

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Petition for Declaratory Ruling)
)
IN THE UNITED STATES DISTRICT)
COURT FOR THE MIDDLE DISTRICT)
OF FLORIDA)
 TAMPA DIVISION)
 8:00-CV-1231-T-17TBM)
)
LINDA THORPE)
)
 Representative Plaintiff,)
)
vs.)
)
GTE CORPORATION; GTE FLORIDA)
INCORPORATED, AT&T CORP.,)
SPRINT-FLORIDA, INCORPORATED,)
and MCI WORLDCOM NETWORK)
SERVICE, INC.)
)
 Defendants.)
)
CLASS ACTION COMPLAINT)
)

GC Docket No. 03-84

COMMENTS OF SPRINT CORPORATION

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June 5, 2003

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ATTACHMENTS

- I. Exhibit 1—Access Service, Tariff FCC NO. 3**
- II. Exhibit 2—Access Service Tariff, Additional Engineering**
- III. Exhibit 3—Dispositive Motion**

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and MCI WORLDCOM NETWORK)	
SERVICE, INC.)	
)	
Defendants.)	
)	
CLASS ACTION COMPLAINT)	
)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent local exchange (“ILEC”) and competitive LEC (“CLEC”)/long distance divisions, respectfully submits its Comments in response to the Notice¹ requesting comments on the above-referenced Petition for Declaratory Ruling.²

¹ Public Notice, Comment Requested on Petition for Declaratory Ruling Concerning the Bundling of Local Telephone Service with Long Distance Service, DA 03-867, released March 27, 2003.

² *Petition for Declaratory Ruling in the United States District Court for the Middle District of Florida, Tampa Division, CG Docket No. 03-84, filed August 9, 2002 (“Petition”).*

I. INTRODUCTION

Petitioner Linda Thorpe filed the instant Petition pursuant to an Order by the United States District Court for the Middle District of Florida which referred several questions to the Commission under the doctrine of primary jurisdiction.³ In this proceeding, the Commission seeks comment of three specific issues raised in the Petition. Before addressing those issues specifically, Sprint believes a brief review of the facts, as presented by Petitioner, are in order.

The substance of Petitioner's complaint is that GTE, in provisioning local exchange service to Petitioner, initially assigned, without Petitioner's request or knowledge, AT&T as Petitioner's preferred long distance carrier ("PIC") and later, after Petitioner's complaint, refused to allow Petitioner to have local exchange service without a named PIC.

Petitioner filed suit, alleging several state law claims, in Florida state courts. That lawsuit was subsequently removed to federal district court which resulted in the aforementioned referral order.⁴

For some reason, which is still not clear to Sprint, the Petitioner named Sprint-Florida, Incorporated ("Sprint-Florida"), one of the Sprint ILECs, as a defendant in the underlying lawsuit. To Sprint's knowledge, the Petitioner has never subscribed to local service from Sprint-Florida, nor even requested local service. Nor does Petitioner allege that she ever subscribed to or requested any service from Sprint-Florida. Petitioner has not presented, either in the underlying lawsuit or in the Petition, any facts that would demonstrate that Sprint engages in the behavior Petitioner complains of -- refusing "the

³ Thorpe v. GTE Corporation, et al., No. 8:00 CV-1231-T-17TBM (M.D. Fla. June 21, 2000). Docket No. 56, (Feb. 8, 2002)(Order).

⁴ Id.

consumer the choice of not having a long distance carrier”⁵ and “slamming an interexchange carrier and a long distance fee when not consented to or contracted for by the customer,”⁶

In fact, in compliance with their filed tariffs at the Commission and various State Commissions, the Sprint ILECs explicitly allow consumers the choice of not choosing a long distance carrier. Sprint’s Tariff F.C.C. No. 3 provides:

End users may designate that they do not want a primary IC. This choice is considered a valid selection and a Presubscription Charge will apply to any subsequent change.⁷

Sprint’s intrastate tariffs are identical for purposes of end-users’ choice of an intraLATA primary interexchange carrier.⁸ Accordingly, the Sprint ILECs already provide, and in fact must provide pursuant to their filed tariffs, the exact freedom of having local service without a presubscribed long distance carrier that Petitioner is seeking.

II. THE STATE LAW CLAIMS SET FORTH BY PETITIONER IN THE COMPLAINT ARE BARRED BY THE FILED-RATE DOCTRINE.

Petitioner’s state-law claims are for violation of Florida’s Unfair and Deceptive Trade Practices Act, for breach of contract, and for breach of duty of good faith and fair dealing. As noted above, Sprint did not commit any of the alleged “wrongs” that are the basis of Petitioner’s state-law claims and, on that basis alone, should not be subject to any further complaints from Petitioner. However, even assuming that Sprint engaged in the

⁵ Petition, at p. 5.

