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November 24, 1998

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Chairman William E. Kennard
Federal Communications Commission
1919 M St. NW
Washington, DC 20554

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

Dear Chairman Kennard:

On behalf of the Ad Hoc Telecommunications Users Committee, the California Bankers Clearinghouse Association, The New York Clearing House Association L.L.C., ABB Business Services, and The Prudential Insurance Company of America, we urge the Commission to rule promptly on the petitions for reconsideration now before it in the above-referenced proceeding so that the issue of whether the Commission may impose mandatory detariffing can move forward for resolution by the courts. Our clients are large users of interstate interexchange telecommunications services and associations of such users who fully support the Commission's decision to forbear from the tariff filing requirements. This letter addresses two issues – the pernicious nature and effects of the Filed Rate Doctrine, and the interest of some Commissioners in retaining a rate publication requirement as a consumer protection measure even after tariffs *per se* are abolished.

The Filed Rate Doctrine

The Commission's conclusion that traditional regulation of nondominant interexchange carriers is not necessary to ensure just and reasonable rates echoes and is required by a series of deregulatory actions taken over the past five years, including instituting a one-day tariff notice period, eliminating price cap regulation, and presuming tariffs to be lawful without reviewing cost support data. In deciding to eliminate tariffs, the Commission rightly found that they undermine competition by facilitating price coordination among competing carriers. In this context, the Commission correctly concluded that forbearing from the tariff-filing requirement would not undermine its commitment to protecting consumers from anti-competitive practices.

Mandatory detariffing is in fact essential to protect both business and residential consumers. Under the current regime, carriers can and do unilaterally

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change, on a whim, tariff prices, terms and conditions they find inconvenient simply by filing changes to the applicable underlying tariffs. Notice to customers of relevant, adverse changes is the exception, not the rule. One-day notice periods preclude even a theoretical opportunity for protest and the process of filing and prosecuting a formal complaint is costly and time-consuming. In addition, because tariffs are presumed lawful and a contested tariff provision remains in effect pending the outcome of a complaint, the enforcement process provides little prospect for relief.

Under the filed rate doctrine, tariffed provisions – however one-sided and unreasonable – govern the relationship between the parties, to the point where, unlike any other area of commerce, carriers are free to repudiate the promises of their representatives, even if delivered in written contracts signed by an officer of the company, without fear that they will be held to their word. Our pleadings provided numerous examples of unilateral tariff amendments that would be patently unlawful in the absence of the tariff regime and harm customers, including provisions that:

- Add new charges;
- Automatically renew multi-year service agreements, even when the customer did not agree (and actually does not know) that the automatic renewal has been added to its "agreement";
- Significantly increase customer liability for early termination of multi-year agreements;
- Permit a carrier to terminate service prior to the expiration of the agreed upon term;
- Compel arbitration of disputes on extraordinarily onerous terms (*e.g.*, the customer has no right to a copy of its bills, the arbitrator is compelled to presume the justness and reasonableness of the carrier's tariffs, and the carrier cannot be prevented from cutting off service during the arbitration); and
- Are facially designed to evade the Commission's resale policies;

Nor are problems of this nature limited to large users. Sprint was sued by customers of its "Free Fridays" program, which provided free long-distance calls on Friday to anywhere in the world for one year. Four months into the promotion, Sprint unilaterally eliminated ten countries from the list. Customers who call those ten countries brought a class action charging breach of contract, but their claim was dismissed. In an opinion by Judge Posner (attached), the Seventh Circuit held that because the program was embedded in a filed tariff, Sprint could change it at any time without notice, regardless of its representations to customers. In order to prevent this, a customer would have had to secure rejection of the amended tariff. Under the one-day notice period now in effect consumers had no opportunity to object to Sprint's unilateral change of its promotion, and because of the filed tariff doctrine they could not argue that contract rights, promissory estoppel, or any of the other doctrines that protect contracting parties from unilateral changes of this nature prevented Sprint from acting as it did.

Even more troubling, the Supreme Court recently implied in *AT&T v. Central Office Telephone* (attached) that the filed rate doctrine applies to *all* material terms of the agreement between a carrier and a customer, and not just to rate and rate-affecting terms. This is especially troubling because the tariff "options" that reflect the prices of individually negotiated agreements, such as AT&T's Contract Tariffs and MCI's Special Customer Arrangements, are prepared by the carriers and virtually never reflect all of the terms and conditions of the underlying agreements. Depending upon how *COT* is construed, many of the terms negotiated by large business and government users with carriers could be void because the carrier did not file them and/or can be unilaterally changed by the carrier without notice to the customer and without a realistic opportunity for redress. To ensure that the filed rate doctrine does not apply on a going forward basis, it is imperative that the Commission reaffirm its order mandating detariffing.

The Publication of Consumer Rates

The principal issue raised in the petitions for further reconsideration now pending before the Commission is whether to reinstate public disclosure of the rates of non-dominant carriers. There is no public filing of charges or rates for credit cards, cellular services, or virtually any other competitively offered service purchased by tens of millions of residential and small business customers, and we do not believe that public disclosure of the rates for long-distance service is necessary to protect consumer interests. The market ensures that pricing information is widely disseminated and readily available -- through mass market advertising, direct mail solicitations, consumer publications, the news media and (most recently) the Internet.

If the Commission's concern is consumer protection, there are a variety of measures that would be of greater benefit to consumers than public disclosure of rates, which the carriers would presumably continue to be able to change on short or no notice. The Commission could, for example:

- Prohibit carriers from misrepresenting the rates offered by themselves or their competitors;
- Require carriers to provide information that is likely to affect a consumer's decision to purchase service, such as material time period or country restrictions, other conditions of service; policies concerning refunds; limitations on cancellation, etc.;
- Prohibit carriers from advertising rates that contain hidden terms and conditions that render the rates deceptive or misleading, such as advertising low per-minute rates in large print while failing to disclose – or disclosing in small print -- high flat monthly charges;
- Require carriers to clearly and conspicuously state, in plain English, the rates, terms and conditions for each plan they offer;

- Require carriers that offer promotions to make them available for a reasonable period of time, and prohibit them from terminating such plans for existing customers abruptly or after a short period;

- Require carriers to notify consumers through clearly written, prominent bill inserts of changes in their rate plans, and give customers the option of switching plans or providers without penalty if a material, adverse change is made,

- Reiterate that after detariffing is accomplished, remedies for unfair and deceptive acts and practices are (and should continue to be) available under state consumer protection laws,

- Consider a rulemaking to determine whether additional consumer protection measures are necessary to protect subscribers.

If the Commission concludes that a public disclosure requirement is desirable for consumer protection purposes, we urge it to tailor this requirement so that it does not undermine the justifications for detariffing – doing away with the one-sided and unjust filed rate doctrine and ending anti-competitive price/term signaling.

First, the Commission should make it clear that a decision to require public disclosure does not imply that it believes tariffs serve the public interest. Any public disclosure benefits that accompany the filing of tariffs are more than offset by the harm caused by the filed rate doctrine. In addition, although tariffs do provide the information that would be subject to public disclosure, this disclosure is theoretical, at best, when it comes to consumers. Few, if any, consumers actually use the Commission's tariff reference room, and the public disclosure contemplated by the Commission should be specifically designed to make relevant information available to consumers in a manner they can actually use. For this reason, we recommend that the Commission require that relevant information be posted on the Internet and updated daily. Otherwise, the information may be made available in a remote room in a distant location during limited hours of the day, where it can be copied for a fee by "interested parties" -- who, during the brief period in which detariffing with disclosure was in effect, were almost exclusively other carriers.

