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BEFORE THE

Federal Communications Commission

Federal Communications Commission
Office of the Secretary

WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF FIRST FINANCIAL MANAGEMENT CORPORATION

First Financial Management Corporation ("FFMC"), by its attorneys, hereby submits its reply comments on the Notice of Proposed Rule Making in the above-captioned proceeding. ^{1/}

As demonstrated by the record in this proceeding, the Commission should retain the permissive forbearance doctrine because it is authorized by the Communications Act of 1934 -- as recently affirmed by Congress -- and because it will promote competition and innovation within the telecommunications industry. ^{2/} Nevertheless, should the Commission decide that permissive forbearance is unlawful, then interexchange carriers

^{1/} Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, 7 FCC Rcd 804 (1992) ("Notice").

^{2/} Mobile Marine Radio claims that "without tariffing, the Commission has no direct means of knowing" about unlawful conduct by non-dominant carriers. Comments of Mobile Marine Radio, Inc. at 7. However, the Commission rejected this argument early in the Competitive Common Carrier proceeding, stating that the antidiscrimination standards of Sections 201(b) and 202(a) could be enforced against common carriers through the Section 208 complaint process. Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 FCC 2d 59, 70-71 (1982) ("Competitive Common Carrier") (subsequent history omitted). As a large user of telecommunications services, FFMC can confirm that there is active price and service competition among carriers and that this competition has had a substantial, beneficial impact on FFMC's productivity and efficiency. 0+5

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("IXCs") should be required to file new tariffs that preserve the rates and other terms and conditions in service arrangements currently provided by contract.

I. THE COMMUNICATIONS ACT AUTHORIZES THE FCC TO ESTABLISH A PERMISSIVE FORBEARANCE POLICY

1. As recognized by many parties to this proceeding, the Commission's authority to forbear from requiring non-dominant common carriers to file tariffs stems from Sections 4(i), 203(b)(2), 203(c), 211, and 219 of the Communications Act of 1934, as amended. ^{3/} U S West Communications, Inc. ("US West") and American Telephone and Telegraph Company ("AT&T") claim that, as a matter of statutory interpretation, the tariff filing requirement of Section 203(a) overrides the general authority provision of Section 4(i) and that forbearance is unlawful. ^{4/} This argument, however, understates the important regulatory flexibility provided to the Commission by Congress and ignores four other important provisions of the Communications Act that authorize or contemplate the provision of common carrier services by contract rather than tariff.

2. Specifically, Section 203(b)(2) permits the Commission to modify tariff filing requirements "in its discretion and for good cause shown." Section 203(c) further supports the Commission's forbearance authority by allowing carriers where

^{3/} See, e.g., FPMC Comments at 3-6; Comments of the Association for Local Telecommunications Services at 3-5; Comments of the International Communications Association at 2-3; Comments of GTE Service Corporation at 7-18.

^{4/} US West Comments at 6; AT&T Comments at 5 n.***.

"otherwise provided by or under authority of this Act" to provide communication services without filing a tariff. Sections 211(b) and 219(a) expressly contemplate that the Commission can authorize carriers to provide service by contract rather than tariff. Taken both individually and collectively, these sections of the Communications Act make clear that the Commission has the authority to permit carriers to offer their services by contract rather than by tariff.

3. Likewise, the argument by some dominant carriers that the court's decision in MCI Telecommunications Corp. v. FCC^{5/} precludes the Commission from authorizing any type of forbearance policy must also be rejected.^{6/} Although the court in that case found that the Commission was not authorized to prohibit non-dominant common carriers from filing tariffs, it explicitly stated that it was not deciding that the Commission's permissive forbearance policy was unlawful pursuant to Section 203(a).^{7/} Importantly, subsequent Congressional action makes it incorrect to conclude that the court's decision in MCI Telecommunications even implies that the Commission's permissive forbearance policy is unlawful. This is because, inter alia, the court in MCI Telecommunications relied on the fact that Congress had not authorized or approved the Commission's mandatory forbearance

^{5/} 765 F.2d 1186 (D.C. Cir. 1985).

^{6/} AT&T Comments at 3-5; US West Comments at 5-6.

^{7/} MCI Telecommunications Corp., 765 F.2d at 1196.

policy. ^{8/} In contrast, since MCI Telecommunications, Congress has enacted legislation -- the Telephone Operator Customer Services Improvement Act of 1990 ("Operator Services Act") -- that is clearly predicated on the lawfulness of the permissive forbearance policy. ^{9/}

II. THERE IS NO CONFLICT BETWEEN THE MAISLIN DECISION AND THE PERMISSIVE FORBEARANCE DOCTRINE

4. Parties opposing the FCC's forbearance policy also assert that a recent Supreme Court decision, Maislin Industries, U.S., Inc. v. Primary Steel, Inc., ^{10/} dictates that the policy be considered unlawful. ^{11/} To reach this conclusion, however, the parties stretch the language and implications of Maislin to create a conflict with the forbearance doctrine where none truly exists. Maislin held that as long as carriers are required to file tariffs, they cannot charge customers rates for the same services that are different from the filed tariffed rates. ^{12/} Maislin assumed -- but did not address directly -- the fundamental issue of whether carriers must always file tariffs to

^{8/} Id. at 1195.

