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April 29, 1992

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APR 29 1992

Federal Communications Commission
Office of the Secretary

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 92-13 / Tariff Filing Requirements
for Interstate Common Carriers

Dear Ms. Searcy:

Transmitted herewith for filing on behalf of the Telecommunications Marketing Association are an original and four copies of its reply comments in the above-captioned matter. If there are any questions regarding this filing, please communicate either with Andrew Isar, Director of Regulatory Relations, (206) 641-5240, or with the undersigned.

Sincerely,



Mitchell F. Brecher

MFB/hcg

Enclosure

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

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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

To the Commission:

REPLY COMMENTS OF
THE TELECOMMUNICATIONS MARKETING ASSOCIATION

The Telecommunications Marketing Association ("TMA"), on behalf of its members, hereby submits its Reply Comments in this proceeding.¹

The positions taken by commenting parties regarding the legality of the Commission's tariffing forbearance policy ("Policy"), have been for the most part predictable, based on the effect of the Commission's Policy on each company. TMA believes that the divergence in opinions between those believing the Policy is legal and those who do not, simply underscores TMA's contention that the legality of the policy is one of *interpretation* of statute and case law. TMA maintains, however, that the Policy has been found legal by the Commission, has a successful long-standing "track record" for supporting the public interest, and that neither recent court decisions nor legislation should modify the Commission's finding.

Of those filing comments, only a few, including AT&T and several of the Regional Bell Operating Companies ("RBOC(s)"), all dominant carriers, argue against the legality of the Policy, apparently, in part, in an

¹ Tariffing Filing Requirements for Interstate Common Carriers (Notice of Proposed Rulemaking), FCC 92-35 (hereinafter "Notice" or "NPRM")

effort to pursue further streamlining of existing tariffing requirements for themselves. TMA believes their arguments are primarily focused on narrow interpretations of pertinent provisions of the 1934 Communications Act ("Act"), court decisions and related legislation. Many other parties, including TMA, have jointly taken opposing views of the Commission's authority to forbear from regulation, the implications of recently enacted legislation in the Telephone Operator Consumer Services Improvement Act ("TOCSIA")² and the implications of *Maislin*³, in support of the tariffing forbearance policy's legality.

The majority of those supporting the legality of the Commission's Policy, for example, state that the provisions of Section 203(b)(2) of the Act, and the Act's *recently* adopted Section 226, enacted by TOCSIA give the Commission full legal authority to implement voluntary forbearance. TMA fully concurs with Sprint Communications Company L.P.'s assessment that the recent passage of TOCSIA makes the Commission's position on the legality of forbearance, much stronger now than when first adopted.⁴ Clearly, Congress was aware of the Commission's policy of tariffing forbearance, structuring TOCSIA to require the filing of informational tariffs by a certain group of carriers without making changes to the Commission's policy. TMA believes that those interpreting tariffing forbearance as illegal, have narrowly focused on the requirements of Section 203(a) requiring all carriers to file tariffs, ignoring or dismissing

²47 U.S.C. §226.

³Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

⁴See, e.g. Comments of Sprint Communications Company L.P., CC Docket 92-13"...that given the TOCSIA legislation, the Congressional approval which it implies and the need under sound principles of statutory construction to give meaning to the new provisions added to the Act in Section 226, it is , on balance, easier to read Section 203(a) to permit voluntary forbearance than was the case when the Commission first examined the issue."

the Commission's authority to modify requirements granted in Sections 4(i)⁵ and 203(b)(2) of the Act, and implicitly upheld through Section 226. Neither the provisions of Section 4(i), Section 203(b)(2) nor the implicit acceptance of the legality of the Commission's Policy established by the enactment of Section 226 can be skirted, if an honest assessment of the Commission's authority to forbear from regulation of non-dominant carriers is to be made.