Second, the Commission should make it clear that any *disclosure* requirement it adopts is not a *tariff* requirement. As we observed in comments filed in response to the petitions for further reconsideration, carriers have intentionally created confusion on this issue. MCI opened a so-called "Tariff Reference Room" in Washington D.C. at which members of the public can examine or purchase (for 25¢ a page) a copy of MCI's "Domestic Price Guide." The cover page of the Domestic Price Guide states that the document "is being filed" in accordance with the detariffing Order, and that ***"the terms and conditions . . . reflected in the Guide constitute a tariff"*** that is being maintained at MCI's offices instead of those of the Commission (emphasis supplied). Of course, MCI's Domestic Price Guide was *not* a tariff. It was a compendium of one-or-two-page summaries of the prices for domestic interstate interexchange services that had been negotiated with individual customers. MCI's description of this document as a "tariff" and its statement that the document had been "filed" in a "Tariff Reference Room" was clearly intended to create the (inaccurate) impression that the document had official status, was not negotiable, and was alterable by the carrier at any time in a manner that would be binding upon subscribers. In short, it was intended to preserve for MCI the benefits of the discredited filed rate doctrine. We urge the Commission to make it clear that public disclosure is not intended to preserve the unjust and unreasonable prerogatives that carriers enjoyed under the tariff regime after the elimination of Commission review and waiting periods.[1]

Third, the Commission should make it clear that a decision to reinstate public disclosure does not mean it has reconsidered its conclusion that tariffs may (and, in our experience, do) facilitate price coordination. To limit the opportunity for price and term coordination while still protecting consumers, the Commission should specifically limit public disclosure to mass market offerings, targeting the consumers and small business users that are the focus of Commission concern. Large users obtain market rates for communications as they do for other goods and services -- by soliciting competitive bids from multiple vendors. Public disclosure of individual agreements facilitates *de facto* bid rigging – by seeing what their competitors have offered the last X customers in a particular size range, carriers learn how much they "should" charge and what terms they can refuse to offer because "no one else is doing that."[2] The risk of anti-competitive price coordination is much greater with respect to the individually negotiated service agreements of large users than in the case of mass market offerings available to consumers and small businesses (which become widely known immediately upon their introduction). While the risk of price coordination remains for mass market offerings subject to a limited public disclosure requirement, the Commission may reasonably conclude that, despite that risk, the public interest is served by eliminating the filed rate doctrine while maintaining public disclosure for consumers of mass market services, at least for an interim period.

The Commission's decision to reaffirm the conclusions it has already reached (twice) in the detariffing proceeding will be of enormous benefit to both large and small users. As a result of the judicial stay of the Commission's decision, however, the benefits of detariffing will be delayed pending the completion of judicial review. For this reason, we encourage the Commission to adopt and implement *permissive* detariffing while the litigation is pending.[3] If the

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1 Limiting the public disclosure requirement to rates, and not terms and conditions, would also help achieve this objective.

2 Required public disclosure of terms and conditions is also used by the carriers as a weapon in negotiations to resist particular terms of interest of given users: "I'd love to agree to that, but I'd have to disclose it and then everyone would demand it."

3 Since the original detariffing order was adopted in October of 1996 the Commission has, without objection, permissively detariffed interstate access services and certain international

Commission allows for valid and enforceable rates and terms to be established through mechanisms other than filed tariffs, a carrier could no longer claim that the filed rates and terms are the only lawful rates and terms. AT&T, in an *ex parte* presentation dated July 17, 1996 in this proceeding, agreed that if a carrier and a customer entered into an unfiled written agreement under a regime permitting such an agreement the carrier could not invoke the filed rate doctrine to make unilateral changes to the terms of its contract.

We hope these comments are useful, and look forward to the Commission's decision in this matter.

Sincerely,

Henry D. Levine
Valerie Yates

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Kathryn C. Brown
Thomas Power
James L. Casserly
Kevin J. Martin
Kyle D. Dixon
Paul Gallant
Lawrence E. Strickling
Carol Mattey
Jordan Goldstein

Attachments

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services when they are provided by non-dominant carriers. *See, e.g., Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers.* Memorandum Opinion And Order And Notice Of Proposed Rulemaking, CCB/CPD No. 96-3; CCB/CPD No. 96-7; CC Docket No. 97-146, 12 FCC Rcd 8596 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, P 77 (rel. Oct. 31, 1996).

133 F.3d 484 printed in FULL format.

Suzanne Cahnmann, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. Sprint Corporation, Defendant-Appellee.

No. 97-2088

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

133 F.3d 484; 1998 U.S. App. LEXIS 118; 11 Comm. Reg. (P & F) 57

November 7, 1997, Argued

January 7, 1998, Decided

SUBSEQUENT HISTORY:
Certiorari Denied June 26, 1998, Reported at: *1998 U.S. LEXIS 4292.*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 96 C 5129. James B. Zagel, Judge.

DISPOSITION: Affirmed.

CORE TERMS: tariff, customer

COUNSEL: For SUZANNE CAHNMANN, Plaintiff - Appellant: Robert J. Stein, III, KRISLOV & ASSOCIATES, Chicago, IL USA.

For SPRINT CORPORATION, Defendant - Appellee: David A. Shaneyfelt, HOOGENDOORN, TALBOT, DAVIDS & GODFREY, Chicago, IL USA. Brant M. Laue, ROUSE, HENDRICKS, GERMAN, MAY & SHANK, Kansas City, MO USA.

JUDGES: Before Posner, Chief Judge, and Easterbrook and Kanne, Circuit Judges.

OPINIONBY: POSNER

OPINION: [*486] Posner, Chief Judge. Sprint, a communications common carrier regulated by the FCC, was sued by customers of Sprint's "Fridays Free" long-distance calling promotion in a class action originally filed in an Illinois state court. The suit was removed to federal district court, which entered judgment for Sprint. The district judge ruled that although the complaint does not allege any violation of federal law and there is no diversity of citizenship, the suit was removable because the sort of claim that the class is making can arise only under federal, and not under state, law. Characterizing the federal claim as one to invalidate [**2] a tariff filed with the FCC, the judge gave judgment for Sprint on the pleadings, on the ground that he would be invading the FCC's jurisdiction if he invalidated the tariff.

In January 1996, Sprint had filed with the FCC a tariff setting forth the terms of a new service intended to attract long-distance customers to Sprint from other telephone companies. The tariff offered, to small businesses that agreed to subscribe to Sprint for a minimum of $ 50 in long-distance calls per month, up to $ 1,000 worth per month of free long-distance calls on Fridays to anywhere in the world for one year. Four months later, Sprint amended the tariff to delete ten countries, including Israel and China, from the offer of free Friday calling, although under the amended tariff customers receive a 25 percent discount off Sprint's regular rates for all calls (not just Friday calls) to nine of the countries (all but the Dominican Republic, for reasons not disclosed by the record).

The class members, several thousand in number, are "Fridays Free" customers who are continuing to call one or more of the ten countries and paying more, on balance, than they would have had to pay had the original tariff remained [**3] in force. Sprint claims to have had good reasons, having to do with congested phone lines and customer fraud (residential customers pretending to be small businesses), for amending the tariff. But there is no evidence on the issue, and for purposes of this appeal we assume that Sprint had no good reason for the amendment--or, worse, that it was planning from the start to renege on the offer of a full year of free Friday calls to anywhere in the world.