⁶ *Id.*, at p. 6.

⁷ Sprint Local Telephone Companies, Tariff F.C.C. No. 3, Section 13.3.2(C)(2), attached hereto as Exhibit 1.

⁸ See e.g., Sprint-Florida, Incorporated, Florida Access Service Tariff, Section E13.3.3.C.2 attached hereto as Exhibit 2. In fact, in Florida, Sprint-Florida, Incorporated and other Florida ILECs are required to offer a “no-PIC” option for end-users’ intraLATA presubscribed carrier. See, *In re Generic consideration of incumbent local exchange (ILEC) business office practices and tariff provisions in the*

type of practices that Petitioner complains of or that Sprint's tariffs did not explicitly allow Sprint to provide a "no preferred interexchange carrier" option, Petitioner's state law claims would be barred by the filed rate doctrine. In the underlying lawsuit, Sprint argued:

Plaintiff's claims against Sprint are barred by the filed tariff doctrine, which provides that any filed rate or term is per se reasonable and unassailable in judicial proceedings brought by ratepayers. Tariffs filed with the FCC conclusively and exclusively control the rights and liabilities between a carrier and its customer with respect to the tariffed services, unless and until the FCC finds the tariff unlawful. Accordingly, plaintiff states no claim against Sprint as a local service provider because Sprint's FCC tariffs concerning long distance access explicitly address the matters alleged in the complaint, namely the presubscription of lines to long distance carriers and the charges for this service.⁹

Indeed, not only do Sprint's validly filed tariffs explicitly address the matters raised in the Petitioner's state-law claims, but explicitly require Sprint to provide exactly what Petitioner wants.

Petitioner claims that the filed-rate doctrine has nothing to do with Petitioner's state-laws claims because:

"at no time does the Plaintiff raise any issues regarding rate-setting or tariffs. ... It is clear that the Plaintiff is not challenging the Defendants' charges, but is challenging the practice of the Defendants in "slamming" an interexchange carrier and a long distance fee when not consented to or contracted for by the customer."¹⁰

implementation of intraLATA presubscription, Docket No. 970526-TP, Order No. PSC-97-0709-FOF-TP, issued June 13, 1997.

⁹ Defendant Sprint's Dispositive Motion for Judgment on the Pleadings or, in the Alternative, for Stay and Referral to the Federal Communications Commission, filed September 5, 2000 in *Thorpe v. GTE Corporation*, et al., No. 8:00 CV-1231-T-17TBM (M.D. Fla). A copy of Sprint's Dispositive Motion is attached hereto as Exhibit 3.

¹⁰ Petition at p. 6.

As to Petitioner's first claim – that rate-setting has nothing to do with Petitioner's state law claims - Petitioner clearly misunderstands the file-rate doctrine. It is well established that the doctrine applies to more than just rate-setting.

This fact has been made clear by the Supreme Court in its *Central Office* decision where it held that the Communications Act's filed-tariff requirements pre-empt respondent's state-law claims, stating:

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.” [Citation omitted.] Rates, however, do not exist in isolation. ... 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 communications, or employ or enforce any classifications, regulations, or practices affecting such charges” except those set forth in the tariff, § 203(c).¹¹

More recently, the Second Circuit relied on *Central Office* and the filed-rate doctrine in its *ICOM* decision barring a plaintiff's state-law breach of contract claims. The Plaintiff complained that high-speed circuits were not installed as fast as promised by Defendant. However, the Court found that the Defendant's tariff explicitly excluded any guarantee of installation dates. The Court stated:

Interpreting these provisions, the Supreme Court has adopted the filed-rate doctrine, which holds that “the rate of the carrier duly filed is the only lawful charge” and that “deviation from it is not permitted upon any pretext,” [Citation omitted.] ... The rights and liability defined by the tariff “cannot be varied or enlarged by either contract or tort of the carrier [citations omitted], and therefore any state-law claim seeking to enforce a contractual provision that differs from a filed rate is preempted by federal law. [Citation omitted.] (“Since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce.”)¹²

¹¹ American Telephone and Telegraph, Company v. Central Office Telephone, Inc., 524 U.S. 214, 233-34 (1998) (“*Central Office*”).

¹² ICOM Holding, Inc. v. MCI WorldCom, Inc., 238 F.3d 219, 221 (2nd Cir. 2001)(“*ICOM*”).