^{9/} See infra Section III for a discussion of the Operator Services Act.

^{10/} 110 S. Ct. 2759 (1990).

^{11/} See, e.g., Comments of the NYNEX Telephone Companies at 7-9; US West Comments at 7-8; Mobile Marine Radio Comments at 5-6; Comments of Alascom, Inc. at 1-3.

^{12/} Maislin, 110 S. Ct. at 2770-71. See FFMC Comments at 7; Comments of Sprint Communications Company L.P. at 6-8; Comments of International Business Machines Corporation at 9-10.

provide service. ^{13/} Accordingly, that decision cannot properly be viewed as determining the lawfulness of the FCC's forbearance policy.

5. Similarly, parties opposing forbearance disregard important statutory distinctions between the Communications Act and the Interstate Commerce Act. ^{14/} For example, the language of the initial modifying clause of Section 203(c) of the Communications Act ^{15/} is broader and more flexible than the counterpart provision of the Interstate Commerce Act. ^{16/} Moreover, the Interstate Commerce Act contains no provision analogous to Section 211 of the Communications Act, which in combination with Section 203(c), contemplates the provision of common carrier services by contract rather than by tariff. Thus, Maislin's holding that the Interstate Commerce Commission cannot permit exceptions to its statutory "filed rate" requirement does not foreclose the FCC's ability under the Communications Act to modify its tariff filing requirements.

^{13/} Maislin, 110 S. Ct. at 2769.

^{14/} AT&T Comments at 5-6 n.***, US West Comments at 3.

^{15/} 47 U.S.C. § 203(c) (1988) ("No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate . . .") (emphasis supplied).

^{16/} 49 U.S.C. § 10761(a) (1988) ("Except as provided in this subtitle, a carrier . . .") (emphasis supplied). Under Section 10761(b) of the Interstate Commerce Act, the Interstate Commerce Commission may grant relief from the filed rate requirement only to contract carriers -- not common carriers -- and only if certain specific conditions are met. Id. § 10761(b).

6. Finally, AT&T cites Maislin for the proposition that Congress must act before the Commission can avoid "strict adherence" to the filed rate doctrine. ^{17/} AT&T then claims that this same principle applies to the tariff filing requirement of Section 203(a). However, AT&T either ignores or fails to recognize that both the text and the legislative history of the Operator Services Act show that Congress indeed has acted in this area and has affirmed the validity of the permissive forbearance doctrine.

**III. BY ENACTING THE OPERATOR SERVICES ACT, CONGRESS
APPROVED THE PERMISSIVE FORBEARANCE DOCTRINE**

7. In the Notice, the Commission concludes that "Congress appears to have recognized the operation of our forbearance rule when it enacted" the Operator Services Act. ^{18/} With one exception, the parties opposed to the FCC's forbearance doctrine do not discuss the Operator Services Act in their comments. Given the statute's clear relevance to this proceeding, the fact that virtually all of the parties opposing forbearance ignore the Operator Services Act exposes a fundamental weakness in their anti-forbearance arguments.

8. The one opposing party that does discuss the Operation Service Act, Marine Mobile Radio, argues that Congress established a separate statutory scheme for operator service providers ("OSPs") to file informational tariffs without

^{17/} AT&T Comments at 7 (quoting Maislin, 110 S. Ct. at 2771).

^{18/} 7 FCC Rcd at 805.

addressing the forbearance doctrine. However, Marine Mobile's argument ignores both the effect and the legislative history of the Operator Services Act. The Operator Services Act was not drafted in a vacuum, but rather reflects the fact that Congress clearly understood the Commission's permissive forbearance doctrine and chose to enact a statute which would complement, rather than reject, that doctrine.