The first count in the complaint charges that Sprint broke its contract with its "Fridays Free" customers. It promised them the full year; it received consideration for the promise in the form of the minimum [*487] monthly paid calls; it broke its promise. Q.E.D. The plaintiff acknowledges that Sprint might interpose as a defense that in reneging on its promise it was merely complying with the amended tariff; that the Communications Act requires a common carrier to comply with its tariffs, *47 U.S.C.* § *203*(c); *MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 230, 129 L. Ed. 2d 182, 114 S. Ct. 2223 (1994);* and that the defense might therefore be a good one (though she thinks not). But she points out that a suit cannot [**4] be removed to federal court merely on the basis of a federal defense. *Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841, 103 L. Ed. 2d 924, 109 S. Ct. 1519 (1989); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-14, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983); Blackburn v. Sundstrand Corp., 115 F.3d 493, 495 (7th Cir. 1997).*

Public utility regulation and common carrier regulation (essentially the same form of regulation, the term "common carrier" being generally used of firms providing transportation or communications and "public utility" of firms providing electricity or gas) have been rolled back very far in recent years. But a piece of it survives in its pristine form in the provision of long-distance telephone service. The terms and conditions of service are set forth in "tariffs," which are essentially offers to sell on specified terms, filed with the FCC and subject to modification or disapproval by it. Once a tariff is filed and until it is amended, modified, superseded, or disapproved, the carrier may not deviate from its terms. *Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520, 83 L. Ed. 953, 59 S. Ct. 612 (1939); Keogh [**5] v. Chicago & Northwestern Ry., 260 U.S. 156, 163, 67 L. Ed. 183, 43 S. Ct. 47 (1922); Norwest Transportation, Inc. v. Horn's Poultry, Inc., 23 F.3d 1151, 1153 (7th Cir. 1994).*

The original declared purpose of the tariff system was to prevent the utility or carrier from discriminating in price or service among its customers; a covert purpose was to discourage price competition by preventing secret discounts (tariffs are published documents). George W. Hilton, "The Consistency of the Interstate Commerce Act," 9 Journal of Law and Economics 87 (1966). These purposes are no longer widely supported, but the rule remains, vestige though it is: the carrier may not deviate from the terms of the tariff. It doesn't matter how eager both the carrier and its customers are to strike a special, off-tariff deal, *Maislin Industries v. Primary Steel, Inc., 497 U.S. 116, 130-31, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990),* or even whether the customer reasonably relied on the carrier's promise to file the negotiated rate as a tariff. See *id. at 124 n. 7.*

What this means is that the filed tariff is the contract between the plaintiff (and the other members of the class) and Sprint. Or rather [**6] tariffs, since there were two. The plaintiff treats the first tariff, the one filed in January of 1996, as the contract between her and Sprint. If Sprint violated the tariff to her detriment, she would be entitled to proceed against Sprint under federal law. She could either seek reparations in an administrative proceeding before the FCC, or she could bring a suit for damages directly under the Communications Act, *47 U.S.C. §§ 206*, 207; *Stiles v. GTE Southwest Inc., 128 F.3d 904, 907 (5th Cir. 1997); Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., 953 F.2d 1431, 1435 (3d Cir. 1991),* though if an issue arose in the suit concerning the validity of a tariff the court would interrupt the litigation and, pursuant to the doctrine of primary jurisdiction, compel the parties to resort to the FCC for a determination of that validity, after which the suit could resume if any other issues, such as relief, remained. *United States v. Western Pacific R.R., 352 U.S. 59, 63-65, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956); City of Peoria v. General Electric Cablevision Corp., 690 F.2d 116, 120-21 (7th Cir. 1982); National Communications Ass'n, Inc. v. American Tel. & Tel. [**7] Co., 46 F.3d 220, 222-23 (2d Cir. 1995); Allnet Communication Service, Inc. v. National Exchange Carrier Ass'n, Inc., 296 U.S. App. D.C. 156, 965 F.2d 1118 (D.C. Cir. 1992).* Sprint would no doubt defend against the suit on the basis of the amended tariff, which it was duty-bound to comply with. The plaintiff would respond to this defense by asking the FCC to hold the [*488] second tariff invalid because unreasonable, see, e.g., *Maislin Industries v. Primary Steel, Inc., supra, 497 U.S. at 129 n. 10,* and that would be the setting in which Sprint's reasons for amending the original tariff would be ventilated and evaluated.

The plaintiff could thus have obtained all the relief to which she is entitled on the contract count--free calls to the ten countries for a full year, if her contract claim is sound--in a judicial or administrative or combined judicial and administrative proceeding under the Federal Communications Act. The issue is whether her federal remedy is exclusive or whether she can instead seek relief under Illinois' common law of contracts.

The Act does not say, and in fact contains a provision saving other remedies. *47 U.S.C. § 414.* Although the provision is broadly [**8] written, if it were interpreted literally as permitting a state-law breach of contract suit regarding a tariffed service it would impair the Act's policy of confining telecommunications common carriers to tariffed services and vesting the FCC with primary jurisdiction to determine the validity of tariffs; indeed, it would effectively nullify the tariff provisions of the Communications Act. Such interpretations of savings clauses in common carrier statutes--interpretations that would empower state courts to gut the federal regulatory scheme or would place the carrier under inconsistent obligations-are therefore rejected. See for the general proposition *Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 298-300, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976); Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 129-30, 59 L. Ed. 867, 35 S. Ct. 484 (1915),* and *Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446, 51 L. Ed. 553, 27 S. Ct. 350 (1907)* ("the act cannot be held to destroy itself"), and for its application to section 414 of the *Communications Act Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997 (6th Cir. 1994),* and *MCI Telecommunications Corp. [**9] v. Garden State Investment Corp., 981 F.2d 385, 387-88 (8th Cir. 1992).* The plaintiff in effect wanted the state court to knock out Sprint's second "Fridays Free" tariff on the ground that it violated the contract created by the original offer of the service and the plaintiff's acceptance of the offer. Such a procedure, bypassing the FCC, cannot have been the sort of thing intended by the savings provision, the proper operation of which is illustrated by *In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633-34 (6th Cir. 1987).* A carrier was accused of having represented that its rates were lower than a competitor's without revealing that, unlike the competitor, it charged its customers for their uncompleted calls. This was a claim of simple fraud, and its adjudication did not require determining the validity of a tariff.

But all that this analysis establishes is that the plaintiff cannot look to the savings provision as a source of a right to challenge the second tariff under state law. Left unresolved is whether the federal Act extinguishes the right to bring a suit for breach of contract under state law when the effect of the suit would be to challenge a tariff. [**10] We think the Act does extinguish that right--that it does not just provide a defense that the carrier might interpose in a suit under state law.

Remember that Sprint's tariff (either in its original form or as amended) is the contract. Any rights that the plaintiff has to complain about a breach of contract are rights granted to her by the original tariff and protected against the amendment by the principle of reasonableness that the FCC uses to determine the validity of a tariff (or, as here, an amendment to a tariff) when it is challenged. A tariff filed with a federal agency is the equivalent of a federal regulation, *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra, 306 U.S. at 520; Western Union Int'l, Inc. v. Data Development, Inc., 41 F.3d 1494, 1496 (11th Cir. 1995); MCI Telecommunications Corp. v. Garden State Investment Corp., supra, 981 F.2d at 387,* and so a suit to enforce it, and even more clearly a suit to invalidate it as unreasonable under federal law (both types of suit being comprehended in the plaintiff's contract count), arise under federal law. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535, 75 L. Ed. 2d 260, 103 S. Ct. [**11] [*489] 1343 (1983)* (per curiam); *Louisville & Nashville R.R. v. Rice, 247 U.S. 201, 62 L. Ed. 1071, 38 S. Ct. 429 (1918); MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1093-96 (3d Cir. 1995); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968).* (*MCI Telecommunications Corp. v. Credit Builders of America, Inc., 980 F.2d 1021 (5th Cir. 1993),* holds to the contrary, but is impossible to reconcile with Supreme Court authority-- the court failed even to cite Thurston or Rice.) And since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce. Federal law does not merely create a right; it occupies the whole field, displacing state law. See *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, supra, 463 U.S. at 23-24; Bartholet v. Reishauer A.G. (Zrich), 953 F.2d 1073, 1075 (7th Cir. 1992).*

