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

FCC 92-494

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

Report and Order

Adopted: November 5, 1992

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By the Commission:

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I. INTRODUCTION

1. In a Notice, released January 28, 1992,¹ the Commission initiated this rulemaking to review the lawfulness and future application of the tariff forbearance rules we adopted nearly a decade ago in Competitive Carrier.² In particular, we sought comment on whether, in light of intervening court decisions and a challenge to those rules by the American Telephone and Telegraph Company (AT&T), the Commission had authority under the Communications Act of 1934 (Communications Act or the Act) "to continue to permit nondominant carriers not to file tariffs."³ We also sought comment on regulatory alternatives in the event we determined that our existing tariff forbearance rules were unlawful.⁴

2. In response to the Notice, we have received and reviewed comments from more than 40 parties representing virtually every segment of the interstate telecommunications industry, including long distance carriers, local exchange carriers, and telecommunications users.⁵ On the basis of this record, we now conclude that our existing tariff forbearance rules are lawful and serve the public interest. Accordingly, we reaffirm our decision in Competitive Carrier that domestic carriers classified as "nondominant" and subject to forbearance may, but need not, file interstate tariffs. Consequently, we do not address the additional issues raised in the Notice, which were conditioned upon a contrary finding.

¹ Tariff Filing Requirements for Interstate Common Carriers (CC Docket No. 92-13), Notice of Proposed Rulemaking, 7 FCC Rcd 804, 57 Fed. Reg. 6487 (1992) (Notice).

² Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further Notice); Second Report and Order, 91 FCC 2d 59 (1982) (Second Report), recon., 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46,791 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (Sixth Report), rev'd MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (MCI v. FCC).

³ Notice, 7 FCC Rcd at 805, para. 8.

⁴ Id.

⁵ A list of the parties participating in this proceeding is attached hereto as Appendix A.

II. BACKGROUND

A. The Competitive Carrier Proceeding

3. Until the 1960s, AT&T, through its then-subsiary Bell Operating Companies and in cooperation with some 1600 independent local telephone companies, provided virtually all interstate telephone service. Competitive entry into interstate common carriage began on a small scale in 1969, when the Commission authorized Microwave Communications, Inc. (now MCI) to construct and operate microwave circuits between Chicago and St. Louis for the provision of point-to-point common carrier service.⁶ Throughout the 1970s, the Commission expanded in increments the categories of services subject to competitive entry.⁷ Following the D.C. Circuit's Execunet decision,⁸ we opened interstate services generally to competition by the end of the decade.⁹

4. The Commission initiated the Competitive Carrier proceeding in 1979 to examine the proper scope of regulation in the new era of competition and, in particular, to consider amendment of the tariff filing requirements for competitive telecommunications common carriers.¹⁰ We proposed to apply different rules to different carriers depending upon the extent of their market power. "Dominant" carriers -- primarily AT&T and its then-affiliated Bell Operating Companies -- would continue to be subject to full tariff regulation.¹¹ For the new competitive (or "nondominant") carriers, which lacked market power, we proposed a more light-handed approach.¹²

5. The Commission posited in Competitive Carrier that nondominant carriers, precisely because they lacked market power, would be unable to charge unjust and unreasonable rates in violation of Section 201(b) of the

⁶ Microwave Communications, Inc., 18 FCC 2d 953 (1969), recon., 21 FCC 2d 190 (1970).

⁷ See, e.g., Specialized Common Carrier Services, 29 FCC 2d 870 (1971), recon., 31 FCC 2d 1106 (1971), aff'd Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975) ("specialized"/private line services); Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261 (1976), recon., 62 FCC 2d 588 (1977), aff'd AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978) (Resale Decision).

⁸ MCI Telecomm. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977).

⁹ MTS and WATS Market Structure, 81 FCC 2d 177 (1980).

¹⁰ Competitive Carrier Notice, 77 FCC 2d at 309.

¹¹ Id. at 318-28; First Report, 85 FCC 2d at 20-22.

¹² Competitive Carrier Notice, 77 FCC 2d at 313-14.

Communications Act,¹³ or to discriminate unreasonably in violation of Section 202(a) of the Act.¹⁴ We tentatively concluded that, in these circumstances, traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing.¹⁵

6. As an initial step in the regulatory reform process, we adopted a "streamlined" form of tariff regulation for nondominant carriers, which included reduced notice periods and cost support requirements for tariff filings, and the requirement that parties seeking suspension of such filings overcome a presumption of lawfulness.¹⁶ Concurrently, however, we sought comment on two alternatives to streamlining. Under one option, the Commission would "forbear" from exercising the full range of its Title II regulatory powers, including tariff regulation, while continuing to apply the Act's substantive ratemaking standards contained in Sections 201(b) and 202(a).¹⁷ Under a second, "definitional option," we would find telecommunications providers that lacked market power not to be "common carriers" under the Act,¹⁸ and thus subject to broad deregulation.¹⁹

7. In the Second Report, issued in 1982, we adopted the forbearance option, without ruling on our authority to pursue a definitional approach.²⁰ Proceeding in a cautious, incremental manner, we applied forbearance first to resale carriers, ordering that such carriers "no longer need adhere to ... the tariff filing requirements of Section 203."²¹ The substantive standards contained in Sections 201(b) and 202(a) thereafter would be enforced against such carriers primarily through the complaint process under Section 208 of the Act.²² In 1983, the Commission extended

13 47 U.S.C. § 201(b).

14 Id. § 202(a); see Competitive Carrier Notice, 77 FCC 2d at 334-38.

15 Competitive Carrier Notice, 77 FCC 2d at 313-14, 358-59.

16 First Report, 85 FCC 2d at 30-40.

17 Competitive Carrier Notice, 77 FCC 2d at 359-63; see Competitive Carrier Further Notice, 84 FCC 2d at 471-91.

18 Competitive Carrier Notice, 77 FCC 2d at 363-68.

19 Id.; see Competitive Carrier Further Notice, 84 FCC 2d at 463-70.

20 91 FCC 2d at 61-62 & n.7.