9. Congress passed the Operator Services Act to increase regulation of the OSP industry. If the permissive forbearance doctrine were not in effect and acknowledged by Congress to be lawful, then the Section 226(h)(1) informational tariff filing requirement imposed on OSPs would have been superfluous because OSPs would already have been required to file traditional tariffs under Section 203. Indeed, had Congress believed permissive forbearance was unlawful, it would have expressly invalidated the doctrine -- thereby automatically increasing regulation of all IXCs, including OSPs, and satisfying the intent of the legislation -- or it would have decided that there was no need for enacting the less onerous tariff requirements of Section 226(h)(1). Instead, by enacting Section 226(h)(1) Congress intentionally imposed filing requirements on OSPs that are more burdensome than the requirements imposed on other non-dominant carriers but are still less burdensome than those imposed on dominant carriers. ^{19/} By taking this action, Congress

^{19/} See S. Rep. No. 439, 101st Cong., 2d Sess. 9, 23 (1990); H.R. Rep. No. 213, 101st Cong., 1st Sess. 6, 14 (1989).

demonstrated that it understood and approved the Commission's permissive forbearance policy and that it endorsed the important distinction between dominant and non-dominant carriers.

**IV. CUSTOMIZED, INDIVIDUALLY NEGOTIATED
CONTRACTS ARE PRIVATE CARRIAGE ARRANGEMENTS
THAT ARE NOT SUBJECT TO TITLE II REQUIREMENTS**

10. As explained in FFMC's Comments, even if the Commission should find that the permissive forbearance policy is unlawful, carriers should not be required to file contractual services that are properly classified as private carriage services.^{20/} Many companies, including FFMC, have long-term contracts with carriers that constitute a unique package of services individually negotiated to respond to their particular needs. These integrated service contracts should be classified as private carriage^{21/} and as such, should not be subject to any tariff filing requirements imposed on common carrier arrangements. This proposition has attracted support from parties on both sides of the forbearance debate.^{22/}

**V. IF PERMISSIVE FORBEARANCE IS FOUND TO BE
UNLAWFUL, THEN STREAMLINED FILING PROCEDURES
SHOULD BE APPLIED TO NON-DOMINANT CARRIERS**

11. Virtually all parties to this proceeding support streamlined tariff requirements if the Commission decides to invalidate its permissive forbearance policy. However, the

^{20/} FFMC Comments at 12-13.

^{21/} See NARUC v. FCC, 525 F.2d 630, 641-42 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

^{22/} See, e.g., US West Comments at 8-10; Comments of Fairchild Communications Services Company at 5.

Commission must guard against attempts by dominant carriers to use such a change to eliminate the distinction between dominant and non-dominant carriers as this could result in unnecessary restrictions being imposed on non-dominant carriers simply to protect against possible abuses by dominant carriers.

12. For example, AT&T proposes reimplementing the "streamlined" procedures for non-dominant carriers contained in the First Report and Order in the Competitive Common Carrier proceeding.^{23/} This proposal should be rejected because it would, to a large extent, subject non-dominant carriers to the same requirements now imposed on AT&T in certain markets.^{24/} Because non-dominant carriers do not have the market power of a dominant carrier, they cannot charge rates or engage in discriminatory pricing practices that violate the Communications Act.^{25/} Thus, they should not be subject to the same level of regulation. Instead, the public interest will be served if the Commission minimizes the anticompetitive effects of any tariff filing requirements and permits non-dominant carriers to file common carrier tariffs, including contract-based tariffs, with one day's notice and without supporting cost justification.

^{23/} AT&T Comments at 8.

^{24/} Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5894, 5897, 5902 (1991), modified, Order, 6 FCC Rcd 7255 (Com. Car. Bur. 1991), modified on recon., FCC 92-181, CC Docket No. 90-132 (released April 17, 1992).

^{25/} Competitive Common Carrier, Second Report and Order, 91 FCC 2d 59, 69 (1982) (subsequent history omitted).

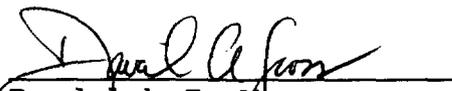
VII. CONCLUSION

30. The record in this rulemaking shows that the Commission's permissive forbearance policy is both lawful and in the public interest. The Communications Act gives the Commission the discretion to modify the Section 203(a) tariff filing requirement for non-dominant carriers. As parties opposing forbearance attempt to ignore, Congress recently affirmed the FCC's forbearance doctrine when it enacted the Operator Services Act. Moreover, the doctrine should be maintained because it serves the public interest by promoting competitiveness for rates and services within the IXC market for business services. If, however, the Commission concludes that its permissive forbearance policy is unlawful, then it should streamline tariff filing procedures and maintain the distinction between dominant and non-dominant carriers. Finally, these streamlined procedures should only be applied to common carriage arrangements, not to individually negotiated, custom tailored private carriage contracts.

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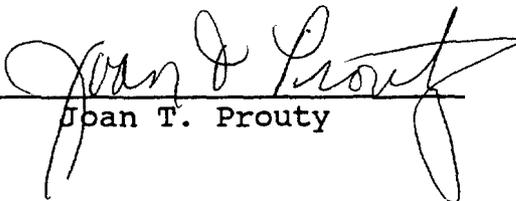
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