It is not as if the "Fridays Free" tariff had promised free calls and another provision of a contract between the plaintiff [**12] and Sprint had promised to sell the plaintiff a bushel of Ugli fruit at market price. If the promises were severable, *Coplay Cement Co. v. Willis & Paul Group, 983 F.2d 1435, 1439 (7th Cir. 1993); In re Balfour MacLaine Int'l Ltd., 85 F.3d 68, 81 (2d Cir. 1996),* the plaintiff could sue to enforce the latter promise, though not the former. There is no space between the contract and the tariff here, as there was, the Ninth Circuit found, in the arrangement between carrier and customer at issue in *Central Office Telephone, Inc. v. American Tel. & Tel. Co., 108 F.3d 981, 989-90 (9th Cir. 1997),* cert. granted, *118 S. Ct. 622, 139 L. Ed. 2d 507, 1997 U.S. LEXIS 7692 (U.S. 1997);* and so there is no room for a state law claim of breach of contract. There probably was no room in Central Office either. The dissenting judge pointed out that AT&T was forbidden to offer nontariff services, so there could be no breach of contract claim based on the offer--because there could be no contract. *108 F.3d at 996.* But that is a detail so far as the present case is concerned. "Although a user's refusal to pay charges fixed by a tariff will often arise in the context of a broken contract, the carrier's claim for payment [**13] is necessarily based on the filed tariff." *MCI Telecommunications Corp. v. Garden State Investment Corp., supra, 981 F.2d at 387.* Equally, although a carrier's refusal to honor the terms of a tariff (in this case, the first "Fridays Free" tariff) will often arise in the context of a broken contract, the customer's claim for damages resulting from that refusal is necessarily based on the filed tariff, with the added wrinkle that to prevail the customer here had to knock out the second tariff, which she could do only under the Communications Act.

We do not think that *Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 53 L. Ed. 126, 29 S. Ct. 42 (1908),* on which the plaintiff puts heavy weight, is inconsistent with our conclusion. True, that case, which the Supreme Court held arose under state law, is very similar to this one (it involved lifetime free passes); and the fact that it arose in the railroad industry rather than the communications industry is immaterial. But there is a crucial difference. The requirement that the carrier provide the service in question in accordance with tariffed terms didn't come into the law until after the contract between the railroad and the [**14] plaintiffs was made and went into effect, so the plaintiffs' claim couldn't have been thought an effort to enforce a tariff or an appeal to the regulatory commission's power to invalidate one. It was a state-law claim whether or not subsequently extinguished by the passage of the federal law putting the subject matter of the contract under tariff regulation.

Although in our case the claim of breach of contract can be maintained only under federal law, the plaintiff emphatically disclaims any intention of prosecuting a federal claim; and it might seem therefore that the district court could not acquire jurisdiction and so should have sent the case back to the state. But the only reason to do that would have been to permit the plaintiff to proceed in state court on her breach of contract claim. Yet we have just seen that this claim can be maintained only under federal [*490] law. If on remand to the state court the plaintiff tried to press the claim in that court, she would be trying to litigate what could only be a federal claim, however denominated by the plaintiff, and so it would again be removable to federal court. The entry of judgment for the defendant was necessary and proper to end [**15] the cycle. This is an uncontroversial application of the "artful pleading" doctrine. See *In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 611 (7th Cir. 1997).* If a claim can arise only under federal law, because federal law has extinguished the state law basis under which it might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint.

A separate question is whether the plaintiff's other counts, which charge fraud, can be said to arise under state law. If so, the district judge, when he dismissed the breach of contract claim on the ground that it could only be federal (and the plaintiff didn't want to remain in federal court to press a federal claim), should have relinquished jurisdiction over the fraud counts, now reconceived as supplemental state law claims to a federal claim dismissed before trial. *28 U.S.C. § 1367*(c)(3); *Korzen v. Local Union 705, 75 F.3d 285, 289 (7th Cir. 1996); Rhyne v. Henderson County, 973 F.2d 386, 395 (5th Cir. 1992).* The plaintiff charges fraud under several Illinois fraud and consumer protection statutes as well as under the state's common [**16] law of torts, but there is no need to discuss the statutes separately. The charge is that Sprint misrepresented to prospective customers that the "Fridays Free" service would entitle them to a full year of free calls on Friday to any country in the world, rather than four months of free calls on Friday to any country in the world and eight months of free calls on Friday to any country in the world minus ten and a 25 percent discount on calls to nine of these countries any day of the week. It is not clear from the complaint whether the misrepresentation consists of a failure to disclose Sprint's right under the Communications Act to amend the tariff or a failure to disclose that Sprint never intended to keep the original tariff in force for a full year.

The principal relief sought is an injunction against continued misrepresentation, an injunction requiring Sprint to honor the promise in the original tariff, and compensatory damages. The request for an injunction against misrepresentation is a throwaway, since there is no suggestion that Sprint is concealing the terms of the amended tariff from any members of the class. With that put to one side, the relief sought by the fraud counts [**17] is identical to that sought by the contract count: the free calls promised in the original tariff. It seems, then, that in this case "fraud" is just another name for "breach of contract," so that to allow the plaintiff and her class to proceed in state court under state fraud law would allow the original tariff to be enforced, and the amended tariff set aside, in a suit under state law, which we just said is not allowed. Cf. *Aero Trucking, Inc. v. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979); H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 489-90 (8th Cir. 1992); Marco Supply Co. v. AT&T Communications, Inc., 875 F.2d 434, 436 (4th Cir. 1989)* (per curiam). It would be just another form of artful pleading, as we know from cases in other areas of law in which plaintiffs seek to avoid federal jurisdiction over contract claims by recharacterizing them as fraud claims. E.g., *Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985); Anderson v. Humana, Inc., 24 F.3d 889 (7th Cir. 1994).*

This may seem a harsh conclusion. One can imagine Sprint making egregious misrepresentations to poor people ignorant of tariff regulation--promising [**18] for example a lifetime of free calls for an advance fee of $ 5,000, followed the next day by the filing of a tariff changing "lifetime" to "one month." But we know from Maislin that even reasonable reliance on a carrier's representation will not allow a suit complaining about the representation to be litigated under state law if the representation concerns a tariffed service. And the victims of Sprint's misrepresentation (if that is what it was) would still have a remedy, only under federal rather than state law, under the same provisions that authorize suits to enforce and to invalidate tariffs, see *47 U.S.C. § 204;* Western Union Telegraph [*491] *Co. v. FCC, 259 U.S. App. D.C. 294, 815 F.2d 1495, 1501 (D.C. Cir. 1987); American Broadcasting Cos. v. FCC, 207 U.S. App. D.C. 68, 643 F.2d 818, 822 (D.C. Cir. 1980)*-- which the hypothetical poor people's suit would be, just like the suit in this case of which our hypothetical is merely a hyperbolic variation. The plaintiffs could obtain damages and a reasonable attorney's fee, though not punitive damages. See *47 U.S.C. § 206.* From a systemic standpoint the federal remedy is preferable, since class actions of thousands or perhaps [**19] even millions of telephone subscribers, litigated in state court under state law, could disrupt the federal regulatory scheme.

Once the plaintiff's claim was properly recharacterized as a challenge to the amended tariff, the doctrine of primary jurisdiction should have been invoked and the plaintiff told to repair to the FCC. But as it is plain that the plaintiff didn't want to do this, that she wanted to stand or fall on her claim that this is really a suit under state law, the district judge was right to enter judgment for Sprint rather than merely staying the suit to allow the parties to ask the Commission for a ruling on the reasonableness of the second, the amending, tariff.

Affirmed.

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1998 U.S. LEXIS 4002 printed in FULL format.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER v. CENTRAL OFFICE TELEPHONE, INC.

No. 97-679

SUPREME COURT OF THE UNITED STATES

118 S. Ct. 1956; 1998 U.S. LEXIS 4002; 66 U.S.L.W. 4483; 12 Comm. Reg. (P & F) 439

March 23, 1998, Argued

June 15, 1998, Decided

NOTICE: [*1]
The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *108 F.3d 981*, reversed.