The Court further explained that Defendant's tariff governed because of the filed-rate doctrine, notwithstanding that rates and rate-setting were not the issue:

We agree with the defendant and conclude, as did the district court, that the Supreme Court's recent decision in *Central Office* controls and requires dismissal of the plaintiff's claims. In *Central Office*, the Court held that the filed-rate doctrine bars state-law claims not only that pertain directly to the price of telecommunications services subject to an FCC filing, but also state-law claims that concern various nonprice aspects, such as "service, provisioning, and billing options." *Central Office*, 524 U.S. at 220.¹³

Finally, Petitioner's claim that her state-law complaints have nothing to do with tariffs is also clearly in error. As demonstrated above, Sprint's tariff deals explicitly with the subject matter of Petitioner's claims – presubscription of a long distance carrier, including selecting "no carrier" as a valid presubscription choice. Accordingly, Sprint's validly filed tariffs control as to the subject matter of Petitioner's complaints and, pursuant to the filed-rate doctrine, Petitioner's state-law complaints must be barred.

III. SPRINT ILECs MAY PROVIDE ONLY LOCAL SERVICE TO THEIR CUSTOMERS AND THEIR FILED TARIFF RATES DO NOT REQUIRE BUNDLING LOCAL SERVICE WITH LONG DISTANCE SERVICE.

As demonstrated above, Sprint's validly filed tariffs provide local service only, upon customer request, by recognizing "no primary IC" as a valid presubscription choice. The Sprint ILECs' tariffs do not, nor should they, require the end-user to choose a preferred interexchange carrier.

¹³ *Id.* at 222.

IV. BUNDLING LOCAL SERVICE WITH LONG DISTANCE SERVICE IN ALL EVENTS DOES NOT VIOLATE THE COMMUNICATIONS ACT.

Sprint does not believe bundling long distance with local, especially in the context of plaintiff's complaint that she was forced to have a preferred long distance provider, should be required. However, that does not mean that every bundle of local and long distance service is a violation of the Act. Many carriers today offer bundles of various services, including local and long distance. However, no end-user is forced, knowingly or unknowingly, to take such bundles. The terms and conditions of the bundle, indeed the existence of the bundle itself, are disclosed to end-users prior to the end-user voluntarily contracting for such bundle. Clearly, these voluntary bundles are not the subject of Petitioner's complaint and are not violations of the Act.

V. CONCLUSION.

Sprint urges the Commission to rule that Petitioner's state-law claims are barred by the filed-rate doctrine and accordingly urges the Commission to deny the Petition.

Respectfully submitted,

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June 5, 2003

ACCESS SERVICE

13. Additional Labor and Miscellaneous Services (Cont'd)13.3 Miscellaneous Services (Cont'd)13.3.2 Presubscription (Cont'd)(C) Presubscription Charge Application (Cont'd) (T)

(2) End users may designate that they do not want a primary IC. (T)
This choice is considered a valid selection and a
Presubscription Charge will apply to any subsequent
change. This "no primary IC" designation is not available to
pay telephone agents.

(3) Should an IC elect to discontinue Feature Group D service (T)
in an end office converting to equal access prior to the
conversion date, or within two years after the introduction
of Feature Group D in the converted end office, the IC shall
contact in writing all end users and agents who selected, or
were allocated to, the cancelling IC as their designated IC.
Such written notification must advise these end users and
agents of the IC cancellation, request that the end users or
agents select a new IC, and state that the cancelling IC will
pay the change charge.

For a period of two years following the IC's discontinuance
of Feature Group D service, the Telephone Company will
bill the cancelling IC the change charge for each end user
and agent that is currently designated to the IC at the time of
discontinuance.

ISSUE DATE:
January 19, 2001

Issued Under Transmittal No. 140
Vice President-Regulatory Affairs
6360 Sprint Parkway
Overland Park, Kansas 66251

EFFECTIVE DATE:
February 3, 2001

ACCESS SERVICE TARIFF

SPRINT-FLORIDA, INCORPORATED
By: F. B. Poag, Director

Second Revised Page 14
Cancels First Revised Page 14

Effective: July 25, 2001

E13. ADDITIONAL ENGINEERING, ADDITIONAL LABOR AND MISCELLANEOUS
CHARGES

E13.3 Miscellaneous Services (Cont'd)

E13.3.3 Presubscription (Cont'd)