21 Id. at 73.

22 47 U.S.C. § 208; see Second Report, 91 FCC 2d at 70-71. We also noted that we could "reimpos[e] ... the tariff filing requirement" at a later time in the "unlikely event" that the complaint process proved inadequate to

this permissive detariffing treatment to other nondominant carriers, including so-called "specialized carriers" such as MCI and US Sprint,²³ and, a year later, we accorded such treatment to virtually all remaining categories of nondominant carriers.²⁴

8. The Commission converted its permissive detariffing rules into a mandatory detariffing requirement for nondominant carriers in 1985.²⁵ The United States Court of Appeals for the District of Columbia Circuit vacated and remanded that decision, holding that the FCC lacked statutory authority to prohibit carriers from filing tariffs.²⁶ The court, however, explicitly did "not reach the question whether the FCC's earlier permissive orders are invalid,"²⁷ and the permissive detariffing rules have remained a cornerstone of the Commission's regulatory regime since that time.

B. AT&T's Complaint

9. On August 7, 1989, AT&T filed a complaint against MCI alleging that MCI was violating Section 203 of the Communications Act by providing interstate telecommunications services to certain large business customers at rates and on terms and conditions not set forth in interstate tariffs.²⁸ AT&T claimed that, notwithstanding the Commission's permissive detariffing rules, the plain language of Section 203 requires all carriers to file tariffs. In support of this contention, AT&T relied principally upon the D.C. Circuit's 1985 MCI v. FCC decision vacating our mandatory detariffing requirement,²⁹ and on the Supreme Court's subsequent decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,³⁰ addressing the "filed rate" doctrine under the Interstate Commerce Act (ICA).³¹

that task. Id. at 70.

²³ Fourth Report, 95 FCC 2d at 578.

²⁴ Fifth Report, 98 FCC 2d at 1191.

²⁵ Sixth Report, 99 FCC 2d at 1020.

²⁶ MCI v. FCC, 765 F.2d at 1192.

²⁷ Id. at 1196.

²⁸ See AT&T Communications v. MCI Telecommunications Corp. (File No. E-89-297), 7 FCC Rcd 807 (1992), pet. for review pending, AT&T v. FCC, D.C. Circuit No. 92-1053.

²⁹ 765 F.2d at 1186.

³⁰ 110 S.Ct. 2759 (1990).

³¹ See AT&T v. MCI, 7 FCC Rcd at 808, para. 8.

10. Recognizing that AT&T's complaint was, in effect, an attack on the legality of the Competitive Carrier permissive detariffing rules, with potentially important consequences for the entire telecommunications industry, we concluded that the issues AT&T raised should be addressed in a broader rulemaking proceeding rather than a two-party adjudication.³² We initiated this rulemaking proceeding for that purpose.³³

III. THE PLEADINGS

11. Of the more than forty parties that responded to the Notice, only six parties, led by AT&T, claim that the Commission was without authority to adopt its permissive detariffing rules.³⁴ These commenters stress that Section 203 of the Communications Act requires that every common carrier file with the Commission schedules showing all charges for itself and showing the classifications, practices, and regulations affecting such charges.³⁵ They claim that the "plain language of Section 203" means that the Commission "has no authority" to relieve any carriers, including nondominant carriers, of the obligation to file tariffs.³⁶ To bolster this construction, they cite various court decisions interpreting Section 203 and similar provisions of the Interstate Commerce Act, upon which the Communications Act provisions are generally patterned.³⁷

12. Apart from the allegedly mandatory language of Section 203 itself, opponents of the Commission's current rules also claim that forbearance is inconsistent with the statutory scheme as a whole. In particular, they stress that the filing of tariffs provides the Communications Act's "central protection" against unjust, unreasonable, or unreasonably discriminatory rates and practices, and that the Commission may not dispense with that protection, even in a competitive environment.³⁸

³² AT&T v. MCI, 7 FCC Rcd at 809, paras. 14-17.

³³ Notice, 7 FCC Rcd 804; see also AT&T v. MCI, 7 FCC Rcd at 809-10, paras. 17-18.

³⁴ These parties are AT&T, Alascom, Mobile Marine Radio, NYNEX, US West, and USTA.

³⁵ AT&T Comments at 3; see also Alascom comments at 3; NYNEX Comments at 6; US West comments at 4-5; USTA Reply Comments at 2-3.

³⁶ See, e.g., AT&T Comments at 3; USTA Reply Comments at 2-3.

³⁷ See, e.g., AT&T Comments at 4-7 (citing MCI v. FCC, 765 F.2d at 1186; Maislin, 110 S.Ct. at 2759; Resale Decision, 572 F.2d at 17); US West Comments at 5-7 (citing, in addition, AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973) (Special Permission Decision)).

³⁸ See, e.g., Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

13. On the other hand, users, nondominant carriers, enhanced service providers, competitive access providers, some local exchange carriers, and others support our current rules. These parties generally dispute claims that the plain language of Section 203 forbids permissive detariffing. They state that the otherwise mandatory language in Section 203(a) that carriers "shall" file tariffs must be read in light of the equally explicit statement in Section 203(b)(2) that the Commission may "modify any requirement made by or under authority of this section," and the provision in Section 203(c) permitting a carrier to offer service without a tariff when "otherwise provided by or under authority of this Act."³⁹ These parties contend that this express power to modify the tariff filing requirements gives the FCC ample authority to adopt permissive detariffing.⁴⁰

14. Supporters of permissive detariffing also point to repeated instances over the past decade in which Congress has demonstrated its awareness of the Commission's existing rules without attempting to overturn them.⁴¹ They claim, in particular, that the recent enactment of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA),⁴² indicates Congressional acquiescence in our interpretation of our forbearance authority.⁴³ Noting that TOCSIA reimposes limited tariffing requirements on some nondominant carriers -- *i.e.*, operator service providers -- these commenters contend that the legislation was "clearly founded on a baseline of forbearance for other nondominant carriers' services,"⁴⁴ without disturbing that baseline.⁴⁵

IV. DISCUSSION

15. Upon consideration of the record developed in this proceeding and our analysis of the law, we conclude that, in light of the language of Section 203, the Commission may lawfully permit nondominant carriers not to

³⁹ See, *e.g.*, Ad Hoc Comments at 7-10; FFMC Comments at 3-6; OCOM Comments at 9-12; MCI Comments at 6-7, 14-18.

