

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

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In the Matter of)
)
Tariff Filing Requirements for)
Nondominant Common Carriers)

CC Docket No. 93-36



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APPLICATION FOR STAY
OF ORDER PENDING APPELLATE REVIEW

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SUMMARY

AT&T seeks a stay pending appellate review of that portion of the Commission's Memorandum Opinion and Order In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, released August 18, 1993 that purports to authorize "non-dominant" carriers to satisfy their ratefiling obligations under the Communications Act by filing tariffs containing only a "range of rates" rather than the actual rates charged. AT&T believes it would be useful to stay the Commission's Order pending appeal so that the D.C. Circuit first has an opportunity to review the Order in light of its prior governing decisions in this area.

Furthermore, the Commission's order is unsupportable as a matter of statutory law and precedent. The Commission's interpretation of the ratefiling requirements of Section 203 of the Communications Act, as well as of its own power to modify those requirements, is plainly inconsistent with the Communications Act, as interpreted by both the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court. Indeed, the Court of Appeals has already reversed (once summarily) three previous orders of the Commission purporting to excuse nondominant carriers from the requirement that they file tariffs stating all of their rates.

For these reasons, there is more than a substantial likelihood that the Commission's Order will be vacated on appeal.

Furthermore, AT&T will suffer irreparable harm if the Commission's Order is not stayed pending appeal. The D.C. Circuit has held that the informational asymmetry produced when one carrier files rates but its competitors refuse to do so causes substantial and cognizable competitive injury. And AT&T's competitors' own recent conduct demonstrates that much of AT&T's injury is irreparable -- despite repeated judicial decisions and the threat of damages actions, those competitors have in recent months continued their practice of refusing to file all of their rates. On the other hand, no other person will suffer substantial harm if the stay is granted. Finally, because the Commission's Order contravenes strong congressional policies embodied in the Communications Act, the public interest will be furthered by a stay.

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Nondominant Common Carriers)

**APPLICATION FOR STAY
OF ORDER PENDING APPELLATE REVIEW**

American Telephone and Telegraph Company hereby requests a stay pending the D.C. Circuit's review of the portion of the Commission's Memorandum Opinion and Order In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, released August 18, 1993 ("Range Tariff Order") providing that nondominant carriers may file ranges of rates rather than the specific rates actually charged. AT&T believes it would be useful to stay the Commission's Range Tariff Order pending appeal so that the D.C. Circuit first has an opportunity to review the Range Tariff Order in light of its prior governing decisions in this area. An appeal of the Range Tariff Order is likely to be heard promptly because three parties have already sought review, and a stay will merely maintain the status quo pending that review.

Furthermore, the Commission's Order satisfies the requirements of a stay. The Order is inconsistent with the Communications Act, as interpreted by both the D.C. Circuit and the United States Supreme Court, and there is therefore more than a substantial likelihood that it will be vacated on appeal. In addition, AT&T will suffer irreparable harm if the Commission's

Order is not stayed pending appeal, while no other person will suffer substantial harm if the stay is granted. Finally, because the Commission's Order contravenes strong congressional policies embodied in the Communications Act, the public interest will be furthered by a stay.

BACKGROUND

The Commission's Range Tariff Order represents the latest chapter in the on-going efforts of the Commission to remove the ratefiling requirements for AT&T's interexchange competitors. Litigation over these issues has been proceeding since 1985, when the D.C. Circuit held in MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), that the statutory ratefiling requirements are mandatory and that the Commission has no authority, under Section 203(b) of the Communications Act or otherwise, to waive these requirements.

The most recent round of proceedings commenced in 1989. At that time, AT&T filed a complaint before the Commission pursuant to Section 208 of the Act (47 U.S.C. § 208) challenging the failure of MCI Telecommunications Corporation ("MCI") to file tariffs specifying all the rates it charged for interstate communications services, as required by Section 203 of the Communications Act, 47 U.S.C. § 203. After over two years of litigation, the Commission issued an Order dismissing AT&T's complaint without resolving the underlying issue of MCI's compliance with Section 203. AT&T v. MCI, 7 FCC Rcd. 807 (1992).

