degree of regulation for every common carrier it oversees.⁶⁰ Courts as well have recognized the Commission's discretion to streamline or modify regulatory requirements where appropriate circumstances permit. Finally, other agencies with enabling statutes similar to the Communications Act have successfully enacted regulations which treat carriers differently based upon competitive market factors.

A. The Communications Act Permits Carrier Classifications

The Commission has already made a compelling argument for its statutory authority to classify carriers.⁶¹ Relying on its "broad discretion in choosing how to regulate"⁶² the Commission has consistently recognized that "the structure and market power of AT&T have required different regulatory treatment from that accorded firms not similarly situated."⁶³ For example, the *First Computer Inquiry*⁶⁴ exempted small carriers from the rules promulgated therein. Those rules were sustained on appeal.⁶⁵ In the *Second Computer Inquiry*,⁶⁶ only AT&T and GTE were required to form separate subsidiaries in order to offer CPE and enhanced services.⁶⁷ Furthermore, the Commission has, in the past, recognized

⁶⁰ Rather, with regard to tariff filings, the Act specifically gives the Commission the authority to modify the Act's requirements in particular instances or special circumstances. See 47 U.S.C. § 203(b)(2) (1988).

⁶¹ See *First Report and Order* at 12-20.

⁶² *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 26 (2d Cir. (1978)), cert. denied, 439 U.S. 875 (1978).

⁶³ *First Report and Order* at 15.

⁶⁴ *Interdependence of Computer and Communication Servs. and Facilities*, 28 F.C.C.2d 267, 275 (1971), aff'd, 34 FCC 2d 557 (1972), modified sub nom., *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

⁶⁵ See *GTE Service Corp.*, 474 F.2d 724.

⁶⁶ 77 F.C.C.2d 384 (1980).

⁶⁷ *Id.* at 474. GTE was relieved from this restraint shortly thereafter. *Second Computer Inquiry*, 84 F.C.C.2d 50, 72 (1980), recon. 88 F.C.C.2d 512 (1981), aff'd sub nom. *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

the principles inherent in variable regulation. For example, in *United States Transmission Systems Inc.*,⁶⁸ the Commission refrained from requiring applicants seeking to resell services from having to provide detailed and burdensome financial and economic showings.

In adopting the dominant/non-dominant regulatory model, the Commission also relied on Congress's grant of a "comprehensive mandate" with "not niggardly but expansive powers."⁶⁹ The Commission found that it was "authorized and obligated to exercise its reasoned judgment in devising the types of regulatory systems most appropriate to the problems presented within its jurisdiction" and that "continuation of the prior undifferentiated system of rules [would] disserve the public and thus be unreasonable."⁷⁰ The Commission also rejected AT&T's contention that its action was precluded by cases such as *FPC v. Texaco*⁷¹ because its variable regulatory policy did not *relieve* carriers of their obligations to comply with the Title II requirements of the Communications Act.

As noted earlier, the D.C. Circuit has also found that "the Commission could further streamline the regulation of non-dominant carriers without encountering any contrary congressional prescription."⁷² In reviewing the Commission's *Sixth Report and Order*, the D.C. Circuit held that while it was "not positioned to confer upon the agency unfettered discretion to regulate or not

⁶⁸ 66 F.C.C.2d 1091 (1976).

⁶⁹ *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). See also *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 811 (1978) ("One of the most significant advantages of the administrative process is its ability to adapt to new circumstances in a flexible manner . . ."); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968).

⁷⁰ *First Report and Order* at 18.

⁷¹ 417 U.S. 380 (1974). In that case, the Supreme Court established the doctrine that an agency charged with regulating just and reasonable rates cannot exclusively defer regulation to the forces of the marketplace. *Id.* at 400.

⁷² *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1196 (D.C. Cir. 1985).

regulate common carrier services⁷³ it “may interpret the FCC’s authority generously.”⁷⁴

The Supreme Court’s *Maislin* decision also recognized the acceptability of variable regulation. The Court expressly noted that the ICC had relaxed some of its regulations relating to motor common carriers.⁷⁵ Indeed, in a portion of the lower court decision not rejected by the Supreme Court, one of these policies was upheld by the U.S. Court of Appeals.⁷⁶ Thus, courts which have had the opportunity to review forbearance-type policies have found this regulatory approach to be consistent with the agency’s enabling legislation.