⁴⁰ See, *e.g.*, Comptel Comments at 2-5, 7-9; MCI Comments at 8-14; CTIA Comments at 11-14.

⁴¹ See, *e.g.*, MCI Comments at 25-45; Comptel Comments at 9-14; Comptel Reply Comments at 6-8.

⁴² P.L. 101-435 (codified at 47 U.S.C. § 226 (West Supp. 1990)).

⁴³ See, *e.g.*, Ad Hoc Comments at 10-13; Comptel Comments at 9-11; FFMC Comments at 8-12; OCOM Comments at 5-7; IBM Comments at 4-6.

⁴⁴ See, *e.g.*, Ad Hoc Comments at 12 n.9; *see also* Comptel Comments at 9-12; FFMC Comments at 9-12; OCOM Comments at 5-7; MCI Comments at 34-35; IBM Comments at 5-6.

⁴⁵ See CTIA Comments at 15-16 (quoting 47 U.S.C. § 226(i) ("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 Act.")).

file tariffs. We also find that our conclusion in the Competitive Carrier decisions -- that permissive detariffing furthers the purposes of the Communications Act and meets the substantive requirements of Sections 201(b) and 202(a), which require that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory -- is still valid given the growth and development of the interexchange market.⁴⁶ Consequently, we conclude that our forbearance rules that permit nondominant carriers not to file tariffs are both lawful and desirable as serving the public interest.

A. Permissive Detariffing Is Lawful Under the Communications Act

1. The "Plain Language" of the Act Allows Permissive Detariffing

16. Opponents of the Commission's permissive detariffing rules claim that the plain language of Section 203 requires tariff filings by all carriers and, thus, that the Commission lacks the power to relieve carriers of this requirement, regardless of whether tariffs otherwise serve the broader purposes of the Act.⁴⁷ Section 203 of the Communications Act provides, in pertinent part:

(a) Every common carrier ... shall, within such reasonable time as the Commission shall designate, file with the Commission ... schedules showing all charges for itself ... and showing the classifications, practices, and regulations affecting such charges....

(b) (2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice specified in paragraph (1) to be more than one hundred and twenty days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall ... charge, demand, collect, or receive a greater or less or different compensation, for such communications, or for any service in connection therewith ... than the charges specified in the schedule then in effect....

17. Although the language of Section 203(a) and 203(c) states that "every" common carrier "shall" file tariffs and "no carrier ... shall engage or participate in such communication unless schedules have been filed and

⁴⁶ See Second Report, 91 FCC 2d at 71; Competitive Carrier Further Notice, 84 FCC 2d at 478-84.

⁴⁷ See, e.g., AT&T Comments at 2-3; US West Comments at 6.

published...,⁴⁸ we find that other language within Section 203 limits those commands. Specifically, under Section 203(b)(2) the Commission is granted equally explicit authority to "modify any requirement" -- save one -- "made by or under authority of this section."⁴⁹ By its terms, Section 203(b)(2) limits the Commission's modification power in one circumstance only -- the FCC "may not" expand the 120-day period notice period for tariff filings prescribed in Section 203(b)(1). We believe that this specific, narrow limitation on the Commission's modification power strongly suggests that Congress did not otherwise intend to limit our authority, upon a proper public interest showing, to alter the requirements of Section 203. As we noted in Competitive Carrier, "[t]he words 'this section' clearly refer to the entire Section 203. When Congress wished to identify subsections, it used the word 'subsection' or 'paragraph' (followed by the letter or number) throughout the Act. See, e.g., Sections 204, 213."⁵⁰ Thus, this modification power may be employed to alter the tariff filing requirements of both subsections (a) and (c) of Section 203.

18. Similarly, Section 203(c)'s prohibition against providing service without a tariff applies "unless otherwise provided by or under authority of this Act."⁵¹ In Competitive Carrier, we noted that Section 203(b)(2) may be construed as the authority referenced in 203(c).⁵² We find no evidence that Congress intended that the Section 203(b) power to modify the requirements prescribed under Sections 203(a) and 203(c) be limited to particular requirements except the requirement explicitly mentioned (the 120-day notice period). We agree with those parties that assert that without specific limitations upon the Commission's authority, Congress intended for the FCC to have broad powers that could be exercised as the public interest requires.⁵³ Consequently, we find that Section 203 permits the FCC to exercise its authority under Section 203(b) in order to alter the tariff filing requirements of both subsections (a) and (c) of Section 203 as long as the FCC demonstrates that the goals of the Communications Act will be met and

⁴⁸ See MCI v. FCC, 765 F.2d at 1191 ("'Shall' ... is the language of command, [and] ... [a]bsent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive.") (internal quotations omitted).

⁴⁹ 47 U.S.C. § 203(b) (emphasis added).

⁵⁰ Competitive Carrier Further Notice, 84 FCC 2d at 480 n.69.

⁵¹ 47 U.S.C. § 203(c) (emphasis added).

⁵² See 84 FCC 2d at 481.