AT&T petitioned for review and the Court granted the petition, relying on its previous decision in MCI v. FCC, 765

F.2d 1186 (D.C. Cir. 1985) and the Supreme Court's decision in Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990). AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied 113 S. Ct. 3020 (1993). The Court held that MCI's practice of refusing to file its rates for all its communications services was unlawful, and it vacated the Commission's Fourth Report (the Commission's so-called "permissive detariffing policy") insofar as it purported to authorize MCI's conduct.¹ AT&T v. FCC, 978 F.2d at 729. In the course of so holding the Court made it clear that it expected the illegal practices at issue to "cease." Id. at 737. The Court therefore remanded the case to the Commission, and stated that AT&T appeared "entitled promptly to a cease and desist order against MCI." Id.² The Court of Appeals subsequently granted AT&T's Motion for Summary Reversal of a rulemaking by the Commission purporting to re-adopt permissive

¹ In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Servs. & Facilities Authorizations Therefor, CC Docket No. 79-252, Fourth Report and Order, 95 F.C.C.2d 554 (1983) ("Fourth Report").

² On remand, the Commission issued a cease and desist order requiring MCI "to file tariffs including the information required by section 203 for all of its interstate common carrier services." AT&T v. MCI, File No. E-89-297, FCC No. 93-222, Memorandum Op. and Order at 3 (May 4, 1993). MCI, however, did not comply with the Commission's order and file tariffs specifying its rates. AT&T therefore sought and obtained a preliminary injunction from the United States District Court for the District of Columbia, pursuant to section 401(b) of the Communications Act, requiring MCI to comply and to file tariffs "setting forth all rates levied for its interstate common carrier services; all rates charged shall be either 'published in' or 'readily ascertainable from' the published schedule." AT&T v. MCI, Civil Action No. 93-1147, at 3 (D.D.C. July 7, 1993), quoting Regular Common Carrier Conference v. United States, 793 F.2d 376, 380 (D.C. Cir. 1986).

detariffing. See AT&T v. FCC, No. 92-1628, Order (D.C. Cir. June 4, 1993).

In response to the D.C. Circuit's invalidation of its permissive detariffing policy, the Commission initiated this rulemaking. In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking, 8 FCC Rcd. 1395, 1397 (1993). On August 18, 1993 the Commission issued the Range Tariff Order. That order is the practical equivalent of the Commission's prior detariffing orders. It purports to authorize "non-dominant" carriers, like MCI, to file tariffs containing only a "range of rates" rather than the actual rates charged. The Commission asserts that while Section 203(a) of the Communications Act, 47 U.S.C. § 203(a), may require that tariffs be filed, it does not require that those tariffs specify any actual rates, Range Tariff Order, ¶ 34, and that in any event the Commission has the authority to "modify" any such requirement under Section 203(b), 47 U.S.C. § 203(b). Range Tariff Order, ¶ 35.

ARGUMENT

The Range Tariff Order is unsupportable as a matter of statutory law and precedent. The Commission's new rules are inconsistent with the plain language of Section 203 of the Communications Act, and with a long line of judicial decisions forbidding exactly what the Commission here seeks to do.

In order to obtain a stay of the Commission's Order pending appeal, AT&T must demonstrate that "(1) it has a substantial likelihood of succeeding on the merits; (2) it will

suffer irreparable harm if the injunction is not granted; (3) other interested parties will not suffer substantial harm if the injunction is granted; and (4) the public interest will be furthered by the injunction."³ Each of these equitable elements is assessed against a sliding scale that varies according to the strength of the showing for the other elements. "Probability of success is inversely proportional to the degree of irreparable injury evidenced." Cuomo v. United States Nuclear Reg. Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). Relief is appropriate "with either a high probability of success and some injury, or vice versa." Id.; see WMATC v. Holiday Tours, Inc., 559 F.2d at 843 ("The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors"); Woerner v. United States Small Business Admin., 739 F. Supp. 641, 642-43 (D.D.C. 1990); In the Matter of Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd. 3672, 3673 (1987).

