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Federal Communications Commission
Office of the Secretary

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

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

REPLY COMMENTS OF THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Thomas J. Sugrue
Acting Assistant Secretary for
Communications and Information

Phyllis E. Hartsock
Acting Chief Counsel

William F. Maher
Associate Administrator
Carol E. Matthey
Joseph L. Gattuso
Office of Policy Analysis
and Development

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th & Constitution Ave., N.W.
Washington, D.C. 20230
(202) 377-1816

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SUMMARY

NTIA has long supported the Commission's efforts to adjust its regulatory oversight of common carriers to marketplace realities and, in particular, to reduce regulatory burdens on carriers as their market power with respect to the provision of particular services is diminished. Where effective competition exists, removing unnecessary regulatory requirements can produce significant consumer benefits. In NTIA's view, the Commission's decision ten years ago to relieve domestic nondominant carriers of the burden of filing tariffs -- adopted as part of its "permissive forbearance" policy -- has significantly enhanced the ability of such carriers to respond rapidly to changing market conditions and has enabled them to become vigorous competitors in the interexchange service marketplace. NTIA thus believes that permissive forbearance has been a policy success that has enabled the Commission to achieve more effectively the goals of the Communications Act.

NTIA believes the Commission has ample legal authority to continue to apply permissive forbearance to domestic nondominant interexchange carriers. While we are aware of arguments to the contrary, we believe that permissive forbearance remains lawful, taking into account recent judicial developments. Moreover, there is a strong argument that Congress was aware of, and acquiesced in, the Commission's forbearance policy when it passed the Telephone Operator Consumer Services Improvement Act of 1990,

which gives additional support to the Commission's view that the Communications Act permits the implementation of the forbearance policy. In the event that the Commission concludes otherwise, however, it should consider some form of "maximum streamlined" tariff requirements for nondominant interexchange carriers.

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The National Telecommunications and Information Administration (NTIA), as the Executive Branch agency principally responsible for the development and presentation of domestic and international telecommunications and information policy, respectfully submits the following Reply Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/}

I. INTRODUCTION

In this proceeding, the Commission is examining the lawfulness of its longstanding policy of forbearing from requiring nondominant domestic interexchange carriers to file interstate tariffs -- one aspect of its "permissive forbearance" policy -- that it adopted in the Competitive Carrier proceeding.^{2/} In Competitive Carrier, the Commission concluded

1/ Notice of Proposed Rulemaking, 7 FCC Rcd 804 (1992) (hereinafter Notice).

2/ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54

that the Communications Act of 1934 (the Act) provided it with substantial discretion with respect to Title II of the Act, including the discretion to refrain from applying the full panoply of Title II regulation, so long as that discretion is exercised in a manner that effectuates the Act's overarching goals.^{3/}

Among other things, the Commission decided to forbear from requiring certain "nondominant" domestic carriers^{4/} to file tariffs under Section 203(a) of the Communications Act, which provides:

Every common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges.^{5/}

In analyzing its legal authority to take such action, the Commission relied in part on Section 203(b)(2) of the Act, which provides:

(1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020, rev'd and remanded sub nom., MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

^{3/} Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 478-91 (1981); Second Report and Order, 91 FCC 2d at 65-66.

^{4/} The Commission defined "nondominant" carriers as those lacking market power (*i.e.*, the ability to control prices in the marketplace). First Report and Order, 85 FCC 2d at 10.

^{5/} 47 U.S.C. § 203(a).

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 found that tariff filing requirements were unnecessary for these nondominant carriers because they had neither the ability nor the incentive to engage in the anticompetitive practices prohibited under the Act.^{7/} Moreover, it found that requiring nondominant carriers to file tariffs imposed significant costs by inhibiting price competition, service innovation, and the ability of firms to respond quickly to market trends.^{8/}

6/ 47 U.S.C. § 203(b)(2). See Further Notice of Proposed Rulemaking, 84 FCC 2d at 479-81. The Commission also relied on Section 203(c) of the Act, 47 U.S.C. § 203(c), which provides that no carrier shall offer service unless schedules have been filed, "unless otherwise provided by or under authority of this Act." The Commission concluded from this provision that although the statute generally provides for the filing of tariffs and for carriers to provide service in accordance with those filings, it also provides the agency with authority to exempt carriers from those requirements. Id. at 481. In its ordering clause, the Commission also cited Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), which provides: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Second Report and Order, 91 FCC 2d at 73.