- (D)
- C. Presubscription Charge Application (T)
1. New end users **or agents**, who will be served by end offices equipped with equal access, will be asked to select a primary IC **for both intraLATA and interLATA calls, or one (1) IC for their interLATA calls and a different IC or the Company for intraLATA calls** at the time they place an order with the Company for Telephone Exchange Service. A confirming notice will be mailed to the new end user when an IC is verbally chosen. New end users **or agents** who return confirmation notices within **thirty** (30) days identifying an IC different from that given verbally will have such selection processed without charge. New end users will be offered a list of participating carriers to aid in their selection of a primary IC. There will be no charge for this initial selection. (C)
- After the end user's **or agent's** initial primary IC selection, for any change thereafter, a charge, as set forth in **E** following, applies. (T)
2. End users may designate that they do not want a primary IC. This choice is considered a valid selection and a Presubscription Charge will apply to any subsequent change. **This "no primary IC" designation is not available to pay telephone agents.** (C)

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LINDA THORPE,)
)
 Plaintiff,)
)
 v.) Case No. 8:00-cv-1231-T-17C
)
 GTE CORPORATION, GTE FLORIDA)
 INCORPORATED, AT&T CORP.,)
 SPRINT-FLORIDA, INCORPORATED,)
 and MCI WORLDCOM NETWORK)
 SERVICES, INC.)
)
 Defendants.)
)

**DEFENDANT SPRINT'S DISPOSITIVE MOTION
FOR JUDGMENT ON THE PLEADINGS OR,
IN THE ALTERNATIVE, FOR A STAY AND
REFERRAL TO THE FEDERAL
COMMUNICATIONS COMMISSION**

Defendant Sprint-Florida, Incorporated ("Sprint") moves the Court pursuant to Fed. R. Civ. P. 12(c) and 12(h)(2) for an order dismissing this case. Plaintiff's complaint fails to state a claim against Sprint upon which relief can be granted, because plaintiff's claims are barred by the filed tariff doctrine. In the alternative, if the case is not dismissed the doctrine of primary jurisdiction requires the entry of a stay and referral to the Federal Communications Commission.

A memorandum in support of the motion is submitted concurrently.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by first class mail, postage prepaid, on this 5th day of September, 2000, upon the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LINDA THORPE,

Plaintiff,

v.)

Case No. 8:00-cv-1231-T-17C

GTE CORPORATION, GTE FLORIDA
INCORPORATED, AT&T CORP.,
SPRINT-FLORIDA, INCORPORATED,
and MCI WORLDCOM NETWORK
SERVICES, INC.

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANT SPRINT'S
DISPOSITIVE MOTION FOR JUDGMENT ON THE PLEADINGS OR,
IN THE ALTERNATIVE, FOR A STAY AND REFERRAL TO THE
FEDERAL COMMUNICATIONS COMMISSION**

Defendant Sprint-Florida, Incorporated ("Sprint") submits this memorandum in support of its dispositive motion for judgment on the pleadings or, in the alternative, for a stay and referral to the Federal Communications Commission ("FCC").

Introduction

Plaintiff's claims against Sprint are barred by the filed tariff doctrine, which provides that any filed rate or term is per se reasonable and unassailable in judicial proceedings brought by ratepayers. Tariffs filed with the FCC conclusively and exclusively control the rights and liabilities between a carrier and its customer with respect to the tariffed services, unless and until the FCC finds the tariff unlawful. Customers are presumed to know the tariffed terms and rates

and therefore cannot claim any alleged misrepresentations by the carrier concerning those matters. Accordingly, plaintiff states no claim against Sprint as a local service provider because Sprint's FCC tariffs concerning long distance access explicitly address the matters alleged in the complaint, namely the presubscription of lines to long distance carriers and the charges for this service. Furthermore, plaintiff could state no claim against Sprint as a long distance provider (assuming it were one) because Sprint would have done nothing more than receive payments based on filed tariff rates.

In the alternative, plaintiff's claims must rest on a determination of whether Sprint's filed tariff terms and rates are reasonable and consistent with federal law. Such a determination is within the primary jurisdiction of the FCC. If plaintiff believes that she has been wronged by the actions of Sprint, then the appropriate relief is to file an action with the FCC.¹

Background

Plaintiff does not allege that she had any contract or other dealings with Sprint. Instead, she simply alleges that Sprint is both a "local service provider" and a "long distance service provider." Complaint ¶¶ 3, 4, 7.² As a local provider, Sprint allegedly engaged in the "negative

¹ Defendants GTE Florida Incorporated and AT&T Corp. have previously filed a motion to dismiss asserting the same legal grounds presented in this motion. Sprint hereby joins in the GTE/AT&T motion and submits this memorandum for the purpose of placing its tariffs before the Court and addressing certain arguments raised by plaintiff in response to the GTE/AT&T motion.