In the instant case, AT&T's likelihood of success on appeal is overwhelming. The Commission's new rule is plainly contrary to settled law, as authoritatively construed by the Court of Appeals and the Supreme Court. Furthermore, judicial decisions as well as recent events demonstrate beyond dispute that AT&T will suffer irreparable injury if the Commission's order is not stayed, and that a stay will not substantially

³ Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1990); see also WMATC v. Holiday Tours, Inc., 559 F.2d 841, 842-43 & n. 1 (D.C. Cir. 1977), quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); In re Application of WWOR-TV Inc., 6 FCC Rcd. 193, 205 (1990).

injure any other persons. Finally, the congressional enactment of Section 203's ratemaking requirements, as well as decisions construing that statute and parallel provisions of the ICA, establish that the public interest will be served by the issuance of a stay.

I. THERE IS AN OVERWHELMING LIKELIHOOD THAT AT&T WILL PREVAIL ON APPEAL, AND THE COURT OF APPEALS WILL VACATE THE COMMISSION'S RANGE TARIFF ORDER.

The Commission concluded in the Range Tariff Order that it may excuse carriers from the statutory requirements that they file tariffs specifying "all charges," or specifying formulae from which charges may be ascertained, for their communications services, 47 U.S.C. § 203(a), and that they charge only rates which are "specified" in those tariffs, 47 U.S.C. § 203(c). This conclusion is contrary to the plain language of Section 203 of the Communications Act, and to numerous decisions of the D.C. Circuit and the United States Supreme Court construing both that Act and the parallel provisions of the Interstate Commerce Act ("ICA") that were the model for the Communications Act. It would defeat the entire purpose of Section 203.

Section 203 "requires that every communications common carrier file its rates with the FCC." AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). Section 203(a) of the Communications Act provides that "[e]very common carrier" shall file "schedules showing all charges" and "showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Section 203(c) provides that "no carrier" shall "charge, demand, collect, or receive" compensation other "than the charges

specified," and shall not "refund or remit by any means or device any portion of the charges so specified." 47 U.S.C. § 203(c).

The Range Tariff Order is irreconcilable with those statutory provisions. A range of rates is by definition not a "specified" rate, and does not show "all charges." A range tariff does not show all of the "classifications, practices, and regulations affecting . . . charges," because such a tariff gives no indication of the basis upon which a carrier will choose what rate within the range it will charge a specified customer. And the filing of only a range of rates obviously makes it impossible to determine whether "any portion" of the "charges so specified" has been unlawfully "refund[ed] or remit[ed]."

Indistinguishable provisions of the Interstate Commerce Act ("ICA")⁴ have been interpreted as requiring the filing of and strict adherence to a single, precise rate. As the Supreme Court has explained:

If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. . . . [The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the

⁴ Compare 47 U.S.C. § 203(a) (Communications Act tariff filing requirement) with 49 U.S.C. § 6(1) (original ICA tariff filing requirement) and 49 U.S.C. § 10762(a) (recodified ICA tariff filing requirement). Compare 47 U.S.C. § 203(c) (first clause, Communications Act prohibition of service in absence of filed tariffs) with 49 U.S.C. § 6(7) (original ICA prohibition against service without filing rates) and 49 U.S.C. § 10761(a) (recodified ICA prohibition against service without filing rates). Compare 47 U.S.C. § 203(c) (second clause, Communications Act prohibition of rebates or service at other than filed rates) with 49 U.S.C. § 6(7) (original ICA anti-rebate provision) and 49 U.S.C. § 10761(a) (recodified ICA anti-rebate provision).

only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. at 130-31 (internal quotations omitted). The D.C. Circuit also so held in Regular Common Carrier Conference v. United States, 793 F.2d 376, 380 (D.C. Cir. 1986). It concluded that the ICA's counterparts to Sections 203(a) and 203(c) unequivocally require that the particular charge for common carrier service must be "readily ascertainable" from the tariff, and that a tariff is "patently unlawful" if, instead, it is "crafted to permit the [carrier] unfettered discretion to secretly propose whatever [rate] it wishes." Id.⁵

These decisions authoritatively establish the invalidity of the Commission's Range Tariff Order. Courts have repeatedly confirmed that decisions interpreting the Interstate Commerce Act are controlling for the corresponding provisions of the Communications Act, including Section 203.⁶ The Commission's only response to this overwhelming authority is to suggest that, whatever the terms of Section 203(a), it has the authority under

⁵ In an Order issued just two weeks prior to the Commission's Range Tariff Order, the Interstate Commerce Commission ("ICC") has confirmed that range tariffs are inconsistent with the ICA's ratefiling requirements, as interpreted in Maislin and Regular Common Carrier Conference. Range Tariffs of All Motor Common Carriers, Nos. 40887 et al. 11-12 (August 2, 1993).

