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December 19, 1996

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DEC 19 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

Re: Ex Parte Presentation in CC Docket No. 96-61

Dear Mr. Caton:

Today Kristen Thatcher and I, representing AT&T, met with Susan O'Connell, Senior Legal Advisor; Kerry Murray, Senior Legal Advisor; and Mark Uretsky, Chief Economist, all with the International Bureau, to discuss AT&T's views expressed in its comments and reply comments submitted in the above-referenced proceeding. Additionally, we discussed the problems presented by the Commission's decision not to allow carriers to detariff the international portion of offerings including both international and domestic services. The attached document was also used in our discussion.

Two copies of this letter are being submitted to the Secretary of the Federal Communications Commission in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Sincerely,

Judy Argentieri

cc: Susan O'Connell
Kerry Murray
Mark Uretsky

Attachment

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List ABCDE

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July 17, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RECEIVED
JUL 17 '96
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation -- CC Docket No. 96-61

Dear Mr. Caton:

Today AT&T provided copies of the attached document to Richard Welch, Chief, Policy Division, Common Carrier Bureau, and to Melissa Waksman, Christopher Heimann, Jordan Goldstein, and Patrick DeGraba, also of the Policy Division of the Common Carrier Bureau.

Two copies of this Notice, along with the attached letter, are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

Judy Argentieri

Attachment

cc: R. Welch
M. Waksman
C. Heimann
J. Goldstein
P. DeGraba

AT&T Ex Parte Presentation -- CC Docket No. 96-61

## Permissive Detariffing And The Filed Rate Doctrine

Although a majority of commenters in CC Docket No. 96-61 support permissive detariffing, a few commenters continue to support mandatory detariffing,[1] at least for negotiated service arrangements, based on the purported concern that unless detariffing were mandatory, carriers could continue to file tariffs and invoke the filed rate doctrine to make unilateral changes to carrier-customer deals. A brief analysis of the filed rate doctrine, however, makes plain that this "problem" is chimerical. The filed rate doctrine is a product of a specific legal regime -- a regime of mandatory tariffs -- not a talisman that trumps all contractual agreements. As explained below, under a permissive detariffing regime, a written contract could specify that it is controlling over subsequent tariff filings, and the customer could then assert the contract as a defense to any claim based on such filed tariffs.

The filed rate doctrine was the product of two interrelated subsections of the Interstate Commerce Act (ICA). First, the ICA required that carriers make public filings disclosing their rates. Second, and correlatively, carriers were prohibited from charging or collecting any rates other than filed rates. These two requirements served as the model for Sections 203(a) and (c) of the Communications Act.[2] The purposes of the tariff requirements of both the ICA and the Communications Act were "to render rates definite and certain, and to prevent discrimination and other abuses"[3] by ensuring that all customers paid the same charges -- the filed rate -- for the same service. In numerous decisions, the Supreme Court construed these requirements to mean that "the rate of the carrier duly filed is the only lawful rate."[4]

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1 As explained in its comments in this docket, and in its July 10, 1996 ex parte, AT&T does not believe that the Commission may lawfully order mandatory detariffing, for two reasons. First, the Commission's authority under Section 10 permits it to refrain from requiring tariffs, but does not extend to prohibiting the filing of tariffs. Second, because the record establishes that mandatory detariffing would impose enormous costs on carriers and customers, particularly with respect to casual calling and services provided to residential and small business customers, with no countervailing benefits that could not be achieved through permissive detariffing, a mandatory detariffing rule would not be "in the public interest."

2 MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994).

3 Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990) (citing Arizona Grocery Co. v. Atchison, T. & S.F.R.R. Co., 284 U.S. 370, 384 (1932)).

4 E.g., id. at 127, quoting Louisville & Nashville RR Co. v. Maxwell, 237 U.S. 94, 97 (1915).

The Supreme Court's decisions make clear that that the filed rate doctrine necessarily derives from the requirement that all rates be filed. The sole purpose of the filed rate doctrine is to enforce a regime in which tariff filings are mandatory. As the Supreme Court explained in Maislin, allowing a carrier to charge other than filed rates would "render nugatory" the statutory requirement that all rates be filed.[5] The filed rate doctrine thus reduces to a syllogism: If a rate must be filed in order to be valid, then unfiled rates cannot be valid.

By exercising its statutory forbearance authority to adopt permissive detariffing, the Commission would eliminate the major premise of the syllogism -- the requirement that all rates be filed. Valid and enforceable rates can be established through mechanisms other than filed tariffs, such as through unfiled contracts. There is simply no basis for the assertion that the filed rate doctrine would vitiate contract rates in a permissive detariffing scheme. A carrier that had agreed to rates in an unfiled contract could no longer claim that the filed rate was the "only lawful rate."

Indeed, the courts have recognized that where the statute at issue, or the agency acting within its statutory authority, permits rates and other terms of service to be established other than through filings with the agency, the filed rate doctrine does not apply.[6] Thus, in Maislin, the Supreme Court invalidated the Interstate Commerce Commission's (ICC) "Negotiated Rates" policy based on its conclusion that the ICC had no authority to abrogate the ICA's requirement that all rates be filed. Conversely, the court's opinion makes clear that the Negotiated Rates policy could have been sustained had the ICA given to the ICC the forbearance authority which Congress has now given to the Commission in Section 10.[7]

It has nevertheless been suggested that in a permissive detariffing regime, a carrier could "voluntarily" file and attempt to enforce a tariff against a customer with which the carrier had previously entered into a written agreement providing that the contractual terms would control over any inconsistent tariff provisions. This argument, which is based on the language in Section 203(c) requiring that a carrier charge and collect its filed

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5 Maislin, 497 U.S. at 132.

6 See Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981) (recognizing that carrier must charge and collect the filed rate, "[e]xcept when the Commission [validly] permits a waiver"). In a later proceeding in Arkansas Louisiana, the Fifth Circuit observed that the Supreme Court's decision in that case "clearly recognized that the waiver provisions of [15 U.S.C. § 717(d) authorized] the Commission to waive the usual requirements of timely filing of an alteration in a rate." Hall v. FERC, 691 F.2d 1184, 1189 (5th Cir. 1982) (quotation omitted). Accordingly, Hall v. FERC expressly noted that the filed rate doctrine would not bar exercise of FERC's waiver authority. Id.

7 Maislin, 497 U.S. at 133-35.

rates, ignores the fact that the Commission's Section 10 forbearance authority extends to Section 203(c) no less than to Section 203(a). Indeed, Section 203(c) itself provides that its requirement that carriers collect their filed rates is inapplicable where "otherwise provided by or under the authority of this Act." If the Commission were to exercise its authority under new Section 10 to forbear from enforcing Sections 203(a) and 203(c) when a carrier and a customer have entered into an unfiled written agreement, and thereby adopt permissive detariffing, a carrier could not invoke the filed rate doctrine to make unilateral changes to the terms of their deal.[8]

[8] Permissive detariffing would operate in a manner analogous to the role of the Uniform Commercial Code in contracts for the sale of goods. Parties to such contracts may specify that the "default" provisions in the UCC do not govern their relationship, and instead may specify alternative terms. Similarly, carriers and customers may provide that any or all of the terms in the contract apply in lieu of otherwise applicable tariff provisions.