

ORIGINAL

ORIGINAL
RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 29 1992

Federal Communications Commission
Office of the Secretary

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

CC Docket No. 92-13

REPLY COMMENTS OF TELOCATOR

Telocator, the Personal Communications Industry Association, by its attorneys, hereby submits its reply comments in the above-captioned proceeding. For reasons detailed in its original comments and overwhelmingly supported by numerous other parties, Telocator submits that the Commission's tariff forbearance policy for radio common carriers ("RCCs") is well within the agency's lawful discretion under the Communications Act and should be maintained.

I. SUMMARY

The Notice of Proposed Rulemaking ("Notice") initiating this proceeding stems from AT&T's challenge to the legality of the Commission's tariff forbearance policy.¹ Although the Notice focuses primarily on the market for long distance telephone service, Telocator asks the Commission to be mindful of the proceeding's other possible effects -- namely,

No. of Copies rec'd
List ABCDE

0+5

¹ FCC 92-35 (released January 28, 1992)

the extension of tariffing requirements, for the first time, to RCCs.

For several reasons, the Commission's tariff forbearance policy as applied to RCCs is lawful, and should not be modified or abandoned:

- First, mobile services have always been considered primarily intrastate, and accordingly, not subject to the Commission's tariffing authority under Section 2(b) of the Communications Act. In addition, even geographically interstate mobile services often are considered jurisdictionally intrastate pursuant to Section 221(b) of the Act.
- Second, as the Commission found in 1981, Section 203(b)(2) of the Communications Act grants the Commission authority to exempt carriers from filing.² The Commission's longstanding interpretation of its own enabling statute is entitled to considerable deference.
- Third, Congress effectively ratified the Commission's forbearance scheme of regulation for mobile carriers in 1982 when it adopted Section 332 of the Communications Act. It further confirmed the lawfulness of forbearance in 1990 in passing the Telephone Operator Consumer Services Improvement Act ("TOCSIA").³
- Fourth, the Commission has additional authority and discretion under Section 303 of the Communications Act to relieve RCCs from tariff filing requirements if doing so would serve the public interest. The intensely competitive nature of the RCC marketplace provides compelling justification for continuing forbearance regulation of RCCs' interstate services.

² Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facility Authorizations Thereof, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 479 (1981).

³ 47 U.S.C. § 226.

Accordingly, there is no legal requirement or policy basis to impose tariff regulation on the mobile communications industry.

II. THE COMMISSION'S TARIFF FORBEARANCE POLICY FOR RADIO COMMON CARRIERS IS AUTHORIZED BY THE COMMUNICATIONS ACT

The absence of tariff regulation in the land mobile industry is a longstanding practice. As Telocator explained in its opening comments, pursuant to Sections 2(b) and 221(b) of the Communications Act, RCC services are predominantly subject to state rate regulation, although the FCC retains plenary authority to regulate the assignment of numbering resources and the terms and conditions of interconnection with the public switched telephone network.⁴ The Commission should not disrupt this division of responsibility mandated by Sections 2(b) and 221(b).

RCCs do, of course, provide a limited amount of interstate services. This section of Telocator's reply comments will explain why the Commission can and should continue to exempt RCCs from filing federal tariffs for those services.

⁴ See, Telocator, pp. 3-5.

A. Section 203(b)(2) Grants the Commission Authority to Modify the Tariff Filing Requirement of Section 203(a).

Section 203(a) of the Communications Act provides that "[E]very common carrier... shall... file with the Commission... schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication..."⁵ However, Section 203(b)(2) further provides:

The Commission may in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions...⁶

The Commission, during its Competitive Carrier Proceedings, extensively reviewed the legislative history of the Act and the legal implications of tariff forbearance. It determined that it possessed substantial discretion under Section 203(b)(2) to remove the tariff filing requirement when appropriate.⁷ As many commenters correctly observe, the Commission, as the expert agency in this field, is entitled to great deference in its interpretation of its own enabling

⁵ 47 U.S.C. § 203(a).

⁶ 47 U.S.C. § 203(b)(2) (emphasis added).

⁷ 84 FCC 2d 445, 479 (1981).

statute.⁸ Unless clearly inconsistent with the terms of the statute, the courts are reluctant to overturn such an administrative interpretation.⁹ Here, the Commission's interpretation conforms to the plain language of Section 203(b)(2).

The Supreme Court's decision in Maislin Industries, U.S. v. Primary Steel, Inc.,¹⁰ does not undermine the Commission's reading of the Communications Act. As an initial matter, the Maislin case dealt with a provision of the Interstate Commerce Act ("ICA"), which, while similar to Section 203, does not grant the ICC authority to modify the tariff filing requirement. Moreover, Maislin did not deal with a forbearance policy, where carriers could voluntarily decide not to file tariffs. Rather, that case, read properly, only concerned the issue of whether a tariff should control over a contract establishing different rates for the same services. In addition, Maislin was decided in the absence of any Congressional review of or ratification of the ICC's "negotiated rates" policy, in contrast to the Commission's

⁸ Comments of Cellular Telecommunications Industry Association, p.9 ("CTIA"); Comments of the Competitive Telecommunications Association, p.9 ("CompTel"); Comments of MCI Telecommunications Corporation, p.44 ("MCI"); Comments of Metropolitan Fiber Systems, Inc., p.6 ("MFS").