⁵³ See, e.g., IBM Comments at 2; GTE Comments at 12; MCI Comments at

that the public interest would be served thereby.⁵⁴ We therefore reaffirm our conclusion in Competitive Carrier that these provisions defeat any claim that permissive detariffing is facially inconsistent with Section 203.⁵⁵

19. Nor do the cases cited in support of the "plain language" construction alter our analysis. In MCI v. FCC, the court held that our Section 203(b) authority to "modify" tariffing requirements did not permit the Commission to convert the statutory command that carriers "shall" file tariffs into a requirement that carriers shall not do so. The petitioner in that case was a nondominant carrier that wished to file tariffs and that asserted, among other things, that the Commission's decision to prevent it from doing so would cause it harm.⁵⁶ The court stated that in such a context, Section 203(b) did not justify the "wholesale abandonment or

⁵⁴ Moreover, in the absence of any explicit statutory prohibition, Section 4(i) of the Act, 47 U.S.C. § 154(i), provides additional authority for forbearance. See, e.g., New England Tele. & Tel. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987), cert. denied, 109 S.Ct. 1942 (1989) ("section 4(i) is a 'necessary and proper clause' empowering the Commission to 'deal with the unforeseen ... to the extent necessary to regulate effectively those matters already within the boundaries'") (quoting North American Telecomm. Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985)). It has long been recognized that the FCC, as the expert agency, has ample discretion in this dynamic field of communications. See FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) (the Communications Act is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy"); Bell Telephone of Pennsylvania v. FCC, 503 F.2d 1250, 1265 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1974). Absent explicit statutory direction, we have well-established discretion in choosing how to regulate, FCC v. Pottsville Broadcasting Co., 309 U.S. at 138; National Broadcasting Co. v. U.S., 319 U.S. 190, 218-19 (1943); United States v. Southwestern Cable Co., 392 U.S. 157, 172-73, 180-81 (1968); CCIA v. FCC, 693 F.2d at 212, including the discretion "not to exercise particular authority which ... has been granted." NARUC v. FCC, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976). Because the Commission continues to ensure that the substantive requirements of the Act are met, it is free to exercise its discretion. Cf. FPC v. Texaco, 417 U.S. 380 (1974) (indirect regulation of small natural gas producers' rates is permissible so long as the FPC properly applies the Act's substantive standards to those rates).

⁵⁵ Second Report, 91 FCC 2d at 71; see Competitive Carrier Further Notice, 84 FCC 2d at 478-84.

⁵⁶ See MCI v. FCC, D.C. Circuit No. 85-1030, Brief of MCI, filed April 1, 1985, at 59-60; id., Reply Brief of MCI, filed May 15, 1985, at 26-27. In fact, the court in MCI v. FCC suggested that the only statutory interest properly raised in that case was the interest of the nondominant carrier in being permitted to file tariffs. The court noted that "[o]nly when the Commission turned permission into command [in the Sixth Report] did MCI's grievement become evident and plainly adequate to support a challenge" to the Commission's action. MCI v. FCC, 765 F.2d at 1190.

elimination" of tariff filings.⁵⁷ The court, however, did not -- and, in light of other precedent permitting tariff forbearance in limited contexts,⁵⁸ could not -- find that Section 203 facially precluded permissive detariffing. Indeed, the court in MCI v. FCC noted that our permissive detariffing rules were "fundamentally" different from those it struck down, and it expressly did "not reach the question whether [those] ... permissive orders are invalid."⁵⁹

20. Similarly, the Supreme Court's decision in Maislin also is not dispositive here.⁶⁰ The Court held in that case that the Interstate Commerce Commission (ICC) could not "relieve a shipper of the obligation of paying the filed rate when the shipper and carrier ha[d] privately negotiated a lower rate."⁶¹ That core holding simply reaffirms the "filed rate doctrine," which courts previously have applied in Communications Act cases as well.⁶² By contrast, our forbearance rules allowing permissive detariffing are consistent with that long-established doctrine.⁶³

21. Moreover, we note that the specific motor common carrier tariff filing provisions at issue in Maislin facially differ in important respects from Section 203 of the Communications Act. In particular, the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA -- 49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the "requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide ... transportation only if the rate for the transportation or service is contained in a tariff...." As set forth above, the modification authority contained in Section 203(b) applies, by its terms, to both the obligation to

⁵⁷ 765 F.2d at 1192.

⁵⁸ See infra Section IV.A.2.

⁵⁹ MCI v. FCC, 765 F.2d at 1190, 1196. See Richman Bros. Records v. U.S. Sprint Communications Co., 953 F.2d 1431, 1436 (3rd Cir. 1991) (MCI v. FCC did not address lawfulness of permissive detariffing).

⁶⁰ Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

⁶¹ 110 S.Ct. at 2762.

⁶² See, e.g., American Broadcasting Cos. v. FCC, 643 F.2d 818, 819 (D.C. Cir. 1980).

⁶³ See Competitive Carrier Further Notice, 84 FCC 2d at 483-84; Certified Collateral Corp. v. Allnet Communications Servs., Inc., 2 FCC Rcd 2171, 2174 n.13 (Com. Car. Bur. 1987).

file tariffs (Section 203(a)) and the prohibition against untariffed offerings (Section 203(c)).

22. In addition, although Section 10761(a)'s requirement (like that in Section 203(c)) is applicable "[e]xcept as provided in this subtitle," the Maislin Court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt contract carriers from the requirements of Section 10761(a),⁶⁴ thus "demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor common carriers."⁶⁵ Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.⁶⁶

23. Furthermore, we stress that courts have recognized that while there are "similarities" between the Interstate Commerce Act (ICA) and the Communications Act, the FCC should not be "restrict[ed] ... to a course of action that has been dictated by the requirements of the transportation industry."⁶⁷ For instance, in holding that the FCC's authority to modify tariff notice periods was greater than that accorded the ICC under former Section 6(3) of the ICA, the Second Circuit stressed that Section 203 of the Communications Act, in particular, is "not ... a carbon copy of the Interstate Commerce Act."⁶⁸

24. We also find that the Special Permission Decision, in which the Second Circuit stated that Section 203(b) authorized modifications only "as to the form of, and information contained in, tariffs," does not alter our analysis.⁶⁹ Not only was such language dicta, but like the mandatory detariffing at issue in MCI v. FCC, and unlike the permissive detariffing rules at issue here, the "special permission" requirement in that case had the effect of prohibiting AT&T from filing tariffs.⁷⁰ The court there explained that there had been "[n]othing in Section 203(b) to justify such procedure ... [which] was in effect a rate "prescription" and inconsistent

64 See 49 U.S.C. § 10761(b).

65 110 S. Ct. at 2771 (emphasis in original).

66 See infra paragraphs 30-34.

67 General Telephone Co. of the Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971).

68 AT&T v. FCC, 503 F.2d 612, 616, 617 (2d Cir. 1974).

69 487 F.2d 865, 879 (2d Cir. 1973).