CORE TERMS: tariff, customer, carrier, filed-rate, tort claim, billing, state-law, long-distance, Communications Act, contract claim, derivative, tortious interference, provisioning, reseller, network, slamming, pre-empted, promised, discount, shipper, common carrier, classifications, regulations, usage, pre-empt, willful, contractual, special services, intentionally, filed-tariff

SYLLABUS: Respondent purchases "bulk" communications services from long-distance providers, such as petitioner AT&T, and resells them to its customers. Petitioner, as a common carrier under the Communications Act of 1934, must file with the Federal Communications Commission (FCC) "tariffs" containing all its "charges" for interstate services and all "classifications, practices and regulations affecting such charges," *47 U.S.C.* § *203*(a). A carrier may not "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such [tariff]." § 203(c). The FCC requires carriers [*2] to sell long-distance services to resellers under the same rates, terms, and conditions as apply to other customers. In 1989, petitioner agreed to sell respondent a long-distance service, which, under the parties' written subscription agreements, would be governed by the rates, terms, and conditions in the appropriate AT&T tariffs. Respondent soon experienced problems with the service it received, and withdrew from the contract before the expiration date. Meanwhile, it had sued petitioner in Federal District Court, asserting, inter alia, state-law claims for breach of contract and for tortious interference with contractual relations (viz., respondent's contracts with its customers), the latter claim derivative of the former. Respondent alleged that petitioner had promised and failed to deliver various service, provisioning, and billing options in addition to those set forth in the tariff, and that petitioner's conduct was willful, so that consequential damages were available under the tariff. The Magistrate Judge rejected petitioner's argument that the claims were pre-empted by § 203's filed-tariff requirements; he declined, however, to instruct on punitive damages for the tortious-interference [*3] claim. The jury found for respondent and awarded damages. The Ninth Circuit affirmed the judgment, but reversed the Magistrate Judge's failure to instruct on punitive damages and remanded for a trial on that aspect of the case.

Held: The Communications Act's filed-tariff requirements pre-empt respondent's state-law claims. Pp. 7-14.

(a) Sections 203(a) and (c) are modeled after similar provisions of the Interstate Commerce Act (ICA), and the "filed-rate doctrine" associated with the ICA tariff provisions applies to the Communications Act as well. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 229-231, 129 L. Ed.*

2d 182, 114 S. Ct. 2223. Under that doctrine, the rate a carrier duly files is the only lawful charge. *Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 59 L. Ed. 853, 35 S. Ct. 494*. Even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff. *Kansas City Southern R. Co. v. Carl, 227 U.S. 639, 653, 57 L. Ed. 683, 33 S. Ct. 391*. That this case involves services and billing rather than rates or ratesetting does not make the filed-rate doctrine inapplicable. Since [*4] rates have meaning only when one knows the services to which they are attached, any claim for excessive rates can be couched as a claim for inadequate services and vice versa. The Communications Act recognizes this in the § 203(a) and (c) requirements, and the cases decided under the ICA make it clear that discriminatory privileges are not limited to discounted rates, see, e.g., *United States v. Wabash R. Co., 321 U.S. 403, 412-413. Pp. 7-10, 88 L. Ed. 827, 64 S. Ct. 752*.

(b) This Court's filed-rate cases involving special services claims cannot be distinguished on the ground that the services they involved should have been included in the tariff. That is precisely the case here. Even provisioning and billing are "covered" by the applicable tariff. Nor does it make any difference that petitioner provided the same services, without charge, to other customers; that only tends to show that petitioner acted unlawfully with regard to the other customers as well. Pp. 10-11.

(c) The analysis used in evaluating respondent's contract claim applies with equal force to its wholly derivative tortious-interference claim. The Communications Act's saving clause does not dictate a different result. It copies [*5] the ICA's saving clause, which has long been held to preserve only those rights that are not inconsistent with the statutory filed-rate requirements. *Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163, 67 L. Ed. 183, 43 S. Ct. 47*. Finally, respondent's argument that petitioner's willful misconduct makes the relief awarded here consistent with the tariff is rejected. Pp. 12-14.

108 F.3d 981, reversed.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion. O'CONNOR, J., took no part in the consideration or decision of the case.

OPINIONBY: SCALIA

OPINION: JUSTICE SCALIA delivered the opinion of the Court.

Respondent Central Office Telephone, Inc. (COT), a reseller of long-distance communications services, sued petitioner AT&T, a provider of long-distance communications services, under state law for breach of contract and tortious interference with contract. Petitioner is regulated as a common carrier under the Communications Act of 1934, 48 Stat. 1064, as amended, *47 U.S.C. § 151* et seq. The issue before us is whether the federal [*6] filed-tariff requirements of the Communications Act pre-empt respondent's state-law claims.

I

Respondent purchases "bulk" long-distance services -- volume-discounted services designed for large customers -- from long-distance providers, and resells them to smaller customers. Like many other resellers in the telecommunications industry, respondent does not own or operate facilities of its own; it is known as a "switchless reseller," which is the industry nomenclature for arbitrageur. Of course respondent passes along only a portion of the bulk-purchase discount to its aggregated customers, and retains the remaining discount as profit.

Petitioner provides long-distance services and, as a common carrier under the Communications Act, § 153(h), must observe certain substantive requirements imposed by that law. Section 203 of the Act requires that common carriers file "schedules" (also known as "tariffs") containing all their "charges" for interstate services and all "classifications, practices and regulations affecting such charges." § 203(a). The Federal Communications Commission (FCC), which is the agency responsible for enforcing the Act, requires carriers to sell long-distance [*7] services to resellers such as respondent under the same rates, terms, and conditions as apply to other customers.

Prior to 1989, petitioner had developed a type of long-distance service known as Software Defined Network (SDN), designed to meet the needs of large companies with offices in multiple locations. SDN established a "virtual private network" that allowed employees in different locations to communicate easily. For example, an employee in Washington could call a co-worker in Denver simply by dialing a four-digit extension. SDN customers, in exchange for a commitment to purchase large volumes of long-distance communication time, received this service at a rate much below what it would otherwise cost.

Several changes to SDN in 1989 made the service extremely attractive to resellers, such as respondent, who aggregate smaller customers. Petitioner developed the capability to allow customers to use ordinary ("switched access") telephone lines to connect locations to their SDN networks. Previously, locations had to be connected over special "dedicated access" lines, which are direct lines from a location's telephone system to petitioner's long-distance network, bypassing the switches [*8] of the local exchange carrier. Dedicated access involves large fixed costs, so it is cost-effective only when a location originates a large volume of calls. Switched access, in contrast, does not entail additional high fixed costs, so it is better suited to small users and hence to resellers. Petitioner also instituted two pricing promotions for SDN in 1989: additional discounts from the basic SDN rates for customers making large usage and duration commitments, and waiver of installation charges for customers making multiyear commitments (subject to penalties for early termination). Petitioner also added a new billing option. In addition to network billing, whereby petitioner prepares a single bill that applies the tariffed rate to all usage at all locations, petitioner started to offer multilocation billing (MLB), which allows the SDN volume discounts to be apportioned between an SDN customer and individual locations on its network, with the proportion being chosen by the customer. Under this option, petitioner sends bills directly to the customer's individual locations (which, in the case of resellers, means to the reseller's customers) but the customer (or reseller) remains responsible [*9] for all payments. The tariff provides, however, that petitioner is not responsible for the allocation of charges. See AT&T Tariff FCC No. 1, § 6.2.4 (1986), App. to Brief for Petitioner 24a.

Attracted by these changes, in October 1989, respondent approached petitioner regarding its possible purchase of SDN. LaDonna Kisor, a sales representative in petitioner's Portland, Oregon office, described the service and gave respondent literature on SDN. She predicted that petitioner could establish an initial SDN network for respondent in four to five months, and could thereafter add new locations within 30 days of receiving an order. Respondent subscribed to a tariffed switched-access SDN plan under which the up-front installation charges would be waived and respondent would receive a 17 to 20% discount off basic SDN rates in exchange for a 4-year commitment to purchase two million minutes of service annually. Respondent also requested MLB. Petitioner confirmed respondent's order, stating that respondent would obtain SDN "'pursuant to the rates, terms and conditions in AT&T's [FCC Tariff No.1],'" and that the provisions of the tariff, "'including limitations on AT&T's liabilities, shall [*10] govern your and AT&T's obligations and liabilities with respect to the service and options you have selected.'" Brief for Petitioner 14. Respondent accepted these terms in writing on October 30, 1989.