7/ Second Report and Order, 91 FCC 2d at 69; see also First Report and Order, 85 FCC 2d at 20-21 ("[A] firm without market power does not have the ability or incentive to price its services unreasonably [or] to discriminate among customers unjustly").

8/ Second Report and Order, 91 FCC 2d at 65.

The Commission's recent decision to reexamine its permissive forbearance policy was prompted, in part, by a complaint filed by AT&T against MCI, which alleged that MCI is violating Section 203 of the Communications Act by providing service to customers at rates and on terms and conditions not set forth in interstate tariffs.^{9/} The FCC's decision to initiate a rulemaking was also prompted by a recent Supreme Court case, Maislin Industries, U.S., Inc. v. Primary Steel, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) (Maislin), which held that the Interstate Commerce Commission's (ICC's) policy of allowing shippers privately to negotiate rates different from filed tariffs was unlawful.

NTIA has long supported the Commission's efforts to adjust its regulatory oversight of common carriers to marketplace realities and, in particular, to reduce regulatory burdens on carriers as their market power with respect to the provision of particular services is diminished.^{10/} Where effective

9/ In a separate order, the FCC dismissed AT&T's complaint for injunctive relief on the ground that reconsideration of such a fundamental policy should not occur in an adjudicatory proceeding. AT&T Communications v. MCI Telecommunications Corp., 7 FCC Rcd 807 (1992), appeal docketed, No. 92-1053 (D.C. Cir. Feb. 7, 1992).

10/ See, e.g., Reply Comments of the National Telecommunications and Information Administration (filed Sept. 18, 1990) in Competition in the Interexchange Marketplace, CC Docket No. 90-132 (NTIA Interexchange Competition Reply Comments). See also Views of the National Telecommunications and Information Administration on H.R. 6121, reprinted in H.R. Rep. No. 1252, 96th Cong., 2d Sess., pt. 1, at 132 (1980) (NTIA Views) (NTIA supported regulatory forbearance, suggesting that the FCC had "sufficient flexibility under the 1934 Act to adapt its regulations and policies to

competition exists, removing unnecessary regulatory requirements can produce significant consumer benefits. For example, in NTIA's view, the Commission's decision in Competitive Carrier to relieve nondominant carriers of the burden of filing tariffs has significantly enhanced their ability to respond rapidly to changing market conditions and enabled them to be vigorous competitors in the interexchange service marketplace.^{11/}

NTIA believes that permissive forbearance has been a successful policy that has enabled the Commission to achieve more effectively the goals of the Communications Act. We believe the Act provides the Commission with the flexibility to apply its tariff filing requirements in ways that further, rather than impede, realization of those goals. In particular, we believe the Commission has ample legal authority to continue to apply permissive forbearance to nondominant interexchange carriers. While we realize that arguments to the contrary have been made, we believe that permissive forbearance remains lawful, even taking into account recent judicial developments. Moreover, there is a strong argument that Congress was aware of, and has

today's realities . . . , " but recognized that a "substantial legal issue" existed at the time over whether the FCC could forbear from regulation).

^{11/} The benefits of the Commission's permissive forbearance policy have been described by a number of commenters in this proceeding. See, e.g., Comments of Ad Hoc Telecommunications Users Committee at 3-4 (filed Mar. 30, 1992) (Ad Hoc Users Comments); Comments of the Competitive Telecommunications Association at 5-6 (filed Mar. 30, 1992) (Comptel Comments).

acquiesced in, the Commission's policy when it passed the Telephone Operator Consumer Services Improvement Act of 1990 (OSP Act),^{12/} adding further support to the Commission's interpretation that the Communications Act allows implementation of permissive forbearance. In the event that the Commission concludes otherwise, however, we urge it to consider some form of "maximum streamlined" tariff requirements for nondominant interexchange carriers.

II. NTIA BELIEVES THAT THE COMMISSION HAS THE LEGAL AUTHORITY TO APPLY ITS PERMISSIVE FORBEARANCE POLICY TO NONDOMINANT DOMESTIC INTEREXCHANGE CARRIERS

AT&T and several other parties in this proceeding argue that the Commission's permissive forbearance policy is unlawful, relying primarily on two court cases: Maislin and MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (MCI). AT&T argues that those cases establish that under Section 203(a) of the Communications Act, all common carriers must file tariffs, and the Commission has no authority to adopt a policy that eliminates this requirement for any carrier.^{13/}

We do not believe that the issue is as straightforward as AT&T contends. While the question is not free from controversy,

^{12/} Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 987 (1990), codified at 47 U.S.C. § 226.