70 See 503 F.2d at 617.

with 47 U.S.C. § 205, which authorizes rate prescriptions only after a full hearing and specific findings."⁷¹ Since Section 203(b), by its terms, grants the Commission authority to modify only the requirements of Section 203 itself, the court understandably found that it did not justify a procedure that conflicted with another section of the Act.

25. Similarly, we do not find the Second Circuit's Resale Decision controlling. In that case, the court upheld the Commission's discretion in its administration and interpretation of the Communications Act.⁷² While the FCC at that time determined not to forbear completely from Title II regulation of resale carriers, it noted in its order on review that "[l]ater experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly."⁷³ The Commission has subsequently reconsidered the issue of forbearance in its Competitive Carrier decision,⁷⁴ and concluded that permissive detariffing, combined with enforcement of Title II substantive standards through the complaint process, was lawful and in the public interest.⁷⁵ Particularly because statutes governing administrative action may be susceptible of more than one valid interpretation,⁷⁶ the Second Circuit's decision to uphold the Commission's own interpretation of its authority in the different context of the Resale Decision provides no support for a facial challenge to our permissive detariffing rules here.

26. Significantly, the opponents' absolutist challenge premised upon the alleged "plain language" of Section 203 proves too much. If there were any merit to their argument, the Commission presumably would be without authority to relieve carriers of the obligation to file tariffs for their interstate common carrier services under any circumstances. That clearly is

⁷¹ Id.

⁷² Resale Decision, 572 F.2d at 25.

⁷³ Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261, 308 (1976).

⁷⁴ See Competitive Carrier Notice, 77 FCC 2d at 360-61.

⁷⁵ Second Report, 91 FCC 2d at 70-71, 73. Indeed, as the D.C. Circuit held in Geller v. FCC, 610 F.2d 973, 978-81 (D.C. Cir. 1979), our "public interest" mandate requires us to reexamine and adjust our regulations -- as we did in Competitive Carrier -- in light of changed circumstances. As stated in the Fourth Report, the Commission generally has the "duty to determine that its rules promote the public interest when applied to particular carriers or applicants, and to refrain from imposing and to remove unnecessary regulatory burdens on carriers." Fourth Report, 95 FCC 2d at 580.

⁷⁶ See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1079-80 (D.C. Cir. 1987) (en banc), cert. denied, 485 U.S. 913 (1988); American Federation of Government Employees v. FLRA, 777 F.2d 751, 759 (D.C. Cir. 1985).

not the case, however. Courts on several occasions have recognized our power to forbear from requiring the filing of federal tariffs for interstate common carrier services in other contexts.

27. For example, in Diamond International Corp. v. FCC,⁷⁷ the court upheld the Commission's refusal to disturb the charges for certain interstate common carrier services that New York Telephone Company had included in its intrastate, rather than interstate, tariff. Although the complaining customer in that case argued that Section 203 of the Communications Act required the disputed charges to be included in interstate tariffs,⁷⁸ the court upheld the Commission's decision to defer to state regulation of the service in the absence of any unreasonable burden on interstate communications.⁷⁹ Similarly, in CCIA v. FCC,⁸⁰ the D.C. Circuit upheld the Commission's decision to forbear from all Title II regulation--including tariff regulation -- of certain enhanced services and customer premises equipment that otherwise would be subject to such common carrier regulation, where the Commission found that the "difficulty in isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation."⁸¹ In fact, the court stated: "To the extent that certain enhanced services could lawfully be regulated under Title II once they were identified as common carrier services, we sanction the Commission's forbearance from Title II regulation."⁸² We believe that these cases indicate that Section 203 does confer some discretion upon the FCC in determining how to apply that section so that the public interest is served.⁸³

⁷⁷ 627 F.2d 489 (D.C. Cir. 1980).

⁷⁸ Id. at 490.

⁷⁹ Id. at 493. See also New York Telephone Company v. FCC, 631 F.2d 1059, 1067 (2d Cir. 1980) (noting that Commission may permit state, rather than federal, tariffing of interstate component of mixed interstate/intrastate service if state regulation does not discriminate against interstate customers).

⁸⁰ Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) (CCIA v. FCC).

⁸¹ CCIA v. FCC, 693 F.2d at 211.

⁸² Id. at 210. We recognize that the Commission asserted, as the primary ground for its decision not to apply Title II regulation to enhanced services and CPE, that the offerings were not "common carrier" services at all. The court explicitly held, however, that the Commission's action was "sustainable on either of the grounds asserted by the Commission." Id. at 209.

⁸³ For other instances in which the Commission declined in its discretion from regulating facilities and services, see our orders cited in the Second Report, 91 FCC 2d at 66-67.

2. Congress Has Acquiesced In Permissive Detariffing.

28. As demonstrated above, we believe that Section 203 can be read to permit the FCC to adopt forbearance rules when the public interest so requires. We recognize, however, the contentions of some of the parties that Congress could not have foreseen the development of nondominant carriers and thus did not address the precise issue.⁸⁴ Given that Section 203 was enacted long before a competitive long distance market was even foreseeable, we agree that it is reasonable to conclude that Congress lacked any specific intention regarding the regulatory treatment of nondominant carriers. Section 203 tariff filing requirements were enacted in the context of a monopoly telephone market in order to protect the public from the unlawful rates and practices of the monopoly carrier that exercised unchecked market power. There is no indication that Congress ever considered at the time it enacted Section 203 whether carriers that lacked such market power should also be subject to the full tariff filing requirements of Sections 203(a) and 203(c) if it did not serve the public interest. In tailoring our tariffing policies to the onset of competition in telecommunications, therefore, we have addressed, as we may, circumstances not dealt with directly in the organic statute.⁸⁵

29. Nevertheless, we find that since the time it enacted Section 203, Congress has acquiesced in the FCC's present forbearance rules. We believe these manifestations of legislative intent provide additional support for our conclusion that we have authority to adopt permissive detariffing rules.