By February 1990, it had become apparent that the demand for SDN exceeded petitioner's expectations -- largely because of the switchless resellers attracted to the service. Petitioner could not fill the volumes of switched-access orders as rapidly as dedicated access orders, or as quickly as petitioner's personnel had predicted. Accordingly, Ms. Kisor notified respondent that it would take up to 90 days to add new locations after the initial SDN was established. She suggested placing respondent's customers with another AT&T service, the Multilocation Calling Plan (MLCP), until they could be placed on SDN. Respondent agreed to this, and ordered MLCP. Again, respondent signed a letter confirming that MLCP "'is provided under the terms and conditions stated in AT&T's Tariff F. C. C. Nos. 1 and 2.'" Brief for Appellant in Nos. 94-36116, 94-36156 (CA9), p. 15.

Ms. Kisor informed respondent that its initial SDN network was functioning in April 1990. At that point, respondent elected to increase [*11] to a larger SDN volume commitment in order to qualify for a larger discount. In placing this order, respondent signed a form stating that the SDN service "'WILL BE GOVERNED BY THE RATES AND TERMS AND CONDITIONS IN THE APPROPRIATE AT&T TARIFFS.'" Brief for Petitioner 14-15. Respondent then began reselling SDN to its own customers and placing orders with petitioner that required petitioner to treat respondent's customers as if they were new locations on a corporate SDN.

Almost from the outset, respondent experienced problems with the network, including delays in provisioning (the filling of orders) and in billing. An additional billing problem was especially damaging to respondent: respondent's customers received bills reflecting 100% of the discount instead of the 50% respondent selected. These problems continued, and in October 1990, they led respondent to switch to network billing. Although respondent continued to resell SDN, it was ultimately unable to meet its usage commitment for the first period in which it was applicable. In September 1992, respondent notified petitioner that it was terminating its SDN service effective September 30, 1992, with 18 months remaining on its contract. [*12]

Meanwhile, on November 27, 1991, respondent had filed suit against petitioner in the United States District Court for the District of Oregon. The complaint contained a variety of claims, none of which arose under the Communications Act, and ultimately two state-law claims went to trial: (1) breach of contract (including breach of an implied covenant of good faith and fair dealing); and (2) tortious interference with contractual relations (viz., respondent's contracts with its customers). Respondent's state-law claims rested on the allegation that its contracts with petitioner were not limited by petitioner's tariff but also included certain understandings respondent's president derived from reading petitioner's brochures and talking with its representatives. According to respondent, petitioner promised various service, provisioning, and billing options in addition to those set forth in the tariff. Respondent also claimed that petitioner violated its state-law implied duty of good faith and fair dealing by taking actions that undermined the purpose of the contract for respondent, which was to purchase SDN services for resale at a profit. The tortious interference claim was derivative [*13] of the contract claim. Respondent asserted that, because respondent promised certain benefits of SDN to its customers, and because petitioner provided competing services, any intentional violation of petitioner's contractual duties constituted tortious interference with respondent's relationship with its customers. Respondent also asserted that, since petitioner's conduct was willful, consequential damages were available under the terms of the tariff. Petitioner filed a counterclaim to recover $ 200,000 in unpaid tariffed charges from April to October 1990, and to obtain the termination charges that respondent did not pay in 1992.

Throughout the proceedings in District Court, petitioner argued that respondent's state-law contract and tort claims were pre-empted by the filed-tariff requirements of § 203 of the Act. The Magistrate Judge rejected this argument and instructed the jury to consider not only the written subscription agreements, but also any statements made or documents furnished before the parties signed the agreements "'if you find that the parties intended that those statements or written materials form part of their agreements.'" Brief for Petitioner 18. The Magistrate [*14] Judge also instructed the jury that it could not find for respondent on its contract claims unless it found that petitioner engaged in willful misconduct. He declined to instruct on punitive damages for the tortious-interference claim. The jury found for respondent on its state-law claims, rejected petitioner's counterclaim, and awarded respondent $ 13 million in lost profits. The Magistrate Judge reduced the judgment to $ 1.154 million, which represented the lost profits respondent claimed during the period before it canceled SDN on September 30, 1992; he found that there was no competent evidence for lost profits after that date. The Court of Appeals, over a dissent by Judge Brunetti, affirmed the judgment but reversed the Magistrate Judge's failure to instruct on punitive damages and remanded for a trial on that aspect of the case. *108 F.3d 981 (CA9 1997)*. We granted certiorari to determine whether the federal filed-rate requirements of § 203 pre-empt respondent's claims. 520 U. S ___ (1997).

II

Section 203(a) of the Communications Act requires every common carrier to file with the FCC "schedules," i.e., tariffs, "showing all charges" and "showing the classifications, practices, [*15] and regulations affecting such charges." *47 U.S.C. § 203*(a). Section 203(c) makes it unlawful for a carrier to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." § 203(c). These provisions are modeled after similar provisions of the Interstate Commerce Act (ICA) and share its goal of preventing unreasonable and discriminatory charges. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 229-230, 129 L. Ed. 2d 182, 114 S. Ct. 2223 (1994)*. Accordingly, the century-old "filed-rate doctrine" associated with the ICA tariff provisions applies to the Communications Act as well. See *id., at 229-331; Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981)*; cf. *United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474, 481, 76 L. Ed. 408, 52 S. Ct. 247 (1932)*. In *Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 59 L. Ed. 853, 35 S. Ct. 494 (1915)*, we described the basic contours of the filed-rate doctrine under the ICA:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon [*16] any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Thus, even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff. *Kansas City Southern R. Co. v. Carl, 227 U.S. 639, 653, 57 L. Ed. 683, 33 S. Ct. 391 (1913)*.

While the filed-rate doctrine may seem harsh in some circumstances, see, e.g., *Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130-131, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990),* its strict application is necessary to "prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts," the very evil the filing requirement seeks to prevent. *Id., at 127.* Regardless [*17] of the carrier's motive -- whether it seeks to benefit or harm a particular customer -- the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that anti-discriminatory policy which lies at "the heart of the common-carrier section of the Communications Act." *MCI Telecommunications Corp. v. American Telephone & Telegraph Co., supra, at 229.*

The Ninth Circuit thought the filed-rate doctrine inapplicable "because this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing." *108 F.3d at 990.* Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form [*18] of an enhanced service for an equivalent price." *Competitive Telecommunications Assn. v. FCC, 302 U.S. App. D.C. 423, 998 F.2d 1058, 1062 (CADC 1993).* The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges," *47 U.S.C.* § *203*(a); and when it makes it unlawful to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges" except those set forth in the tariff, § 203(c).

Unsurprisingly, the cases decided under the ICA make it clear that discriminatory "privileges" come in many guises, and are not limited to discounted rates. "[A] preference or rebate is the necessary result of every violation of [the analog to § 203(c) in the ICA] where the carrier renders or pays for a service not covered by the prescribed tariffs." *United States v. Wabash R. Co., 321 U.S. 403, 412-413, 88 L. Ed. 827, 64 S. Ct. 752 (1944).* In *Chicago & Alton R. Co. v. Kirby, 225 U.S. 155, 56 L. Ed. 1033, 32 S. Ct. 648 (1912),* we rejected a shipper's breach-of-contract claim against a railroad for failure to ship a carload of race horses by a [*19] particularly fast train. We held that the contract was invalid as a matter of law because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train" and therefore the shipper received "an undue advantage . . . that is not one open to others in the same situation." *Id., at 163, 165.* Similarly, in *Davis v. Cornwell, 264 U.S. 560, 68 L. Ed. 848, 44 S. Ct. 410 (1924),* we invalidated the carrier's agreement to provide the shipper with a number of railroad cars on a specified day; such a special advantage, we said, "is illegal, when not provided for in the tariff." *Id., at 562.* See also *Kansas City Southern R. Co. v. Carl, supra, at 653; Wight v. United States, 167 U.S. 512, 517-518, 42 L. Ed. 258, 17 S. Ct. 822 (1897);* I. Lake, Discrimination by Railroads and Other Public Utilities 310-315 (1947).

