

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

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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 THE
NYNEX TELEPHONE COMPANIES

New York Telephone Company ("NYT") and New England Telephone and Telegraph Company ("NET") (collectively, the "NYNEX Telephone Companies" or "NTCs"), hereby file their Reply to the Comments filed on March 30, 1992 in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.

I. INTRODUCTION

The Commission's request for comment as to whether it has authority under the Communications Act to continue to permit non-dominant carriers not to file tariffs has generated considerable interest and disagreement. Several commenters, including the NTCs, contend that the current forbearance rules violate the Communications Act (the "Act"), while other commenters argue that the current application of the forbearance rules is not unlawful. A number of others argue that while the forbearance rules are not unlawful, if the rules

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are found to be unlawful, the Commission should impose only minimal tariff filing requirements on non-dominant carriers.

As the NTCs have demonstrated, the Commission's forbearance policy is inconsistent with the requirements of the Act.¹ However, as the NTCs have also demonstrated, the Commission is not required to adopt rules requiring all common carriers to file tariffs with identical support, and with identical review periods for all of their services.² Rather, the Commission, as noted by many commenters, may establish different filing requirements depending on the class of carrier and competitive nature of a particular market. Finally, the NTCs believe that elimination of the Commission's forbearance policy would provide an appropriate opportunity for further regulatory reform. The principles adopted by the Commission in the Competitive Carrier Order,³ which provided increased regulatory flexibility to AT&T for certain of its services, should be expanded to provide comparable regulatory flexibility to the LECs for their services subject to competition.

1 See Comments of the NYNEX Telephone Companies, pp. 5-9.

2 Id. at pp. 9-13.

3 In the Matter of Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd 5880 (1991) ("Competitive Carrier Order").

II. THE COMMISSION'S FORBEARANCE POLICY IS INCONSISTENT WITH THE REQUIREMENTS OF THE COMMUNICATIONS ACT

A number of commenters claim that the Commission's forbearance policy is not inconsistent with the provisions of Section 203 of the Act. They argue that (1) Section 203 of the Act clearly permits forbearance; (2) judicial precedent such as the Supreme Court's Maislin⁴ decision is inapposite; or (3) Congress approved the Commission's forbearance policy in the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"). These arguments should be rejected by the Commission.

First, Section 203(a) of the Act clearly states that all common carriers must file tariffs.

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission...schedules showing all charges for itself and its connecting carriers...and showing the classifications, practices and regulations affecting such charges.⁵

Furthermore, Section 203(b)(2) of the Act does not, contrary to the claims of several commenters,⁶ provide the Commission with a basis for exempting non-dominant carriers

⁴ Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990) ("Maislin").

⁵ 47 U.S.C. §203(a) (emphasis supplied).

⁶ See Comments of MCI Telecommunications Corporation ("MCI"), pp. 5-7; Comments of Metropolitan Fiber Systems ("MFS"), pp. 5-7; Comments of First Financial Management ("First Financial Management"), pp. 3-4; Comments of Ad Hoc Telecommunications Users Committee ("Ad Hoc"), p. 7.

from the tariff filing requirements of Section 203(a).⁷ The Court of Appeals rejected this argument in reversing the Commission's mandatory forbearance policy in MCI Telecommunications Corp. v. F.C.C.⁸ The Court, in reviewing the language of Section 203(b)(2), stated:

The words "modify...in particular instances or by general order applicable to special circumstances or conditions" suggest circumscribed alterations - not, as the FCC now would have it, wholesale abandonment or elimination of a requirement. See, e.g., Black's Law Dictionary 905 (5th Ed. 1979) ("modify" defined as "[T]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit; reduce").⁹

Nor do other sections of the Act cited by some commenters, such as Section 154(i),¹⁰ provide the Commission

⁷ Section 203(b)(2) 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....

⁸ 765 F.2d 1186 (D.C. Cir. 1985).

⁹ 765 F.2d 1186, 1192. See also American Telephone and Telegraph Co. v. FCC, 487 F.2d 865, 879 (2d Cir. 1973). Since Section 203(b) only permits modifications of 'the requirements made by or under the authority of this section', the Commission may not rely upon this section to circumvent the requirements of Sections 204 and 205 relating to the limitation of the suspension period and the prescription procedure. In short, under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision. (emphasis supplied)

¹⁰ Section 154(i) provides that:

The Commission may perform any and all acts, make such

(Footnote Continued On Next Page)

the authority for its forbearance policy.¹¹ While it is true that "Congress has granted the Commission expansive powers under the Communications Act to adjust its regulatory policies and programs,"¹² it is a fundamental rule of statutory construction that specific terms of a statute take precedence over general terms. Thus, even if the general provisions of Section 154(i) conflicted with specific provisions of Section 203(a), the specific tariff filing requirements of Section 203(a) must control.

Contrary to the arguments of several commenters that the Supreme Court's Maislin decision has no bearing on the legality of the Commission's forbearance policy,¹³ Maislin clearly is strong precedent against forbearance. While it is correct that in Maislin the court construed the tariff filing provisions of the Interstate Commerce Act ("ICA"), not the Communications Act, the provisions of the ICA construed by the Court are identical to those of Section 203 of the Communications Act. The Court held that these filing

10 (Footnote Continued From Previous Page)

rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

11 See MCI, p. 21; First Financial Management, p. 5; Comments of GTE, p. 8.

12 MCI, p. 21.

13 Comments of US Sprint ("Sprint"), p. 6; MCI, pp. 12-20; Comments of OCOM, pp. 18-22.

provisions were "utterly central" to the administration of the Act.¹⁴

Furthermore, the Maislin Court specifically rejected an ICC argument, similar to that advanced by the Commission, that, in light of a more competitive environment, strict adherence to the filed rate doctrine was unnecessary.¹⁵ The Court pointed out that:

Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry (citations omitted), it does not have the power to adopt a policy that directly conflicts with its governing statute....¹⁶

Finally, several commenters argue that TOCSIA, passed by Congress in 1990, represents a ratification by Congress of the Commission's forbearance policy.¹⁷ In that legislation, Congress adopted Section 226 of the Act which places certain requirements on providers of operator services. Specifically, Section 226 requires that operator services providers must file "an informational tariff specifying rates, terms and conditions...."¹⁸ Furthermore, the Act grants the Commission

14 110 S.Ct. at 2769.