30. Most significantly, in its recent enactment of the TOCSIA, Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it.⁸⁶ That amendment to the Communications Act requires, *inter alia*, that operator service providers (OSPs), which are common carriers, file "informational tariffs."⁸⁷ TOCSIA also authorizes the Commission to waive the filing requirement after four years if it finds that consumers are benefitting from competition and that continued tariff filings by such carriers are not required to meet statutory objectives.⁸⁸

⁸⁴ See, e.g., CTIA Comments at 18 n.16; OCOM Comments at 16-17.

⁸⁵ See U.S. v. Southwestern Cable Co., 392 U.S. at 172-73; NARUC v. FCC, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976).

⁸⁶ 47 U.S.C. § 226.

⁸⁷ Id. § 226(h).

⁸⁸ See 47 U.S.C. § 226(h) (1) (B); 47 U.S.C. §§ 226(d) (1) (A) & (B); S. Rept. No. 101-439, Senate Committee On Commerce, Science, and Transportation, 101st Cong., 2d Sess., at 23 (August 30, 1990).

31. TOCSIA's legislative history makes clear that Congress was aware of the Commission's permissive detariffing rules with respect to nondominant carriers, and that it statutorily modified our authority to forego requiring tariffs for a small subset of common carrier services--involving OSPs -- while leaving the existing regulatory baseline intact. First, the committee reports specifically note that many OSPs were considered to be "nondominant" under our Competitive Carrier rules and that we had "chosen to 'forbear'" from full Title II regulation of those carriers.⁸⁹

32. Second, the required informational tariffs substantially overlap in scope and purpose the tariff filings provided for in Section 203. Section 226(h) (1) (A) provides that OSPs "shall file ... an informational tariff specifying rates, terms, and conditions" for operator services.⁹⁰ Congress explained that "[t]his tariff filing requirement is intended to allow members of the public and the FCC to review and, if necessary, investigate these carriers' rates."⁹¹ This informational tariff requirement would be mere surplusage if Congress believed that the FCC had incorrectly interpreted Section 203 as allowing permissive detariffing.⁹² In this regard, we find it noteworthy that virtually at the same time Congress enacted TOCSIA, it also amended Section 203 itself.⁹³ Although Congress was well aware of the Commission's permissive detariffing rules at that time, as

⁸⁹ S. Rept. No. 101-439, Senate Committee On Commerce Science, and Transportation, 101st Cong., 2d Sess., at 3 & n.10 (August 30, 1990); see also H. Rept. No. 101-213, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 3, 5-6 (August 3, 1989).

⁹⁰ Cf. 47 U.S.C. § 203(a) (requiring that tariffs include "charges" and "classifications, practices, and regulations affecting such charges").

⁹¹ S. Rept. No. 101-439, at 23.

⁹² Although the informational tariffs required by Section 226(h) must include certain data -- e.g., "reasonable estimates of the amount of traffic priced at each rate" -- that are not specifically required by Section 203, Congress also made clear that "these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers." S. Rept. 101-439, at 9. See also H. Rept. No. 101-213, at 14. Thus, we reject AT&T's contention that the informational tariff filing requirement in Section 226(h) was intended as a supplemental requirement (in addition to Section 203 requirements) for OSPs, rather than a substitute for the Section 203 filings that Congress recognized we could excuse. See AT&T Reply Comments at 15 & n.*.

⁹³ See Pub. Law 101-396 (approved September 28, 1990) (increasing the notice period (from 90 to 120 days) for tariff filings); see also H. Rept. No. 101-316, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 7-8 (Oct. 27, 1989) (expressing Congress' sentiment that the increased notice period should be used only for local exchange carriers' annual access tariff filings).

evidenced by the contemporaneous TOCSIA legislative history, Congress made no attempt to disturb the Commission's interpretation of its authority under Section 203.

33. Finally, in permitting waiver of the informational tariffing requirement after four years, Congress in effect recognized and approved the rationale upon which the Commission based its forbearance regime generally. Congress noted that "[i]f the other provisions of this bill have a positive effect in promoting competitive rates and services, ... the need for these tariff[] filings diminishes."⁹⁴ Under these circumstances, we believe that it is fair to assume that Congress has, at the very least, acquiesced in the Commission's construction of its authority to forbear from requiring nondominant carriers to file tariffs under Section 203 of the Communications Act.

34. Therefore, while we recognize that courts may be reluctant to infer Congressional approval of an agency's interpretation of its organic statute based solely upon Congressional inaction,⁹⁵ Congress' record over the past decade since we adopted our permissive detariffing rules displays far more than unknowing silence with respect to those rules. Congress has repeatedly acted in the telecommunications area over the past decade that the Commission's policy was in effect and failed to alter or repeal this fundamental policy.⁹⁶ Thus, we conclude that the enactment of TOCSIA, which is predicated upon a baseline of forbearance, as well as the failure of Congress to express its reservations about our forbearance rules, supports the interpretation of our authority that we adopted in Competitive Carrier.⁹⁷

⁹⁴ S. Rept. No. 101-439, at 23.

⁹⁵ See, e.g., Demarest v. Manspeaker, 111 S.Ct. 599, 603-04 (1991); Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989); Ashton v. Pierce, 716 F.2d 56, 63 (D.C. Cir. 1983).

⁹⁶ See, e.g., H.R. Rep. No. 96-1252, 96th Cong., 2d Sess., pt. 2 at 1 (1980); H.R. 5158, 97th Cong., 2d Sess. (1981) (Telecommunications Act of 1982); H.R. Conf. Rpt. No. 765, 97th Cong., 2d Sess. 56 (1982); FCC Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (1988); H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3 (1989). See also MCI Comments at 25-35; CompTel Comments at 9-13.

⁹⁷ Courts have often held that where Congress is aware of an agency's interpretation and has not sought to alter it despite making other amendments to the statute, it can be presumed that legislative intent has been correctly discerned. See, e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132, 137 (1985); Bob Jones University v. U.S., 461 U.S. 574, 599-602 (1983); New Haven Board of Educations v. Bell, 456 U.S. 512, 533-35 (1982); United States v. Rutherford, 442 U.S. 544, 554 & n.10 (1979); Saxbe v. Bustos, 419 U.S. 65, 74 (1974); Zemel v. Rusk, 381 U.S. 1, 11-12 (1965).