B. Non-Dominant Carriers Should, At A Minimum, Be Allowed to File Tariffs Pursuant to A Further Streamlined Approach

Should the Commission find — contrary to the significant precedents discussed above — that non-dominant carriers are required to file tariffs, CompTel urges the Commission to undertake the “further streamlining” approach sanctioned by the Courts. Specifically, CompTel urges the Commission to consider revising its current tariff filing rules in order to avoid imposing costly and unjustified requirements on non-dominant IXCs. Indeed, such further streamlining would be consistent with Commission objectives to “reduc[e] the degree of unnecessary regulation imposed upon non-dominant carriers.”⁷⁷

In the event non-dominant carrier tariffs are required, CompTel urges the Commission to consider the following proposals:

⁷³ *Id.* (quoting *Computer & Communications Industry Ass’n v. FCC*, 693 F.2d 198, 212 (D.C. Cir. 1984)).

⁷⁴ *Id.*

⁷⁵ *Maislin*, 110 S.Ct. at 2770.

⁷⁶ See *Southern Motor Carriers Rate Conference v. U.S.*, 773 F.2d 1561, 1567 (11th Cir. 1985).

⁷⁷ *First Report and Order* at 14.

- a. *No cost support for tariff filings.* It has been well recognized by the Commission that the requirement to produce tariff cost support material represents a major burden to competitive interexchange carriers.⁷⁸ Furthermore, the Commission has already found that the rates of competitive non-dominant carriers “are to a large extent determined by marketplace forces.”⁷⁹
- b. *A presumption of lawfulness for tariff filings.* The Commission has already considered this issue in the context of AT&T’s business tariff filings and accorded it a presumption of lawfulness for purposes of tariff review.⁸⁰ CompTel urges the Commission to adopt a similar requirement for all the tariff filings of non-dominant IXCs.
- c. *One-day notice period for tariff filings.* The Commission has already reviewed its statutory authority to modify the notice period for tariff filings.⁸¹ The Commission stated that “[a]doption of a one day notice period for certain services in light of fundamental changes in the interexchange marketplace appears to come within the scope of this language.”⁸² The one day notice period would allow carriers to respond quickly to changing market conditions.
- d. *Substantially reduced tariff filing fees.* While CompTel realizes that filing fees have, in the past, been set by Congress, CompTel would urge the Commission to propose that Congress adopt a lower fee for tariff filings by non-dominant IXCs. At the current rate, these fees represent a substantial economic burden for smaller IXCs seeking to compete in the marketplace, and may serve as a disincentive to lower rates.
- e. *Authority to file flexible/banded rates.* Non-dominant IXCs should be permitted maximum flexibility in publishing schedules of rates and charges. For example, rates could be represented as “not to exceed” a given charge. These statements of rates would permit the

⁷⁸ See *id.* at 33-34.

⁷⁹ *Id.* at 34.

⁸⁰ *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5894 (1991).

⁸¹ See 47 U.S.C. § 203(b)(2) (1988).

⁸² *Competition in the Interstate Interexchange Marketplace*, 5 FCC Rcd 2627, 2641 (1990). Furthermore, a one-day notice period adopted by the ICC was upheld by the U.S. Court of Appeals. See *Southern Motor Carriers Rate Conference*, 773 F.2d at 1563.

Commission to enforce a literal reading of Section 203 without forcing IXCs to file more rate information than is necessitated by marketplace conditions.

- f. *Annual tariff filings for rate revisions.* CompTel proposes that the Commission adopt a rule whereby non-dominant carriers would only be required to file rate revisions on an annual, rather than event-by-event, basis. Of course, this requirement would not apply to rate increases above the "not to exceed" rate, which carriers would be required to file before the increase takes effect.

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Should the Commission decide that it does not wish to continue with its forbearance policies, it is in no way obligated to find that it is constrained by the Communications Act to regulate all IXCs in the same fashion. As demonstrated above, the Act indeed provides the Commission with ample authority to modify tariff filing requirements. Furthermore, both Congress and the courts have recognized the Commission's ability to streamline regulatory requirements. The Commission should, at a minimum, adopt the streamlining mechanisms outlined above for non-dominant carriers.

IV. CONCLUSION

The Commission's forbearance policies are well within the discretion granted by the Congress and have been largely responsible for the emerging competitive marketplace in interexchange telecommunications. By regulating the dominant carrier, the Commission is assured that the need to remain competitive will prevent non-dominant carriers from charging unjust, unreasonable or unduly discriminatory rates. This approach to regulation has been tacitly endorsed by the Congress and successfully applied by the FCC for almost 40 years. And, due to the Commission's continued regulation of the

dominant carrier, the policy is free of the concerns which led the Supreme Court to nullify the ICC deregulatory scheme in *Maislin*.

Respectfully submitted,

**COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION**

By: Danny E. Adams (cya)

Richard E. Wiley
Danny E. Adams
Rachel J. Rothstein
of

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Genevieve Morelli
Vice President and General
Counsel
**COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION**
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202)296-6650

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