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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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Federal Communications Commission  
Office of the Secretary

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In the Matter of \_\_\_\_\_  
Tariff Filing Requirements \_\_\_\_\_  
for Interstate Common Carriers \_\_\_\_\_  
\_\_\_\_\_

CC Docket No. 92-13

REPLY COMMENTS OF OCOM CORPORATION

OCOM Corporation ("OCOM"), by its attorneys,  
hereby submits this reply to the comments filed in the  
above-captioned proceeding.

The vast majority of commenting parties agree  
that, in the course of the initial Competitive Carrier  
rulemaking, proceeding, the Commission had carefully  
considered the scope of its authority under the Communi-  
cations Act of 1934, 47 U.S.C. §§ 151 et seq. ("Act"),  
and properly concluded that it could adopt permissive  
forbearance as part of its regulatory structure for non-  
dominant carriers.\* Contrary to the arguments of a small

\* Among the approximately 26 parties concluding that  
adopting forbearance is within the scope of the  
FCC's authority are the Ad Hoc Telecommunications  
Users Committee ("Ad Hoc"); Association for Local  
Telecommunication Services; Cellular Telecommunica-  
(Footnote continued)

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handful of parties,\* the legislative history of the Act's relevant section (47 U.S.C. § 203), subsequent congressional activity and subsequent case law all support the Commission's position. In addition, the Competitive Carrier rulemaking has successfully encouraged the development of a dynamic and competitive market for long distance telecommunications services. Reconsideration of a lawful and successful policy would be a waste of resources and could only have detrimental effects.

**I. Case Law Does Not Alter the Plain Language of the Act.**

Parties arguing both for and against the lawfulness of the FCC's forbearance policy agree that the plain language of the Act, and specifically Section 203, governs the issue at hand.\*\* Section 203 provides that

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(Footnote \* continued from previous page)

tions Industry Assoc. ("CTIA"); Competitive Telecommunications Assoc. ("CompTel"); First Financial Management Corp.; GTE Service Corp. ("GTE"); Interexchange Resellers Assoc.; International Business Machines Corp. ("IBM"); MCI Telecommunications Corp. ("MCI"); Metropolitan Fiber Systems, Inc.; OCOM; Pacific Telesis Group ("Pacific Telesis"); Southwestern Bell Corp. ("Southwestern Bell"); Sprint Communications Co. ("Sprint"); Telecommunications Marketing Co.; Telocator.

\* See, comments of Alascom, Inc. ("Alascom"); American Telephone and Telegraph Co. ("AT&T"); Mobile Marine Radio, Inc.; NYNEX Telephone Companies ("NYNEX"); U S West Communications, Inc. ("U S West").

\*\* See, e.g., comments of AT&T at 3; GTE at 11-15; MCI at 6-8; OCOM at 10-12; U S West at 4-5.

upon good cause the Commission may "modify any requirement made by or under the authority of this section." 47 U.S.C. § 203(b)(2). Therefore, parties arguing that forbearance is unlawful must bear the burden of demonstrating why the Act's language should be interpreted extraordinarily narrowly, *i.e.*, that "modify" does not have its usual meaning. The opponents of forbearance have failed to meet this burden.

**A. The Act Is Not a Carbon Copy of the ICA.**

The opponents of permissive forbearance rely primarily on Maislin Industries v. Primary Steel, 110 S. Ct. 2759 (1990), to show that the Commission lacks the authority to forgo the tariff filing requirement for certain well-defined types of carriers.\* Maislin, however, is an ICA case which is not controlling.

First of all, the relevant sections of the Act and the ICA on tariffing are not identical and are not intended to have the same effect. OCOM, MCI and other parties have demonstrated that Congress specifically and intentionally changed certain terms of the ICA when adapting the Act from the ICA.\*\* Section 203 of the Act

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\* See, e.g., comments of Alascom at 1-4; AT&T at 5-7; NYNEX at 7-8; U S West at 3-4.

\*\* See, e.g., comments of OCOM at 18-25; MCI at 19-25; IBM at 2-8; GTE at 19-24; CTIA at 14-17.

was then itself altered over the years until it read as it reads today. This process was intended to create, and did create, broader powers of modification for the FCC as compared to those of the Interstate Commerce Commission.\*

Second, the issue in Maislin was different than the question presented in this case. The only dispute in Maislin was whether a carrier, after having filed a tariff for certain services, may charge rates for such services different from those rates set forth in the tariff (i.e., whether "the filed rate doctrine" applied). Thus, even if the ICA and the Act were identically written and were intended to be interpreted identically, Maislin would not be on point.\*\*

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\* See, e.g., comments of OCOM at 18-25; MCI at 6-8; IBM at 1-8; Ad Hoc at 7-8; Sprint at 11-14; Southwestern Bell at 2.

\*\* See, e.g., comments of OCOM at 23-24; MCI at 19-21; GTE at 19-21; Sprint at 8-9; Southwestern Bell at 9-10; CTIA at 19.