⁶ American Broadcasting Co. v. FCC, 643 F.2d 818, 820-21 (D.C. Cir. 1980); see also Las Cruces TV Cable v. FCC, 645 F.2d 1041, 1051-52 (D.C. Cir. 1981); MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980); AT&T v. FCC, 487 F.2d 865, 873-74 (2nd Cir. 1973).

Section 203(b) to "modify" that section so as to waive the requirement that carriers file a specific rate.

The Commission's reliance on its Section 203(b) modification power is unsupportable. The D.C. Circuit has reversed three prior Commission orders in which the agency asserted that Section 203(b) authorizes it to eliminate the filed rate doctrine. See supra pp. 2-3. That provision authorizes the Commission to modify the ratefiling requirements of Section 203 only "in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). It does not authorize the Commission to remove, for a very large segment of the industry, the core requirement that specific rates be filed and adhered to. Numerous judicial decisions have recognized that the Commission's Section 203(b) power is "restricted" and "limited," and does not permit the Commission to eliminate or eviscerate the core ratefiling requirements of the Communications Act. AT&T v. FCC, 978 F.2d at 736 & n.12; see also MCI v. FCC, 765 F.2d at 1192; AT&T v. FCC, 572 F.2d 17 (2nd Cir. 1978); AT&T v. FCC, 487 F.2d 865 (2nd Cir. 1973).

The D.C. Circuit's decision in Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986), establishes beyond doubt that the modification power does not extend to authorizing range tariffs. The Court expressly rejected the ICC's claim that the provision of the ICA parallel to Section 203(b) permits it to authorize carriers to file "average rates" rather than actual rates. And the ICC itself, in its recent Order prohibiting range tariffs, recognized that

Regular Common Carrier Conference precludes "such an expansive reading" of the parallel provision to Section 203(b). Range Tariffs of All Motor Common Carriers, Nos. 40887 et al. 11-12 (August 2, 1993).

The Commission argues in response that its modification power under Section 203(b) exceeds the ICC's power under 49 U.S.C. § 10762(d)(1), because the latter provision is located in the same section of the ICA as the provision requiring carriers to file tariffs, 49 U.S.C. § 10762(a)(1) (which is parallel to Section 203(a) of the Communications Act), but is in a different section of the ICA from the provision requiring carriers to provide service only at tariffed rates, 49 U.S.C. § 10761(a)(1) (which is parallel to Section 203(c)). Thus, the Commission argues, the ICC is authorized only to modify the parallel provision to Section 203(a), while the Commission may modify either Section 203(a) or 203(c).

The Commission's argument is a complete non sequitur. What is at issue in these proceedings is the power of the Commission to establish or modify what information must be contained in tariffs filed by carriers -- i.e., whether such information must include specified rates, or only ranges of rates. In other words, what is at issue is the Commission's power to modify the filing requirement of Section 203(a). It is thus irrelevant whether the ICC lacks power to modify the ICA provision parallel to Section 203(c).⁷

⁷ The Commission's effort to distinguish the interpretive holding of Regular Common Carrier Conference is similarly
(continued...)

In addition to this basic fallacy, however, the Commission's argument is incorrect in its premise -- the ICC's modification power is not less than the Commission's. Prior to the recodification of the ICA in 1978, all of the relevant ICA provisions, including the tariffing, modification, and filed-rate provisions, were contained in Section 6 of the ICA. See former 49 U.S.C. §§ 6(1), 6(3), 6(7). Further, former Section 6 of the ICA was the model for Section 203 of the Communications Act. See S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn); AT&T v. FCC, 487 F.2d at 879. Thus, prior to recodification, the ICA had the same modification power as the Commission. And when the ICA was recodified, Congress explicitly stated that it "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978).