^{13/} Comments of American Telephone and Telegraph Company at 2, 4-7 (filed Mar. 30, 1992) (AT&T Comments).

we believe that the Commission has the legal authority to continue to apply permissive forbearance to nondominant domestic interexchange carriers. As numerous parties argue in their initial comments in this proceeding,^{14/} the cases relied on by AT&T are distinguishable from the situation before the Commission and do not compel a finding that permissive forbearance is unlawful. Moreover, we believe that congressional awareness of, and acquiescence in, the Commission's permissive forbearance policy through passage of the OSP Act gives additional support to the Commission's view that it has the authority under the Communications Act to forbear from requiring nondominant carriers to file tariffs.^{15/}

^{14/} See, e.g., Ad Hoc Users Comments at 7-10; Joint Comments of Automated Communications, Inc., Business Telecom, Inc., and U.S. Long Distance, Inc. at 8-9 (filed Mar. 30, 1992) (ACI and BTI Joint Comments); Comptel Comments at 14-19; Comments of First Financial Management Corporation at 13-14 (filed Mar. 30, 1992) (First Financial Management Comments); Comments of GTE Service Corporation at 12-14, 19-23 (filed Mar. 30, 1992) (GTE Comments); Comments of MCI Telecommunications Corporation at 13-21 (filed Mar. 30, 1992) (MCI Comments); Comments of Sprint Communications Company L.P. at 6-11 (filed Mar. 30, 1992) (Sprint Comments).

^{15/} See Ad Hoc Users Comments at 10-13; ATI and BTI Joint Comments at 6-8; Comments of Commonwealth Long Distance Company at 4-5 (filed Mar. 30, 1992); Comptel Comments at 9-14; Comments of Cellular Telecommunications Industry Association at 14-17 (filed Mar. 30, 1992) (CTIA Comments); First Financial Comments at 8-12; GTE Comments at 23-24; Comments of International Business Machines Corporation at 2-6 (filed Mar. 30, 1992) (IBM Comments); MCI Comments at 23-45; Comments of Metropolitan Fiber Systems at 7-11 (filed Mar. 30, 1992) (MFS Comments); Comments of OCOM Corporation at 4-7 (filed Mar. 30, 1992) (OCOM Comments); Sprint Comments at 11-14; Comments of Williams Communications Group, Inc. at 2-9 (filed Mar. 30, 1992) (WilTel Comments).

A. The Commission's Permissive Forbearance Policy is Consistent with Judicial Precedent

As numerous parties argue in their opening comments,^{16/} in Maislin, the Supreme Court reaffirmed what is known as the "filed rate doctrine" of the Interstate Commerce Act (ICA). At issue in that case was the validity of the ICC's "Negotiated Rates" policy under which it allowed shippers to raise as a defense (in a suit to collect a filed rate) the existence of a privately negotiated rate between the carrier and the shipper. The ICA expressly requires a carrier under the ICC's jurisdiction to provide transportation or services pursuant to a rate contained in a tariff,^{17/} and it expressly prohibits a carrier from charging a rate different from that tariffed rate.^{18/} The Supreme Court concluded that the purpose of these statutory requirements is to forbid carriers from engaging in price discrimination by secretly negotiating a rate different from a tariffed rate. Accordingly, the Court held that the ICC's "Negotiated Rates" policy was inconsistent with the filed rate doctrine embodied in the ICA.

Contrary to AT&T's implication,^{19/} Maislin did not rule on the question of whether all common carriers must file tariffs for

^{16/} See, e.g., Sprint Comments at 6; CTIA Comments at 19-20; Ad Hoc Users Comments at 8-10.

^{17/} 49 U.S.C. § 10761(a).

^{18/} Id.

^{19/} AT&T Comments at 6.

services in every instance.^{20/} Moreover, we do not agree with AT&T that Maislin "conclusively establishes" that the Commission lacks the authority under the Communications Act to exempt common carriers from the tariff filing requirement of Section 203(a).^{21/} AT&T ignores altogether the existence of Section 203(b)(2) of the Communications Act. Although the ICA contains an analogous provision, 49 U.S.C. § 10762(d)(1),^{22/} the ICC had not relied upon that provision in adopting its "Negotiated Rates" policy, and that provision was not at issue and not even referenced in Maislin.