B. Permissive Detariffing Advances the Purposes of the Communications Act

35. On the basis of our thorough review of permissive detariffing in the Competitive Carrier decisions and the record in this proceeding, we continue to believe that our forbearance policy furthers the statutory purposes of the Communications Act. The fundamental statutory purpose contained in Section 1 of the Act, is "to make available ... to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges...."⁹⁸ As the Commission recognized in Competitive Carrier, the tariff filing procedures set forth in Section 203 of the Communications Act were designed principally to facilitate enforcement of the substantive requirements, contained in Sections 201(b) and 202(a), that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory.⁹⁹ In implementing permissive detariffing, we sought to adapt our regulation of telecommunications common carriers to the changed circumstances of competition and to develop a regulatory approach that furthers the purposes of the Act while fostering innovation and the efficient development of the telecommunications industry.¹⁰⁰ We did not discard the standards of Sections 201(b) or 202(a), but rather committed to enforcing them through the complaint process in the event that "irrational carrier conduct or aberrations" occur.¹⁰¹

36. In the Competitive Carrier decisions, we further concluded that mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends.¹⁰² We found that in the case of nondominant carriers, which by definition lack substantial market power, such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs. We held that, consequently, the users would pay higher rates and that the services available to meet the needs of

⁹⁸ 47 U.S.C. § 151; see Second Report, 91 FCC 2d at 64.

⁹⁹ Second Report, 91 FCC 2d at 71; Competitive Carrier Further Notice, 84 FCC 2d at 483.

¹⁰⁰ Second Report, 91 FCC 2d at 60, 62.

¹⁰¹ Id. at 70; see 47 U.S.C. § 208.

¹⁰² Second Report, 91 FCC 2d at 62, 65, 71; Competitive Carrier Further Notice, 84 FCC 2d at 453, 456, 471, 479.

users would be limited.¹⁰³ Moreover, we additionally held that by allowing permissive detariffing, the risk of collusive pricing would be diminished.¹⁰⁴

37. We conclude that mandatory tariff filing requirements continue to be unnecessary for nondominant interexchange carriers (IXCs) because they continue to lack market power. If such carriers sought to charge unreasonable rates in violation of Section 201(b) or to discriminate unreasonably in violation of Section 202(a), customers would simply move to other carriers.¹⁰⁵ We agree with those parties stating that the competitive forces in the marketplace serve to ensure, in the first instance, carrier compliance with the obligations imposed by Sections 201(b) and 202(a).¹⁰⁶ While some commenters argue that the FCC's forbearance policy alters the statutory scheme envisioned by Congress by making it difficult or impossible to ensure that nondominant carriers comply with the Act's substantive requirements that rates be just, reasonable, and not unreasonably discriminatory, we disagree given the competitive evolution of the industry.¹⁰⁷ Further, we note that the complaint process under Section 208 remains available in the event allegations of unjust or unreasonable rates are made.¹⁰⁸ Significantly, we emphasize that if competitive forces fail to ensure carrier compliance with the obligations imposed by Sections 201(b) and 202(a), we will rely not only upon our complaint process but also upon our ability to reimpose tariff-filing requirements as necessary to protect the public from unjust or unreasonable rates charged by carriers operating under permissive detariffing.¹⁰⁹

¹⁰³ Fourth Report, 95 FCC 2d at 580.

¹⁰⁴ Id. at 556.

¹⁰⁵ See First Report, 85 FCC 2d at 31; Second Report, 91 FCC 2d at 69.

¹⁰⁶ See, e.g., RCI Long Distance Comments at 2 (market forces are sufficient to guarantee that rates and practices will be reasonable, because dissatisfied customers can simply and inexpensively pick another carrier); OCOM Comments at 17-18 (the lack of market power by [nondominant carriers] assures that the public will be afforded the just and reasonable rates required under ... the Act by ensuring a competitive environment in which pricing is determined by market forces); see also Second Report, 91 FCC 2d at 61; Further Notice, 84 FCC 2d at 495.

¹⁰⁷ See, e.g., Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

¹⁰⁸ 47 U.S.C. § 208. Significantly, under our rules, any party filing a complaint under Section 208 is entitled to discovery in order to ascertain pertinent information regarding carriers' rates and practices. See 47 C.F.R. §§ 1.729-1.730 (1992).

¹⁰⁹ See Fourth Report, 95 FCC 2d at 579-80.

38. We also continue to believe that altering our forbearance policy would frustrate the overriding goals of the Act.¹¹⁰ We agree with those commenters that argue that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services in a working market.¹¹¹ We agree with those parties that assert that the forbearance policy developed in the Competitive Carrier decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted.¹¹² Moreover, the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all.¹¹³

39. We conclude that permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices.¹¹⁴ The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in

¹¹⁰ See, e.g., NTCA Comments at 2-3; GTE Comments at 9-10; see also Second Report, 91 FCC 2d at 60-61; Fourth Report, 95 FCC 2d at 555. We concluded in the Fourth Report that applying Section 203(a) requirements to nondominant carriers thwarts the goals of the Act by fostering inefficiencies and imposing costs on carriers and consumers without offsetting benefits to consumers. Fourth Report, 95 FCC 2d at 555, 557.

¹¹¹ See, e.g., RCI Long Distance Comments at 1-2 (tariff process provides a disincentive for innovation and inhibits price competition); see also OCOM Comments at 1-2; TCA Comments at 5.

¹¹² See, e.g., Comptel Comments at 5-6; ACC Long Distance Comments at 4; Ad Hoc Comments at 3-5; Commonwealth Long Distance Comments at 1-3, 5-6; ICA Comments at 2; OCOM Comments at 1-2; RCI Long Distance Comments at 1-2.

¹¹³ See, e.g., Interexchange Resellers Association Comments at 1-2; LOCATE Comments at 7-8; TCA Comments at 5-6; RCI Long Distance (new IXCs can enter niche markets for interstate services without costly filings and lengthy regulatory delays); OCOM Comments at 8 (many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure).