15 Id. at 2770.

16 Id.

17 Sprint, pp. 11-14; MCI, p. 23; Comments of Williams Telecommunications Group, Inc. ("WilTel"), pp. 4-5.

18 47 U.S.C.A. §226(h)(1)(A).

specific authority to waive the tariff filing requirements after four years if certain conditions are met.¹⁹

The enacting of TOCSIA does not represent Congressional ratification of the Commission's forbearance policy. The statute states that:

Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter.²⁰

While TOCSIA may have provided the Commission with the limited authority to exempt a certain class of carriers from tariff filing requirements for certain services, Congress did not, in enacting this legislation, ratify a policy which exempts all non-dominant common carriers from filing tariffs for all of their services. Rather, the language of Section 226(i) states that other requirements of the Act, including the tariff filing requirements of Section 203 of the Act, are to remain unchanged.

If Congress wished, in response to the Supreme Court's Maislin decision, as well as those of the various Courts of Appeals which throw doubt on the validity of forbearance, to show its support for the Commission's policy, it could have done so by amending Section 203 of the Act to make it clear that the Commission has the power to eliminate entirely tariff

19 47 U.S.C.A. §226(h)(1)(B).

20 47 U.S.C.A. §226(i).

filing requirements for a class or classes of carriers.²¹ Congress, however, did not do this. It is simply reading too much into TOCSIA statute to suggest that that statute represents a wholesale ratification by Congress of the Commission's forbearance policy.

III. THE ELIMINATION OF FORBEARANCE SHOULD BE ACCOMPANIED BY FURTHER REGULATORY REFORM

In their Comments, the NTCs further demonstrated that, while the Commission's forbearance policy is in conflict with Section 203 of the Act, the Act does not require the Commission to adopt rules requiring all common carriers to file tariffs with identical tariff support, and with identical review periods for all their services.²² Rather, the Commission may establish different filing requirements depending on the class of carrier and the competitive nature of a particular market. Virtually all commenters agree with this position, even those who argue that the Commission's forbearance policy does not violate the Act.²³

21 The courts have also held that when Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, an intention to adopt that interpretation can be inferred. See Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 465 U.S. 353, 381-82 n.66 (1982). TOCSIA, however, is not a reenactment of Section 203. Rather, it is a separate statutory scheme pertaining to a limited class of carriers.

22 See Comments of the NYNEX Telephone Companies, pp. 9-13.

23 Most commenters who argue that the forbearance policy does not violate the Act also argue, in the alternative, that if tariffing is required, the Commission has the authority

The elimination of forbearance should not be the occasion, as some commenters appear to fear, for imposing significant additional burdens on nondominant carriers. While the Commission cannot exempt any common carrier from the minimum filing requirements of the Act, it has considerable discretion in crafting rules which will comply with the requirements of the Act without placing an undue burden on filing carriers.²⁴ The elimination of forbearance instead provides the Commission with an opportunity for further regulatory reform.

The Commission has recognized that competition has grown dramatically in the large business market and, in the Competitive Carrier Order, granted AT&T increased regulatory flexibility. As the NTCs demonstrated in their Comments, competition has also grown dramatically in certain segments of the local exchange market.²⁵ The general principle established in the Competitive Carrier Order, that regulation of dominant carriers should be relaxed as competition increases, should, therefore, also be applied to LECs. Where

23 (Footnote Continued From Previous Page)

to establish different filing requirements for different classes of carriers. See Comments of ACC Long Distance, p. 6; Comments of Local Area Telecommunications, p. 8; WilTel pp. 11-12; MFS, p. 17.

24 See, e.g., MCI Telecommunications Corporation v. F.C.C., 765 F.2d 1186, 1196 (D.C. Cir. 1985) "...the Commission could further streamline the regulation of non-dominant carriers without encountering any contrary Congressional prescription."

25 See Comments of the NYNEX Telephone Companies, pp. 13-16.

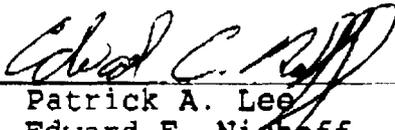
competitive markets exist for LECs, regulation should be significantly reduced.

IV. CONCLUSION

The Commission's forbearance policy is inconsistent with the requirements of the Act, and the Commission cannot abrogate the rate filing requirements of Section 203 for any common carrier subject to the Commission's jurisdiction. While the Commission cannot exempt any common carrier from these requirements, it does, however, have considerable discretion in crafting rules which will comply with the requirements of the Act without placing an undue burden on carriers that have formerly been exempted from filing tariffs under the forbearance policy. Finally, with the elimination of forbearance, the time is ripe for the Commission to expand the reforms introduced in the Competitive Carrier Order, and to provide the LECs with increased regulatory flexibility.

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Dated: April 29, 1992

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY
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class United States mail, postage prepaid, on each of the
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