Nor are we convinced by AT&T's argument that the Commission's policy of permissive forbearance is unlawful under MCI. As the MCI court expressly noted, that decision did not reach the question whether permissive forbearance was valid.^{23/}

^{20/} We recognize that there is language in the Maislin opinion to the effect that, pursuant to Section 10762 of the ICA, motor common carriers are required to file tariffs specifying their rates and may only charge those tariffed rates under Section 10761. 111 L. Ed. 2d at 108. However, the question of whether motor common carriers are always required to file tariffs was not presented to the Court, and thus the language is dictum. No court since Maislin has suggested that case stands for the proposition that all such carriers must file tariffs.

^{21/} AT&T Comments at 6.

^{22/} Section 10762(d)(1) provides: "The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change other requirements of this section if cause exists in particular instances or as they apply to special circumstances."

^{23/} 765 F.2d at 1196.

Rather, the issue in that case was whether the FCC had the statutory authority under Section 203(b)(2) of the Communications Act to prohibit carriers subject to forbearance from filing tariffs.^{24/}

24/ We recognize that, in concluding that mandatory forbearance was invalid, the MCI court stated that Section 203(b)(2) gave the Commission the authority to impose "circumscribed alterations," but not a "wholesale abandonment or elimination" of tariff filing requirements. 765 F.2d at 1192. As noted above, the MCI court was discussing mandatory, not permissive, forbearance. Moreover, the precedents relied on by the MCI court in reaching that conclusion are inconclusive on the question of whether permissive forbearance is lawful. For example, the issue in AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), was whether the FCC had properly concluded that resellers were common carriers subject to regulation under the Act. The court recited the various requirements of Title II, including the requirement of Section 203 that carriers file tariffs, and then concluded that it was "aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met." Such language should not be viewed as dispositive of whether permissive forbearance is lawful under Section 203(b)(2); the decision did not purport to construe the scope of the Commission's authority under that provision. Moreover, permissive forbearance does not equal an abdication of such responsibilities.

In AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973) -- which overturned an early Commission requirement that AT&T obtain special permission before filing new tariffs for services that were the subject of a pending rate investigation -- the court did specifically construe the scope of the Commission's authority under Section 203(b)(2). There is language in that opinion to the effect that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty day notice provision." 487 F.2d at 879. However, we agree with MCI that this dictum should not be viewed as an exhaustive delineation of the Commission's authority under Section 203(b)(2). See MCI Comments at 16-17. Rather, the central holding of that case was that the Commission's special permission requirement was unlawful because it would in essence enable the Commission to suspend AT&T's rates beyond the three months then provided for in Section 204 of the Act. This distinction is critical, for Section 203(b)

B. Congressional Awareness of and Acquiescence in the Commission's Permissive Forbearance Policy Gives Additional Support to the Commission's Interpretation of the Communications Act

NTIA agrees with the view expressed by many commenters^{25/} that Congress is aware of the Commission's forbearance policy and acquiesced in that policy when it passed the OSP Act.^{26/} While not dispositive, such congressional awareness and acquiescence under these circumstances provides additional support^{27/} for the Commission's conclusion that permissive forbearance is consistent with Section 203 of the Communications Act.^{28/}

gives the Commission the authority to "modify any requirement made by or under the authority of this section" (emphasis added). In other words, the Commission has the authority under Section 203(b) to waive the requirement of Section 203(a) that carriers file tariffs; it does not have the authority to impose a requirement under Section 203(b) that directly circumvents another statutory section.

^{25/} See comments cited supra note 15.

^{26/} See supra note 12.

^{27/} When an administrative interpretation has been brought to the attention of Congress, and Congress has failed to alter that construction when it has amended the statute in other respects, that administrative interpretation has been deemed consistent with the statutory intent. See, e.g., United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (congressional inaction regarding a specific interpretation of the Federal Food, Drug, and Cosmetic Act by the Food and Drug Administration (FDA) was held by the Supreme Court to be one reason to defer to the FDA's statutory interpretation); Kay v. FCC, 443 F.2d 638, 646-47 (D.C. Cir. 1970) (court affirmed FCC interpretation of Section 315(a) of the Act); see generally Sutherland Stat. Const. § 49.10 (5th ed. 1992).