III

The Ninth Circuit distinguished the Court's filed-rate cases involving claims for special services on the ground that the services at issue there "should have been included in the tariff and made available to all" because "the customer would have been expected to pay a higher rate" for those services. *108 F.3d at 989, n. 9.* But that is precisely the case here. Indeed, [*20] the additional services and guarantees that respondent claims it was entitled to by virtue of Ms. Kisor's representations and petitioner's sales brochures -- viz., faster provisioning, the allocation of charges through multilocation billing, and various matters relating to deposits, calling cards, and service support, see *108 F.3d at 987-988* -- all pertain to subjects that are specifically addressed by the filed tariff. See AT&T Tariff FCC No. 1, § 2.5.10 (provisioning of orders); § 6.2.4 (allocation of charges); § 2.5.6 (deposits); § 2.5.12.B (calling cards); § 6.2.5 (service supports).

The Ninth Circuit agreed that all of respondent's claims except those relating to provisioning and billing would be pre-empted if the filed-rate doctrine applied. *108 F.3d at 990.* But even provisioning and billing are, in the relevant sense, "covered" by the tariff. For example, whereas respondent asks to enforce a guarantee that orders would be provisioned within 30 to 90 days, the tariff leaves it up to petitioner to "establish and confirm" a due date for provisioning, requires that petitioner merely make "every reasonable effort" to meet that due date, and if it fails gives the customer [*21] no recourse except to "cancel the order without penalty or payment of nonrecurring charges." § 2.5.10(B). Faster, guaranteed provisioning of orders for the same rate is certainly a privilege within the meaning of § 203(c) and the filed-rate doctrine. Cf. *Chicago & Alton R. Co. v. Kirby, supra, at 163* (refusing to enforce promise for faster, guaranteed service not included in the tariff). As for billing, whereas respondent claims that, pursuant to the MLB option, petitioner promised to allocate usage and charges accurately among respondent's customers, the tariff provides that petitioner "will not allocate . . . usage or charges" among the locations on the customer's network and "is not responsible for the way that the Customer may allocate usage or charges." AT&T Tariff FCC No. 1, § 6.2.4. Any assurance by petitioner that it would allocate usage and charges and take responsibility for the task would have been in flat contradiction of the tariff. See *Chesapeake & Ohio R. Co. v. Westinghouse, Church, Kerr & Co., 270 U.S. 260, 266, 70 L. Ed. 576, 46 S. Ct. 220 (1926).*

The Ninth Circuit distinguished respondent's claims from those in our filed-rate cases involving special services in one other [*22] respect: according to respondent, the "special services" that it sought were provided by petitioner, without charge, to other customers, *108 F.3d at 989, n. 9.* Even if that were so, the claim for these services would still be pre-empted under the filed-rate doctrine. To the extent respondent is asserting discriminatory treatment, its remedy is to bring suit under § 202 of the Communications Act. n1 To the extent petitioner is claiming that its own claims for special services are not really special because other companies get the same preferences, "that would only tend to show that the practice was unlawful [with regard to] the others as well." *United States v. Wabash R. Co., 321 U.S. 403, 413, 88 L. Ed. 827, 64 S. Ct. 752 (1944).* Because respondent asks for privileges not included in the tariff, its state-law claims are barred in either case.

n1 Eight months after the close of discovery (and well after the 2-year statute of limitations in the Communications Act, § 415), respondent sought leave to file a second amended complaint to add a § 202 claim. The Magistrate Judge denied the request. Respondent did not appeal that ruling.

[*23]

IV

Our analysis applies with equal force to respondent's tortious-interference claim because that is wholly derivative of the contract claim for additional and better services. Respondent contended that the tort claim was based on "AT&T's refusal to provide [respondent] with certain types of service" and the Magistrate Judge agreed, noting that "'the claims in this case, even the tort claim, . . . stem from the alleged failure of AT&T to comply with its contractual relationship.'" n2 Brief for Appellant in Nos. 94-36116, 94-36156 (CA9), p. 33. Respondent can no more obtain unlawful preferences under the cloak of a tort claim than it can by contract. "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163, 67 L. Ed. 183, 43 S. Ct. 47 (1922);* see also *Maislin, 497 U.S. at 126.*

n2 The dissent argues that "the jury's verdict on respondent's tort claim is supported by evidence that went well beyond, and differed in nature from, the contract claim," post, at 1, which the dissent asserts requires us to remand this case rather than reverse the judgment. This issue of non-contract evidence neither was included within the question presented for our review ("Whether . . . the Ninth Circuit improperly allowed state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff") nor was raised by respondent as an alternative ground in support of the judgment. Nor has respondent ever suggested the need for a remand, even though the Petition for Certiorari sought not merely reversal, but summary reversal. In its brief on the merits, respondent argued that the intentional tort claim was not pre-empted because AT&T's willful breach of its contractual commitments was not protected by the filed-rate doctrine. There was no hint of an argument that, even if that willful breach could not form the basis for an action, other alleged intentional acts sufficed to support the judgment below. At no point has respondent disputed the Magistrate Judge's finding that the tort claim is derivative of the contract claim, or the Ninth Circuit's description of its tort claim as based on the fact that "because COT had promised certain benefits of SDN to its customers, and because AT&T provided competing services, any violation of AT&T's contractual duties constituted tortious interference with COT's relationship with its customers." *108 F.3d 981, 988 (CA 1997).* Contrary to the dissent's assertion, we have no obligation to search the record for the existence of a nonjurisdictional point not presented, and to consider a disposition (remand instead of reversal) not suggested by either side.

[*24]

The saving clause of the Communications Act, § 414, contrary to respondent's reading of it, does not dictate a different result. Section 414 copies the saving clause of the ICA, and we have long held that the latter preserves only those rights that are not inconsistent with the statutory filed-tariff requirements. *Adams Express Co.*

v. Croninger, 226 U.S. 491, 507, 57 L. Ed. 314, 33 S. Ct. 148 (1913). A claim for services that constitute unlawful preferences or that directly conflict with the tariff -- the basis for both the tort and contract claims here -- cannot be "saved" under § 414. "Th[e saving] clause . . . cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446, 51 L. Ed. 553, 27 S. Ct. 350 (1907)*.

Finally, we reject respondent's argument that, even if the tariff exclusively governs the parties' relationship, the relief awarded is consistent with the tariff, since § 2.3.1 provides that petitioner's "liability, if any, for its willful misconduct is not limited by this [*25] tariff." Respondent reasons that, because the jury found that petitioner engaged in willful misconduct, the verdict does not conflict with the tariff. Section 2.3.1, however, can not be construed to do what the parties have no power to do. It removes only those limitations upon liability imposed by the tariff, not those imposed by law. It is the Communications Act that renders the promise of preferences unenforceable. The tariff can no more exempt the broken promise of preference that is willful than it can the broken promise of preference that is unintentional. (In fact, perversely enough, the willful breach displays a greater, if belated, attempt to comply with the law.)

* * *

Because respondent's state-law claims are barred by the filed-rate doctrine, we reverse the judgment of the Ninth Circuit.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

CONCURBY: REHNQUIST

CONCUR: CHIEF JUSTICE REHNQUIST, concurring.

The Court concludes that respondent's tortious interference claim is "wholly derivative of the contract claim" and therefore barred by the filed rate doctrine. The Court accepts the Magistrate Judge's finding to that effect, [*26] ante, at 12, and I agree: the acts of tortious interference asserted against AT&T amount to no more than an intentional refusal to provide services to respondent in an amount or manner contrary to the filed tariff.