Indeed, the weakness of the Commission's attempts to distinguish the ICA precedents is demonstrated by the fact that this argument in its Range Tariff Order is copied virtually

⁷ (...continued)
incoherent. As the Commission acknowledges, the D.C. Circuit in that case struck down range tariffs because it was "impossible to determine from the face of the tariff either what the charged rate was, or what method was used to determine the specified rate." Range Tariff Order at 23 n. 99. Yet the Commission's only response to the Court's reasoning is that under its new rule, "the zone of rates could be determined from the face of the tariff." Id. at ¶ 37. Of course, this is just another way of saying that under the Commission's rules the rate itself cannot be determined, nor can the method used to determine the specific rate actually charged.

verbatim from the Commission's prior permissive detariffing order -- which the D.C. Circuit summarily reversed.⁸

II. AT&T WILL BE IRREPARABLY INJURED IF THE COMMISSION'S RANGE TARIFF ORDER IS NOT STAYED.

AT&T will suffer immediate, substantial, and irreparable competitive injury during the period the Range Tariff Order remains in effect. See generally Declaration of Howard McNally (Attachment A) ("McNally Declaration") (describing nature and scope of AT&T's competitive injury). The Court of Appeals for the District of Columbia Circuit has recognized that the sort of injury imposed upon AT&T by the Order is substantial and cognizable, and there exists no assurance that AT&T will be able to repair that injury through a subsequent suit for damages.

First, AT&T is suffering, and will continue to suffer, substantial competitive injury as a consequence of the Range Tariff Order. By the terms of these rules, AT&T alone among interexchange carriers is required to file publicly-available tariffs specifying its rates. As the D.C. Circuit held in Regular Common Carrier Conference v. United States, 793 F.2d at 379, this asymmetry distorts competition and creates competitive injury: the carriers that refuse to file their rates are able to match or undercut the rates of the carrier that files, but the carrier that files is "unable to match [its] competitors' unknown

⁸ Compare Range Tariff Order at 22, with Tariff Filing Requirements for Interstate Common Carriers, Report and Order, 7 FCC Rcd. 8072, 8076 (1992), summarily rev'd, AT&T v. FCC, No. 92-1628, Order (D.C. Cir. June 4, 1993).

prices."⁹ And this has indeed been the experience of AT&T. Its competitors' "failure to file their rates, and related terms and conditions, for all their services has injured AT&T and placed it at a severe competitive disadvantage." McNally Declaration at ¶ 2. The persistence with which AT&T's competitors have refused to file their rates, notwithstanding repeated judicial decisions reaffirming the legal requirements, is perhaps the best evidence of the enormous competitive advantage that accrues to a carrier that can price in secret when its competitor cannot. See McNally Declaration at ¶ 10.

Second, AT&T's competitors' own recent conduct clearly demonstrates that much of AT&T's injury is irreparable, and that these other carriers will continue to engage in violations of their ratefiling requirements unless the Range Tariff Order is stayed. Notwithstanding numerous prior judicial decisions and the D.C. Circuit's statement that they will be subject to damages actions if they continue to violate those requirements, AT&T v. FCC, 978 F.2d at 737 -- and notwithstanding the federal court damages actions that AT&T filed -- AT&T's competitors did not

⁹ Indeed, MCI has conceded that information disparity creates substantial injury. In opposing AT&T's efforts to obtain a preliminary injunction requiring MCI to comply with the Commission's Cease and Desist Order and file all its rates, MCI argued to Judge Harris that the issuance of an injunction requiring MCI to file all its rates would place MCI "at a disadvantage" with respect to other competitors of MCI that might also violate Section 203. See AT&T v. MCI, No. 93-1147, Defendant MCI's Opposition to Plaintiff AT&T's Application for a Temporary Restraining Order, or, in the Alternative, A Preliminary Injunction at 36 (D.D.C. filed June 18, 1993).

change their illegal conduct after AT&T v. FCC was decided.¹⁰ Sprint, for example, left in place to the present tariffs which permit unspecified discounts of "up to 10% or greater," and thus fail to meet the statutory requirement of filing all rates. McNally Declaration at ¶ 10. Similarly, MCI filed tariffs after the D.C. Circuit's decision in AT&T v. FCC vacating the Commission's Fourth Report which authorized MCI, without any limitation, to "waive[] [unspecified] tariffed charges." Id. In the federal court damages suit, MCI and Sprint each justified their continuing violations of Section 203 by pointing to the Commission's Notice of Proposed Rulemaking that proposed the range of rates order that has now been adopted.