^{28/} Indeed, the Supreme Court recognized this principle in a case involving factual circumstances analogous to the instant case. As WilTel notes in its initial comments, in Bob Jones University v. United States, 461 U.S. 574 (1983), the Supreme Court considered the following in concluding

Several commenters observe that Congress, particularly through its communications oversight committees, has long been cognizant of the Competitive Carrier proceeding and the Commission's determination to forego rate regulation of nondominant domestic carriers, as evidenced in various congressional reports and hearing records. In fact, as MCI notes,^{29/} as early as January, 1980, two years before the Commission adopted the forbearance policy, NTIA submitted

that Congress had ratified a position taken by the Internal Revenue Service: Congress was aware of the IRS position for twelve years, it did not modify that position even while enacting related legislation, and in the related legislation, Congress "affirmatively manifested" its acquiescence in the IRS policy. WilTel states that in the present case, the FCC policy has been in existence since 1982, Congress has amended the Communications Act but left the forbearance policy in place, and the enactment of related legislation, the OSP Act, affirmatively demonstrates congressional acquiescence in the policy. See WilTel Comments at 3.

A number of lower courts, relying on Bob Jones, have looked at similar factors in concluding that Congress has approved of or acquiesced in an agency's policy under a particular statute. See, e.g., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601, 612-13 (D.C. Cir. 1984) (congressional approval of the FCC's policy of granting minority preferences in comparative broadcast proceedings was demonstrated when Congress enacted related legislation, the 1982 amendment to the Communications Act, that enabled the FCC to use lotteries to award licenses, but required that minority preferences be incorporated in such lotteries); Coalition to Preserve the Integrity of American Trademarks v. United States, 598 F. Supp. 844, 852 (D.D.C. 1984) (when Congress specifically noted the Customs Service policy of permitting importation of "grey market" goods and chose not to change that policy when enacting legislation that amended other parts of the relevant statute, Congress was deemed to have approved the policy as consistent with the statute).

^{29/} MCI Comments at 26.

comments to the House Committee on Interstate and Foreign Commerce describing the benefits of regulatory forbearance.^{30/}

More importantly, congressional acquiescence in the Commission's regulatory scheme, when it passed the OSP Act in 1990, provides additional support for the validity of permissive forbearance. In that Act, Congress addressed issues involving a particular class of nondominant common carriers, called "Operator Service Providers" (OSPs),^{31/} that had been the subject of complaints by consumers to the FCC and Congress. The Senate Committee on Commerce, Science, and Transportation specifically acknowledged in its report on the bill that the Commission treated OSPs as nondominant carriers for which the Commission forbears from full Title II rate regulation.^{32/} Similarly, the

^{30/} See NTIA Views, supra note 10. In its comments, MCI outlines numerous other instances in which the Commission's forbearance rule has been brought to the attention of Congress. For example, MCI discusses testimony of FCC Chairman Mark Fowler before the Senate Committee on Commerce, Science, and Transportation in 1983, 1985 and 1986 (see MCI Comments at 28-29, 31-32); testimony of FCC Commissioner James H. Quello at the same 1985 hearing (see id. at 32); letter from FCC Chairman Dennis Patrick responding to questions posed by Rep. John Dingell, Chairman of the House Committee of Energy and Commerce, in 1988 (see id. at 33-34); and testimony by AT&T management in 1985 and 1987 (see id. at 33).

^{31/} OSPs, as defined in the OSP Act, are common carriers that provide any interstate telecommunications service from an "aggregator" location that includes assistance to a consumer to arrange for billing or completion of an interstate call. 47 U.S.C. § 226(a)(7), (9).

^{32/} See S. Rep. No. 439, 101st Cong., 2d Sess. 3 n.10, reprinted in 1990 U.S. Code Cong. & Admin. News 1577 (Senate Report).

House Committee on Energy and Commerce noted in its report that the Commission did not apply rate regulation to OSPs because it classified them as nondominant carriers.^{33/} Although in passing the OSP Act Congress clearly meant to impose additional regulation on these providers, some commenters observe that in several congressional references to the Commission's general permissive forbearance policy in the OSP Act's legislative history, there is "not a hint of disapproval," nor a "raised . . . legislative eyebrow."^{34/}

The OSP Act, among other things, requires OSPs to file limited informational tariffs with the Commission.^{35/} In enacting this requirement, Congress clearly recognized that it

^{33/} H.R. Rep. No. 213, 101st Cong., 1st Sess. 3 (1989) (House Report). Several commenters noted that the Senate and House reports discussed the Commission's forbearance policy. See, e.g., MCI Comments at 34-35; see also Ad Hoc Users Comments at 11; First Financial Comments at 11; OCOM Comments at 6; WilTel Comments at 3-4.