**B. Cases Delineating the Extent of the FCC's Authority Under Section 203(b)(2) Support the Permissive Forbearance Policy.**

Certain parties opposing forbearance also argue that MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), requires that the Commission's established forbearance policy be rejected. MCI, however, held only that the Commission's authority under Section 203(b)(2) did not enable it to prohibit nondominant carriers from filing tariffs. That, the court said, would be tantamount to complete abandonment of the carrier-initiated rate regulatory scheme that Congress guaranteed to carriers so that they would not be at the Commission's mercy in initiating new or changed rates. MCI did not hold, however, that the Commission must require all carriers to file tariffs. Even U S West, which argued that forbearance is unlawful, conceded that the court in MCI specifically stated that it was not addressing the issue of permissive forbearance.\*

In any case, as OCOM and others have shown, permissive forbearance is not in any way a "wholesale abandonment" of the requirements of Title II of the Act. To the contrary, the Commission implemented permissive forbearance because it determined that such a regulatory

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\* U S West at 3.

policy was best designed to meet the Act's requirements to ensure just and reasonable rates in compliance with Title II.\*

As many commenters pointed out, the Commission throughout the Competitive Carrier proceedings was well aware of its obligation to enforce the Act, particularly the just and reasonable rates requirement of Title II of the Act.\*\* The Commission implemented permissive forbearance only after careful analysis to determine whether competitive forces would ensure just and reasonable rates under then-existing circumstances. The Commission also specifically stated that it would reconsider its decision and reinstate the tariffing requirement for nondominant carriers "upon a principled finding that such action would be warranted under the Act."\*\*\*

Significantly, none of the comments submitted contain any evidence that the rates charged or the terms

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\* See, e.g., comments of OCOM at 14-16; MCI at 7-8; GTE at 7-10, 13-15; CompTel at 4-5; IBM at 8; Sprint at 9-10.

\*\* See, e.g., comments of OCOM at 9-10, 24; MCI at 8-13; GTE at 9-10; CTIA at 11-12; IBM at 2-3, 8; CompTel at 4; Southwestern Bell at 2; Sprint at 11-14.

\*\*\* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 448 (1981).

of service offered by carriers that have elected to forego filing tariffs have been unjust or unreasonable or otherwise in violation of the Act. Today, with well over 400 carriers providing competitive interexchange services, more than ever the forces of competition exist to ensure that prices and terms for such services will be just and reasonable under Title II.

**II. Congress Specifically Recognized the Commission's Interpretation of the Act.**

Forbearance opponents failed to show that Congress has disapproved of forbearance, views permissive forbearance as outside the scope of the Commission's authority, or is in fact unaware of the FCC's forbearance policy. In contrast, OCOM and others have demonstrated that Congress not only has acknowledged the Commission's forbearance policy, but specifically has condoned it.\* The enactment of the Telephone Operator Services Consumer Improvement Act, 47 U.S.C. § 226, illustrates congressional affirmation of the Commission's authority to adopt the forbearance policy.\*\*

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\* See, e.g., comments of OCOM at 4-7; MCI at 23-35; CTIA at 14-15; IBM at 5-6; CompTel at 9, 11-13; Ad Hoc at 10.

\*\* See, e.g., comments of OCOM at 5; MCI at 34-35; CTIA at 15-17; GTE at 23-24; IBM at 5-6; CompTel at 9-11; Metropolitan Fiber Systems at 7-11; Ad Hoc at 10-13.

**III. The Commission Should Not Alter a Validity Adopted Policy that Has Created Great Public Benefits.**

The initial Competitive Carrier rulemaking was a milestone in the development of competition in the long distance services market. Since its adoption, competition in that market has flourished and consumers have reaped the attendant benefits. As OCOM pointed out in its comments, consumer costs for interstate services fell at an annual average of nearly 5% while the overall consumer price index has risen on average 4% per year between 1984 and 1991.\*

The current regulatory policy of both the FCC and the Bush Administration is to reduce regulation where possible. In such an environment, it would be unthinkable to reimpose regulatory burdens on competitive carriers operating in a dynamic and competitive marketplace.\*\*

The forbearance policy, as part of the Commission's overall regulatory structure, has encouraged com-

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\* OCOM comments at 2.

\*\* Some parties agree with the principle of streamlining regulation and apparently would support permissive forbearance but for their mistaken belief that forbearance is unlawful. See, e.g., comments of U S West at 8-9; NYNEX at 5-9; Mobile Marine Radio at 7. AT&T itself, for example, has often argued for reducing the regulatory burden on interexchange carriers operating in a competitive environment notwithstanding its position in this proceeding. See MCI at 2-3.

petition, and will continue to do so, while ensuring just and reasonable rates through the competitive marketplace that has developed.\* Its opponents have demonstrated nothing unlawful about it. The Commission acted within its authority to fulfill its mandate under the Act and establish a workable regulatory structure that ensures just and reasonable rates.

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\* See MCI at 10-11 for a discussion of economic theory supporting the FCC's determination that marketplace forces will ensure reasonable rates.

**IV. Conclusion.**

For the foregoing reasons, and those more fully discussed in OCOM's comments filed previously in this proceeding, OCOM urges the Commission not to alter its current regulatory scheme, including its permissive forbearance policy.

Respectfully submitted,

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Dated: April 29, 1992

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Reply Comments of OCOM Corporation" was sent by first-class mail, postage prepaid, on this 29th day of April, 1992, to the parties listed on the attached service list.

  
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April 29, 1992

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