The only explanation for this consistent course of conduct was that AT&T's competitors necessarily must have believed that the existence of a Commission rule means they will obtain greater benefits from violating their ratefiling requirements than AT&T would be able to recover in damages: i.e., that they can inflict irreparable harm on AT&T. There are two reasons that they believe this.

Foremost is the fact that while some of AT&T's injuries (such as increased marketing costs and some lost business opportunities) are easily ascertainable and can be recovered in a damages action pursuant to Section 206 of the Communications Act, others (including some lost business opportunities) are much more difficult to quantify. See McNally Declaration at ¶ 14. The

¹⁰ AT&T v. MCI, No. 93-0283 (D.D.C.); AT&T v. Williams Telecommunications Group, Inc., et al., No. 93-0284 (D.D.C.); AT&T v. Sprint Communications Co., No. 93-0285 (D.D.C.).

competitive and other harm that AT&T is sustaining from its competitors' refusal to file their rates should not be left to the uncertainties of damages calculations. Such harms have been held to be irreparable. See Vogel v. American Soc. of Appraisers, 744 F.2d 598, 599-600 (7th Cir. 1984) (difficulty and unreliability of subsequently measuring damages constitutes irreparable harm because applicant not assured of being made whole).

Second, the competitors appear to believe that the existence of a Commission rule will (until stayed or vacated) operate to limit the federal court damages awarded against them to those that can be easily proved and to preclude the exemplary or other damages that are required to assure AT&T is made whole. AT&T's competitors have contended that decisions of the D.C. Circuit are not retroactive under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and that any decision holding a Commission rule unlawful will not create damage liability for prior periods.¹¹ This view is irreconcilable with the Supreme Court's decisions on retroactivity, for they preclude claims of retroactivity where, as here, prior Court of Appeals decisions had uniformly held that the Commission has no authority to exempt carriers from the requirement that all rates be specified in filed tariffs.

¹¹ See AT&T v. MCI, No. 93-0283, Memorandum in Support of MCI's Motion to Dismiss Under the Primary Jurisdiction Doctrine or For a Stay 15-16 (D.D.C. filed March 2, 1993); AT&T v. Sprint Communications Co., No. 93-0285, Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or, In the Alternative, To Stay Proceedings 21 n.14 (D.D.C. filed March 2, 1993); In the Matter of MCI Telecommunications Corp. Tariff Practices, MCI Petition for Declaratory Ruling (filed with Commission February 22, 1993).

Nonetheless, the Commission purports to be investigating this claim for the pre-1989 period. AT&T's competitors have also seized upon this contention to argue that the damages claims should be referred to the Commission under primary jurisdiction and to make generalized claims that their "good faith" and reliance should bar, or mitigate, damages. Although their claims should be rejected as a matter of law, the simple reality is that the competitors' conduct establishes that AT&T is threatened with irreparable harm, unless and until the Range Tariff Order is stayed.

Finally, MCI has already indicated that it will use the Range Tariff Order as an excuse to cease its very recent practice (adopted only under court order) of filing its rates. MCI has already filed a Motion with the District Court requesting that the injunction against it be vacated in light of the Range Tariff Order. MCI has argued that, as a result of that order, it cannot be deemed to be acting unlawfully "merely because MCI's tariffs do not specify all rates and charges." MCI therefore contends that the injunction should be vacated because, by ordering MCI to file all its rates, the injunction is requiring MCI to do more than is required under "current law." See Motion to Vacate Preliminary Injunction and to Dismiss the Complaint and Incorporated Memorandum of Law, AT&T v. MCI, Civil Action No. 93-1147 at 3-4 (D.D.C. filed August 24, 1993). AT&T has demonstrated to the District Court that there will not be a change in the law unless and until the Court of Appeals overrules its prior decisions and affirms the Range Tariff Order. At the

same time, a stay of the Range Tariff Order will preclude any possibility that the preliminary injunction will be vacated.