^{34/} IBM Comments at 6; Ad Hoc Users Comments at 11. See also OCOM Comments at 6.

^{35/} 47 U.S.C. § 226(h)(1) provides in relevant part:

Each provider of operator services shall file . . . an informational tariff specifying rates, terms, and conditions, including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

was increasing regulation for OSPs.^{36/} However, the informational tariff requirement in the OSP Act does not alter the status of OSPs as nondominant carriers. Congress did not seek to impose, or direct the Commission to impose, the full panoply of Title II tariff regulations on OSPs or any other common carrier.^{37/} Thus, a strong argument exists that Congress intended to preserve the prevailing state of the Commission's regulation of nondominant carriers, including its application of forbearance, except for the filing by OSPs of these informational tariffs.^{38/} Indeed, the care that Congress exercised in not extending heavier tariff regulation to OSPs can be considered an acknowledgment of the benefits of the Commission's tariffing

36/ As Sprint notes, one Senate report stated:

This legislation requires all operator services companies to file "informational tariffs" with the FCC. The informational tariffs are necessary to allow the FCC to monitor the rates of OSPs and to determine whether competition in this market is benefiting the consumer. While this will increase the paperwork burdens faced by these companies and the FCC, these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers.

Senate Report, supra note 32, at 9, cited in Sprint Comments at 12 n.9.

37/ See Senate Report, supra note 32, at 23; House Report, supra note 33, at 14.

38/ The Commission may waive the filing requirement as early as 1994 (four years after passage of the OSP Act) if it finds that certain regulatory objectives have been met. See 47 U.S.C. § 226(h)(1)(B).

practices, including its forbearance policy, that lessen regulatory burdens imposed on carriers. The OSP Act expressly states that it is not to be "construed to alter the obligations, powers, or duties of common carriers or the Commission under the sections of this Act."^{39/}

Of the many parties commenting on the implications of the OSP Act, only one disputes the significance of its passage. Mobile Marine Radio asserts that because the OSP Act did not reenact Section 203 of the Communications Act, but instead established a specialized statutory scheme for OSPs, Congress did not acknowledge the Commission's interpretation of its authority under Section 203.^{40/} Although codification of that section or

^{39/} 47 U.S.C. § 226(i).

^{40/} See Comments of Mobile Marine Radio, Inc. at 7-8 (filed Mar. 30, 1992). Mobile Marine Radio relies on Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 n.66 (1982), for the proposition that "when Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, Congress has expressed an intention to adopt that interpretation."

Mobile Marine Radio interprets Merrill Lynch too narrowly. In that case, Congress had reenacted provisions of the Commodity Exchange Act (CEA), 7 U.S.C. § 6b, and the question before the Court was whether that reenactment carried forward a prior interpretation that an implied private cause of action for damages exists under the CEA. In ruling that such a cause of action exists, the Court did not establish a requirement that Congress must perform such a reenactment for it to have acquiesced in a related agency policy. Indeed, the Court noted that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law.'" Id. at 379 (citing Cannon v. University of Chicago, 441 U.S. 677, 696, 697 (1979)).

the permissive forbearance doctrine itself would, of course, be the ultimate congressional endorsement of this practice, we believe that the measured regulatory steps taken in the OSP Act demonstrate congressional sensitivity to the benefits of the Commission's application of permissive forbearance.

For these reasons, NTIA concludes that Congress was aware of the Commission's permissive forbearance policy and acquiesced to it through enactment of the OSP Act, thus providing further support for the Commission's view that permissive forbearance is consistent with the Communications Act.

III. IF THE COMMISSION DECIDES NO LONGER TO APPLY ITS PERMISSIVE FORBEARANCE POLICY, IT SHOULD ADOPT SOME FORM OF "MAXIMUM STREAMLINED" REGULATION FOR ALL NONDOMINANT DOMESTIC CARRIERS

The Commission recognizes in its Notice that its permissive forbearance policy has been the cornerstone of its regulatory policy towards nondominant domestic interexchange carriers for the last decade.^{41/} Given this longstanding history -- and the success of this policy in reducing regulatory burdens and promoting competition in the interexchange marketplace -- the Commission should reverse course now only if it is convinced that there is no legal basis for continuing the policy.^{42/} As

^{41/} 7 FCC Rcd at 804, para. 2.