¹¹⁴ Based upon the past decade of growth and competition in the interexchange market, we disagree with those commenters that contend that the current application of the forbearance doctrine creates artificial competition because some but not all participants must file tariffs with cost support. See, e.g., PacTel Comments at 2; NYNEX Comments at 13; Alascom Comments at 4-5.

furthering the statutory goals of the Communications Act.¹¹⁵ In 1982, approximately a dozen long distance carriers operated within the United States.¹¹⁶ By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers.¹¹⁷ Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of services, type of services, and selection of carriers.¹¹⁸ To adopt a different course of action at this time would only frustrate the success of our current policy.

40. Moreover, since 1984, overall interstate calling has grown at an annual rate of about 12%, with carriers other than AT&T posting an average annual growth rate in excess of 25%.¹¹⁹ During the same period between January 1984 and January 1992, AT&T's share in terms of minutes of the interstate market declined from over 80% to just more than 60%,¹²⁰ while its rates for directly dialed interstate have also fallen substantially.¹²¹ Several of AT&T's nondominant competitors have engaged in intensive capital

¹¹⁵ Indeed, in the Interexchange Order, we concluded based upon the extensive record in that proceeding, that competition had flourished under the market analysis set forth in the Competitive Carrier decisions. See Competition in the Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5881-82 (Interexchange Order). Cf. American Airlines, Inc. v. CAB, 359 F.2d 624, 633-34 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966).

¹¹⁶ See Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, at 30 & Table 19 (February 1992).

¹¹⁷ Summary of Long Distance Carriers, Industry Analysis Division, FCC, at 6 & Table 1 (June 16, 1992).

¹¹⁸ While AT&T states that the Commission already has developed streamlined tariffing procedures in the First Report that would not overburden nondominant IXCs and that fully complies with Section 203, we believe that the public interest is better served by allowing permissive detariffing of those carriers that lack substantial market power. AT&T Comments at 8. As we stressed in the Fourth Report, forbearance "eliminates a potential vehicle for collusive conduct and facilitates price discounting" and, therefore, serves the public interest better than streamlined regulation. Fourth Report, 95 FCC 2d at 556 n.3.

¹¹⁹ Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, at 34 (September 1992).

¹²⁰ Summary of Long Distance Carriers, Industry Analysis Division, FCC, at 4 & Table 3 (October 1992). With respect to "high end" business services, AT&T's current market share appears closer to 50%. See Interexchange Order, 6 FCC Rcd at 5890.

¹²¹ Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, at 13 (February 1992).

investment programs to develop state-of-the-art fiber optic networks, and AT&T now has less than half of the long distance industry's fiber optic route miles.¹²² Thus, in light of the successful practical experience with permissive detariffing, we believe not only that this policy advances the broad purposes of the Communications Act and is therefore in the public interest, but also that it would be unreasonable to disturb our current rules in the absence of Congressional or judicial commands.

C. Additional Matters

41. In its complaint against MCI that precipitated this rulemaking, AT&T claimed that the permissive detariffing rules we adopted in Competitive Carrier were not substantive rules that relieved nondominant carriers of the obligation to file tariffs, but rather an exercise of the Commission's discretion not to enforce the requirements Section 203. In our order resolving that complaint we explained that our permissive detariffing policy was, in fact, a binding substantive rule that removed the tariff filing requirement from nondominant carriers.¹²³ Having decided here to reaffirm our uncodified forbearance rule, and in order to remove any possible ambiguity on that issue, we codify the permissive detariffing rule.¹²⁴

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

42. Need and purpose of this action. This rulemaking proceeding was initiated to review the continuing lawfulness of the Commission's existing permissive detariffing rules in light of a complaint filed by AT&T alleging, in effect, that these rules violate the Communications Act. This order sustains those rules as being consistent with the Act and the public interest.

43. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Act Analysis. The Initial Regulatory Flexibility Analysis stated that any change in existing rules could have a significant impact on a broad range of telecommunications common carriers. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

44. Significant alternatives considered and rejected. The Notice did not propose new rules or alternative policies, but sought comment on the lawfulness of our existing permissive detariffing rules and on how they should be changed in the event they are found unlawful. This item reaffirms and codifies our existing rules which minimize regulatory burdens on nondominant carriers.

¹²² See Competition in the Interstate Interexchange Marketplace, Notice or Proposed Rulemaking, 5 FCC Rcd 2627, 2633-34 (1990).

¹²³ AT&T v. MCI, 7 FCC Rcd at 809, para. 13.

¹²⁴ See Appendix B.

VI. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4, and 201-05 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 and 201-05, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, IS AMENDED as set forth in Appendix B.

46. IT IS FURTHER ORDERED, that the policies and rules set forth herein ARE ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Donna R. Searcy, Secretary *wzc*

APPENDIX A: PARTIES FILING COMMENTS

Comments

ACC Long Distance Corp. (ACC)
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Association for Local Telecommunications Services
Automated Communications, Inc., et al.
Cellular Telecommunications Industry Association
Commonwealth Long Distance Company
Communications Transmission, Inc.
Competitive Telecommunications Association
Fairchild Communications Services Company
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Interexchange Resellers Association
International Business Machines Corporation (IBM)
International Communications Association (ICA)
KIN Network Access Division
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
Mobile Marine Radio, Inc.
National Telephone Cooperative Association (NTCA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Pacific Telesis Group (PacTel)
RCI Long Distance, Inc. (RCI Long Distance)
Southwestern Bell Corporation
Sprint Communications Company L.P.
Tele-Communications Association (TCA)
Telecommunications Marketing Association
Telocator
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

Reply Comments

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc.
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Centel Cellular Corp.
Communications Transmission, Inc.
Competitive Telecommunications Association
Custom Network Services
First Financial Management Corporation (FFMC)

General Communication, Inc.
GTE Service Corporation (GTE)
Information Technology Association of America (ITAA)
International Communications Association (ICA)
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
McCaw Cellular Communications
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
National Telecommunications and Information Association (NTIA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Southwestern Bell Corporation
Sprint Communications Company L.P.
Telecommunications Marketing Association
Telocator
United States Telephone Association (USTA)
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.