The *Maislin* case was cited by several dominant carriers who argued that the Supreme Court's decision underscored the illegality of tariffing forbearance. These parties suggest that *Maislin* implicitly compels the Commission to require all carriers to file rates and collect the rates they have filed as required in Section 203(a) of the Act. Yet as CompTel and others show, the Court's ruling actually forbade the charging of rates other than those appearing in a *filed tariff*, e.g. the "filed rate" doctrine, and did not consider the issue of forbearance *per se*.⁶ Additionally, since *Maislin* relates to the transportation industry, an industry whose environment differs greatly from that of the telecommunications industry as both CompTel, TMA and others highlighted, the Supreme Court's decision has no *direct* applicability to the Commission's tariffing forbearance policy. Yet even if a direct correlation between *Maislin* and the Commission's Policy exists, the Supreme Court's decision simply affirms that common carriers must charge tariffed rates, subject to Commission rules *if tariffs are filed, not that tariffs must be filed*.

Without question, the Commission's Policy has been effective in promoting interexchange telecommunications competition while reducing

⁵47 U.S.C. §154(i) (1991).

⁶See, e.g., Comments of the Competitive Telecommunications Association at page 15.

the potential abuses of dominant carriers against competitors. TMA finds it ironic that several dominant carriers have extended their comments beyond the scope of this proceeding to pursue more streamlined tariff regulation of their own companies. Several dominant carriers call for greater tariffing streamlining for dominant carriers in order to respond to the highly competitive markets, markets whose competition has been promoted in part by the Commission's pro-competitive policies including tariffing forbearance. These companies easily dismiss the burden and costs that a reversal of the Commission's tariffing forbearance policy would impose on non-dominant carriers, the Commission and public. In essence, several dominant carriers would have the Commission subject all competing carriers to tariffing requirements at tremendous cost, and then "streamline" those requirements for all carriers, including dominant carriers. The net effect would be one of creating significant regulatory burdens and costs for competing carriers while reducing the level of regulation on dominant carriers even further. The only clear beneficiaries would be the dominant carriers, themselves. TMA does not understand how further streamlining of tariffing requirements for dominant carriers could realistically promote industry competition nor be in the public interest. TMA's own recent experiences with AT&T's efforts to manipulate resale competition through the existing reduced regulatory structure underscore this concern. When AT&T filed its Software Defined Network ("SDN") Expanded Volume Plan ("EVP") revision, for example, AT&T filed to introduce SDN EVP contract term limitations where none had previously existed⁷. The filing had the potential impact of terminating

⁷In the Matter of AT&T Revisions to its Tariff FCC No. 1, Transmittal No. 3735, December 20, 1991.

existing carrier contracts without renewal options, thus having the effect of putting numerous AT&T resale providers out of business upon the termination of the contract. Public Notice of the filing came the day after Christmas, six days after the filing issue date, effectively leaving interested parties less than a week for analysis and comment.

Virtually all parties who support the legality of the Commission's Policy, seek streamlining of non-dominant carrier tariff requirements, in the event that the Policy is found illegal. It is evident that existing tariff filing requirements would pose an unnecessary and expensive burden on competitive carriers *and* on the Commission without serving the public interest. Reduced filing fees, rate "caps", presumption of legality and immediate approval of smaller, non-dominant carrier tariff filings, would partially mitigate the significant negative impacts of reimposing tariffing requirements, particularly on smaller carriers who are incapable of influencing market prices. The Commission must consider streamlined tariffing requirements for smaller providers, should the Commission's Policy be found illegal.

TMA maintains that the Commission's Policy is legal and that recent legislation and case law have acted to *confirm* rather than refute the legality of the Commission's Policy. Clearly, the Commission has appropriately exercised its authority to differentiate between dominant and non-dominant carriers in creating a regulatory policy that has promoted competition while protecting the public and industry from the potential abuses of dominant carriers. The Commission's Policy has been effective in creating an innovative and competitive marketplace. A modification of such a policy, based on legal interpretation changes, will unravel the competitive marketplace the Commission's Policy helped create, while

instituting a likely unmanageable administrative nightmare with dubious public benefit.

Respectfully Submitted,

TELECOMMUNICATIONS
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April 29, 1992

CERTIFICATE OF SERVICE

I, Diane V. Corbett, do hereby certify that a copy of the foregoing "Reply Comments of the Telecommunications Marketing Association" was served this 29th day of April, 1992 by delivery thereof by first class mail, postage prepaid, to the parties of record in this proceeding.

A handwritten signature in cursive script that reads "Diane V. Corbett". The signature is written in black ink and is positioned above a solid horizontal line.

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