⁹ See Chevron USA Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984).

¹⁰ 110 S.Ct 2759 (1990).

explicit acquiescence in forbearance under Section 203, as is discussed below.

B. Congress Has Ratified the Commission's Interpretation of its Statutory Authority to Forbear from Tariff Regulation of RCCs.

Congress has been not only aware, but supportive, of the regulatory framework devised in the Competitive Carrier docket from the beginning.¹¹ Of direct relevance to the FCC forbearance issue, Congress stated in 1982, when adding Section 332 to the Communications Act, that "[n]othing in this subsection shall be construed as prohibiting the Commission from forbearing from regulating common carrier land mobile service..."¹² This clearly supports the validity of forbearance in the RCC context.

It is also important to note that Congress has not disturbed the Commission's forbearance policy even though it has amended Sections 203 or 204 of the Communications Act on three occasions in the last four years.¹³ Congress recently enacted a statutory approach to the regulation of operator

¹¹ See CompTel, pp.11-14; MCI pp.24-35.

¹² H.R. Conf. Rpt. No. 765, 97th Cong., 2d Sess., at 56 (1982), reprinted in 1982 U.S. Code Cong. and Ad. News 2237, 2300.

¹³ See Public Law No. 101-396, § 7, 104 Stat. 850 (Sept. 28, 1990); Public Law No. 101-239, Title III, § 3002(b), 103 Stat. 2131 (Dec. 19, 1989); Public Law No. 100-594, § 8(b), 102 Stat. 3023 (Nov. 3, 1988).

services which expressly preserves the Commission's forbearance policy by allowing operator service providers ("OSPs") to remain non-dominant and, though subject to "informational" tariffs, exempt from more burdensome regulatory requirements. In addition, Congress provided that the Commission may waive this requirement after 1994. This evidence is a persuasive indication that the FCC's interpretation of its governing statute is consistent with Congressional intent.

C. The Commission Has Additional Forbearance Authority Relating to RCCs Under Section 303 of the Act.

Section 303 of the Act grants the Commission additional authority to make special provisions relating to radio communications in the public interest, convenience or necessity.¹⁴ Specifically, that section authorizes the Commission to "generally encourage the larger and more effective use of radio in the public interest," and to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter"¹⁵ Telocator agrees with Southwestern Bell that, under this provision, the Commission has "authority to exempt

¹⁴ 47 U.S.C. § 303.

¹⁵ 47 U.S.C. §§303(g), 303(r).

providers of radio communications services from the tariff filing requirements when such action is in the public interest."¹⁶

Clearly, forbearance from tariff filing serves the public interest. As Telocator demonstrated in its opening comments and as the Commission itself has acknowledged, competition among RCCs is extensive and intense. Factors such as a highly unconcentrated, expanding market and an ever increasing number of competitors serve to promote consumer interests and effectuate the overall goals of the Communications Act.¹⁷ In addition, RCCs continue to face competition from private carrier paging companies ("PCPs"), which are not subject to tariff regulation. In such a competitive industry, the costs of imposing federal tariff regulation far exceed any benefits.

III. CONCLUSION

Telocator urges the Commission not to require RCCs to file tariffs for their interstate services. The Commission's

¹⁶ Comments of Southwestern Bell Corporation, p.3 ("SBC").

¹⁷ As CTIA notes, "these carriers are price takers and thus by definition charge reasonable rates." CTIA, p.12.

tariff forbearance policy as applied to RCCs is lawful, sound policy, and should be retained.

Respectfully submitted,

TELOCATOR

By:



R. Michael Senkowski

Jeffrey S. Linder

Lauren A. Brofazi

of

WILEY, REIN & FIELDING

1776 K Street, N.W.

Washington, D.C. 20006

(202) 429-7000

Its Attorneys

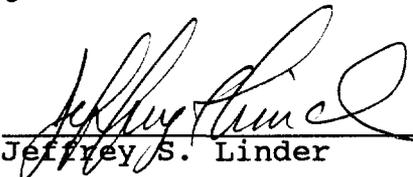
April 29, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 1992, I caused copies of the foregoing "Reply Comments of Telocator" to be mailed via first-class postage prepaid mail to the following:

Policy and Program Planning Division (2 copies)
Common Carrier Bureau
Room 544
1919 M Street, N.W.
Washington, DC 20554

Downtown Copy Center
1114 21st Street, N.W.
Washington, DC 20036



Jeffrey S. Linder