For all of these reasons, the Commission's Range Tariff Order threatens to cause AT&T substantial and irreparable competitive injury if it remains in effect. The above-described injury is more than sufficient to satisfy the requirements of a stay. This is especially so in light of the fact that under the D.C. Circuit's, and the Commission's, precedents, the degree of irreparable injury required for issuance of a stay must be assessed under a "sliding scale" that takes into account the strength of the other factors, including most especially the likelihood of success demonstrated by the applicant. See supra at 4-5. AT&T has demonstrated both an overwhelming likelihood of success on appeal and irreparable injury, and is therefore entitled to a stay of the Commission's Range Tariff Order.

III. NO OTHER PARTY WILL SUFFER SUBSTANTIAL, COGNIZABLE INJURY IF THE RANGE TARIFF ORDER IS STAYED PENDING APPELLATE REVIEW.

In contrast to the great competitive injury which the Range Tariff Order is causing AT&T, no other carrier will suffer any significant, cognizable injury if the Commission's Order is stayed. The only substantial consequence of a stay for AT&T's competitors would be to require them to file tariffs specifying all of their rates. The costs associated with such filings are trivial, in comparison to the financial injury AT&T is suffering.

Furthermore, recent events have demonstrated that requiring such ratefilings will have no disruptive effects on the services provided by these competitors. On July 7, 1993, the United States District Court for the District of Columbia issued

a preliminary injunction requiring MCI to comply with Section 203, and file tariffs specifying all of its rates. See AT&T v. MCI, Civil Action No. 93-1147, Order (D.D.C. July 7, 1993). In opposing AT&T's Motion for injunctive relief in that case, MCI had argued that requiring it to file tariffs would cause "extreme injury" and be "catastrophic." See Defendant MCI's Opposition to Plaintiff AT&T's Application for a Temporary Restraining Order, or, In the Alternative, a Preliminary Injunction at 36-37 (filed June 18, 1993) ("such an order by this court disrupting MCI's service to its customers would be catastrophic for the public interest. Such an order would, by its very nature, throw the business of every MCI customer who had contracted for these services into chaos"). Yet subsequent to issuance of the District Court's injunction, MCI has made extensive filings with no apparent effect on its service or its customers.

Indeed, the only true "harm" that AT&T's competitors will suffer if the stay is granted is that they will be forced to comply with the law by filing specific rates, and compete with AT&T on even terms. That, however, is not "injury" within the meaning of the law -- AT&T's competitors cannot claim that equity requires they be permitted to continue their illegal behavior. The only cognizable costs that issuance of a stay will impose -- the costs associated with filing tariffs -- are thoroughly outweighed by the substantial competitive injury that the Range Tariff Order is imposing on AT&T.

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF A STAY.

Finally, the public interest, as expressed in enactments of Congress and opinions of the courts, clearly favors issuance of a stay. Congress has through the tariffing requirements of Section 203 and the anti-discrimination requirement of Section 202(a) of the Communications Act established that the filing of tariffs by all common carriers -- and the carrier's obligation to make available through tariffed filings the same opportunities and benefits to all similarly situated customers -- is in the public interest. See 47 U.S.C. §§ 202(a), 203; see also Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. at 130-36 (corresponding tariff filing provisions of ICA essential to public interest goals embodied in Act). The D.C. Circuit has similarly recognized that the filing of tariffs specifying all rates is essential to preventing the unreasonable or discriminatory rates which the Communications Act forbids. See Regular Common Carrier Conference, 793 F.2d at 379 ("[w]ithout [the ratefiling requirement] it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory").

Section 203 is thus central to the entire regulatory structure of Communications Act; and the Range Tariff Order represents the latest effort by the Commission to free AT&T's competitors from the core requirements of that provision. The Order should therefore be stayed until the Court of Appeals has at the least had an opportunity to review it.

CONCLUSION

For the reasons stated, the Commission's order should
be stayed pending appeal.

Respectfully Submitted,

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