I write separately to note that this finding is necessary to the conclusion that respondent's state-law tort claim may not proceed. As the majority correctly states, the filed-rate doctrine exists to protect the "antidiscriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'" Ante, at 8. Central to that antidiscriminatory policy is the notion that all purchasers of services covered by the tariff will pay the same rate. The filed-rate doctrine furthers this policy by disallowing suits brought to enforce agreements to provide services on terms different from those listed in the tariff. This ensures that the tariff governs the terms by which the common carrier provides those services to its customers.

It is crucial to note, however, that this is all the tariff governs. In order for the filed-rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided [*27] for in the tariff. This is how the doctrine has been applied in the past. In *Chicago & Alton R. Co. v. Kirby, 225 U.S. 155, 56 L. Ed. 1033, 32 S. Ct. 648 (1912)*, for example, respondent entered into a contract with petitioner to ship horses from Springfield, Illinois to New York City via a special fast train. The tariff that the petitioner had filed "did not provide for an expedited service, nor for transportation by any particular train." *Id., at 163*. The Court ruled that respondent's suit to enforce the special arrangement could not proceed:

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation." *Id., at 165*.

In *Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, the question was not whether a separate contract could be enforced, but rather whether petitioner could bring an antitrust complaint challenging the rate that respondents [*28] had filed in their tariff. The Court ruled that he could not:

"The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Id., at 163* (emphasis added).

In this case respondent's contract claim seeks to enforce side arrangements that it made with petitioner. Respondent contends that petitioner promised to provide it with services on terms different from those listed in the tariff. As the above cases make clear, the filed rate doctrine bars such a claim. Respondent's tort claim is entirely derivative of its contractual claim, and the Court is therefore correct in concluding that the doctrine also bars the tort claim.

The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose on petitioner to refrain from intentionally interfering with respondent's relationships with [*29] its customers by means other than failing to honor unenforceable side agreements, or to refrain from engaging in slander or libel, or to satisfy other contractual obligations. The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law. It is with this understanding that I join the Court's opinion.

DISSENTBY: STEVENS

DISSENT: JUSTICE STEVENS, dissenting.

Everyone agrees that respondent's tortious interference claim would be barred by the filed-rate doctrine if it is "wholly derivative of the contract claim for additional and better services." Ante, at 12 (majority opinion); ante, at 1 (REHNQUIST, C. J., concurring). Moreover, it is true that when the Magistrate Judge ruled that respondent's case would not support a punitive damages award as a matter of state law, he characterized the tort claim as "stemming from the alleged failure of AT&T to comply with its contractual relationship." Tr. 2207. In my opinion, however, the jury's verdict on respondent's tort claim is [*30] supported by evidence that went well beyond, and differed in nature from, the contract claim.

If petitioner, in an effort to appropriate respondent's customers, had included with each bill sent to a customer a statement expressly characterizing respondent as an unethical, profit-hungry middleman, I would think it clear that the filed-rate doctrine would not constitute a defense to such tortious conduct. The evidence in the record indicates that a similar result was obtained by mailing bills to the customers that disclosed the markup that respondent obtained on their calls.

Respondent's tort claim was also premised in part on testimony that AT&T used a telemarketer to contact respondent's customers and, without their authorization, convert them to AT&T's own long-distance service. Id., at 557-558. In rejecting AT&T's motion for a directed verdict on the tort claim, the Magistrate recognized that this practice of "slamming" customers could "easily be a case of intentional interference" that would not necessarily also constitute breach of contract. Id., at 2166-2167. Slamming was clearly a part of the case presented in the District Court. There was an allegation of slamming [*31] in respondent's amended complaint; n1 in the District Court, AT&T's trial counsel took issue with respondent's effort to make slamming "a big part of this case," id., at 2170, and said in closing argument that slamming "is the basis for this intentional interference" claim, id., at 2921; and nothing in the jury instructions remotely suggested that the tort claim required proof of broken promises by AT&T to provide additional services. Respondent's evidence easily fits within the definition of intentional interference set forth in the jury charge:

"COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the evidence, one, that COT had business [*32] relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper means. And, five, that COT suffered economic injury as a result of the interference." App. 71.

n1 "Despite repeated requests by COT to AT&T, AT&T failed to rectify incidents of unauthorized changes made in the designated carriers ('slamming') of COT's customers." App. 28.

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It may be the fact that the billing disclosures and slamming were the consequence of negligence rather than a deliberate plan to take over a network of customers that respondent had developed, but the jury concluded otherwise. It found that petitioner acted intentionally and willfully in interfering with respondent's business relations. See ibid. n2 That finding is doubly significant.

n2 The jury's $ 13 million damages award, reduced by the Magistrate Judge to $ 1.154 million, did not differentiate between the contract and tort claims.

First, as the Court acknowledges, ante, at 13, the jury's finding precludes a defense based on [*33] the provisions of the tariff that purport to limit petitioner's liability. Second, and of greater importance, it determines that the most egregious tortious conduct was not merely derivative of the contract violations. Enforcement of respondent's state-law right to be free from tortious interference with business relations does not somehow award respondent an unlawful preference that should have been specified in the tariff (presumably in return for an added fee or higher rate); it instead gives effect to a generally applicable right that petitioner is required, by state law, to respect in dealing with all others, customers and non-customers alike. Thus, at least some of the tortious interference occurred independently of the customer-carrier relationship and would have been actionable even if respondent had never entered into a contract with AT&T.

The Court correctly states that the filed-rate doctrine will pre-empt some tort claims, but we have never before applied that harsh doctrine to bar relief for tortious conduct with so little connection to, or effect upon, the relationship governed by the tariff. To the extent respondent's tort claim is based on petitioner's billing disclosures [*34] and slamming practices, it neither challenges the carrier's filed rates, as did the antitrust claim in *Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, nor seeks a special service or privilege of the sort requested in cases such as *Chicago & Alton R. Co. v. Kirby, 225 U.S. 155, 56 L. Ed. 1033, 32 S. Ct. 648 (1912)*, and *Davis v. Cornwell, 264 U.S. 560, 68 L. Ed. 848, 44 S. Ct. 410 (1924)*. More akin to this case is *Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 300, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976)*, in which we held that a common-law tort action for fraudulent misrepresentation against a federally-regulated air carrier could "coexist" with the Federal Aviation Act. To a limited degree it may be said that here, as in Nader, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." Ibid. If the Communications Act's savings clause n3 means anything, it preserves state-law remedies against carriers on facts such as these.

n3 "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *47 U.S.C. § 414.*

[*35]

The District Court and the Court of Appeals never considered whether respondent's tort claim is wholly derivative of its contract claim for purposes of the filed-rate doctrine, because those courts mistakenly believed that even the contract claim was not covered by the doctrine. On my own reading of the record, I think it clear that a portion of the tort claim is not pre-empted. The Court should therefore remand the case for a new trial rather than ordering judgment outright for AT&T. n4

n4 Beyond the billing disclosures and slamming, respondent asserts that AT&T also misappropriated customer information from respondent's confidential database. Brief for Respondent 4. That basis for a tort remedy, if supported by sufficient evidence, would also appear not to be pre-empted by the filed-rate doctrine.

Although the Court holds broadly that respondent's tort claim is totally barred, it declines to consider whether a portion of the claim might survive on remand because this issue was not part of the question presented [*36] in the petition for certiorari and was not specifically raised by respondent. Ante, at 12, n. 2. The latter point is wholly irrelevant, precisely because of the scope of the question presented. The only question that we agreed to decide was whether the filed-rate doctrine pre-empts "state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff." Pet. for Cert. i. The Court answers that legal question, and then decides an additional, factual one: whether respondent's tort claim is "based on" AT&T's "failure to honor an alleged side agreement," and thus is "wholly derivative" of the pre-empted contract claim. In resolving that issue, the Court cannot simply rely on AT&T's bald assertion, supported only by a statement of the Magistrate taken out of context, that the tort claim is "wholly derivative"; we have an obligation either to study the record or at least to remand and allow the lower courts to consider the proper application of the legal rule to the facts of this case.

I respectfully dissent.