^{42/} See US Sprint Comments at 19; see also Comptel Comments at 5-9; OCOM Comments at 8.

discussed in the previous section, we believe the Commission should conclude that permissive forbearance is lawful. If the Commission concludes otherwise, however, it should adopt new tariffing policies that would impose minimal regulatory burdens on the carriers now subject to permissive forbearance.

Several commenters urge the Commission to streamline its tariff requirements for nondominant interexchange carriers in the event it concludes it no longer may apply permissive forbearance to such carriers. For instance, Comptel proposes that current tariff filing requirements be streamlined for nondominant carriers so that (1) no cost support is required; (2) tariffs are presumed lawful; (3) tariffs may take effect on one-day notice; (4) filing fees are reduced; (5) carriers are allowed to file banded/flexible rates; and (6) for rate revisions falling with such banded rates, carriers need only file tariff changes on an annual basis.^{43/}

NTIA believes that these proposals have merit and should be seriously considered by the Commission. Because Section 203(a) of the Communications Act merely provides that carriers file

^{43/} Comptel Comments at 23-24. See also MFS Comments at 17-18 ("substantially relax" current tariff requirements); ACI and BTI Joint Comments at 8-9 (endorses "maximum streamlining"); First Financial Comments at 13-14.

tariffs, the Commission has broad discretion to adopt specific rules and policies governing the nature and content of such filings. As MFS argues,^{44/} many of the current Part 61 tariff filing requirements were designed for dominant carriers and are neither mandated by statute, nor necessary to regulate nondominant carriers. As such, we believe that streamlined tariff requirements such as those proposed by Comptel are well within the Commission's legal authority to adopt.^{45/} Moreover, such action would best effectuate the policy goals that underlay the Competitive Carrier proceeding and that remain valid today.

Finally, we strongly disagree with MCI's contention that if tariff requirements are reimposed on nondominant carriers, AT&T should be reregulated to the level it was regulated before the Commission's decision in CC Docket No. 90-132^{46/} in order to

^{44/} MFS Comments at 17.

^{45/} See MCI, 765 F.2d at 1196 (while the FCC could not require carriers not to file tariffs, it could further streamline its regulation of nondominant carriers without violating any congressional prescription); AT&T, 487 F.2d at 879 (FCC has authority under Section 203(b) to modify tariff notice period); see also Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985) (upholding ICC's authority under provision analogous to Section 203(b)(2) of the Communications Act to allow carriers to decrease their rates upon filing tariffs with one-day notice and to increase their rates upon filing tariffs with seven-day notice).

^{46/} Competition in the Interexchange Marketplace, 6 FCC Rcd 5880 (1991) (Interexchange Competition).

preserve a regulatory distinction between dominant and nondominant carriers.^{47/} The basic premise of Interexchange Competition was that because there is robust competition in the business services segment of the interexchange marketplace, lessened regulation of AT&T is appropriate with respect to those services. The reimposition of some tariff filing requirements on nondominant carriers has no bearing on that fundamental conclusion.^{48/}

^{47/} MCI Comments at 54.

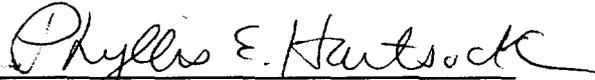
^{48/} NTIA supported the Commission in its decision to lessen regulation of AT&T's business services. See NTIA Interexchange Competition Reply Comments, supra note 10, at 14-15.

IV. CONCLUSION

For the foregoing reasons, NTIA respectfully urges the Commission to continue to apply its permissive forbearance policy to nondominant domestic carriers in the interexchange marketplace. In the alternative, NTIA requests that the Commission consider adopting some form of "maximum streamlined" regulation for nondominant domestic carriers.

Respectfully submitted,

Thomas J. Sugrue
Acting Assistant Secretary for
Communications and Information


Phyllis E. Hartsock
Acting Chief Counsel

William F. Maher
Associate Administrator
Carol E. Matthey
Joseph L. Gattuso
Office of Policy Analysis
and Development

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th & Constitution Ave., N.W.
Washington, D.C. 20230
(202) 377-1816

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