² As pointed out in the motion to dismiss filed by defendant MCI WorldCom Network Services, Inc., a plaintiff's failure to make specific allegations against a defendant itself requires dismissal. Sprint hereby joins in the MCI WorldCom motion and requests dismissal on the same grounds. Significantly, plaintiff's opposition to the MCI WorldCom motion asserts that such defendants are properly joined as parties under Fed. R. Civ. P. 19, and relies primarily on Moore v. Comfed Sav. Bank, 908 F.2d 834 (11th Cir. 1990). As held in Christiansen v. Beneficial Nat'l Bank, 972 F. Supp. 681, 683 (S.D. Ga. 1997), however, reliance on Moore is misplaced where, as here, plaintiff has no standing to assert a claim against Sprint in the first instance.

option” practice of “routinely and arbitrarily assign[ing] lines” to various long distance providers. Id. ¶ 20. As a long distance provider, Sprint allegedly benefitted by receiving call traffic assigned to it by local providers engaging in the “negative option” practice.³

Argument

Although Sprint has denied plaintiff’s allegations as a factual matter, even assuming the factual validity of the allegations they are subject to dismissal as a matter of law.⁴ As a local carrier, Sprint’s actions concerning long distance access service and charges are governed by detailed tariffs filed with the FCC. Even if Sprint were a long distance carrier, which it is not,⁵ as an alleged beneficiary of the local carrier’s “negative option” practice it would have done nothing more than receive payments based on filed tariff rates. Accordingly, all of plaintiff’s claims are barred by the filed tariff doctrine or, at a minimum, must be referred to the FCC.

I. THE FILED TARIFF DOCTRINE BARS PLAINTIFF’S CLAIMS

A. Sprint’s Filed Tariff Governs The Claims

The Federal Communications Act (“FCA” or “Act”) requires telecommunication common carriers such as Sprint to file tariffs with the FCC setting forth their charges and

³ This reading of plaintiff’s allegations is confirmed by plaintiff’s own arguments in its opposition to the MCI WorldCom motion. See Response to MCI WorldCom’s Motion to Dismiss at 5 (long distance providers Abenefit directly from GTE’s conduct@ and Abenefitted from the . . . scheme@).

⁴ Although the timing is different, this Rule 12(c) motion is governed by the same familiar standards as a Rule 12(b)(6) motion to dismiss. See, e.g., Oh v. AT&T Corp., 76 F. Supp.2d 551, 554 (D.N.J. 1999).

⁵ Defendant Sprint-Florida, Incorporated is a local exchange carrier, and does not provide interLATA long distance service. Nevertheless, the discussion here assumes that it is a long distance carrier, as plaintiff alleges.

classifications, practices, and regulations affecting such charges. Section 203(a) of the Act provides, in pertinent part:

Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . ., and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a).

These “federal tariffs are the law, not mere contracts.” MCI Telecommunications Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387 (8th Cir. 1992); see also Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir.), cert. denied, 524 U.S. 952 (1998); Western Union Int’l. Inc. v. Data Dev., Inc., 41 F.3d 1494, 1496 (11th Cir. 1995). “Tariffs filed with the [FCC] conclusively and exclusively control the rights and liabilities between a carrier and its customer” with respect to tariffed services, unless and until the FCC finds the tariff unlawful. MCI Telecommunications Corp. v. Graham, 7 F.3d 477, 479 (6th Cir. 1993).

Pursuant to Sections 203(a) and (b) of the Act, Sprint filed its tariff with the FCC. The tariff contains detailed terms governing “end user access service” – in other words, local customer access to long distance service. See Exhibits A and B attached hereto.⁶ In particular, the tariff contains terms specifically governing the process of “presubscription” to a long distance carrier (described in the tariff as an “interexchange carrier” or “IC”). The tariff states

⁶ Selected tariff pages are attached hereto as exhibits. The tariff is filed with the FCC on behalf of a number of related local telephone companies, thus it bears the designation for ASprint Local Telephone Companies. Sprint’s tariffs are public documents that Sprint is required to file with the FCC, thus the Court may take judicial notice of them pursuant to Fed. R. Evid. 201 and may consider them on this motion. See Kutner v. Sprint Communications Co., 971 F. Supp. 302, 304 n.1 (W.D. Tenn. 1997); Carter v. American Tel. & Tel. Co., 365 F.2d 486, 491-92 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967); see also Kramer v. Time Warner Inc., 937 F.2d 767, 773-74 (2d Cir. 1991) (permitting court to rely on public documents filed with the SEC).

that customers "will be asked to select a primary IC at the time they place an order." Ex. A, at ¶ 13.3.2(B)(4)(b). Of course, the tariff also contains the rates for the access service, e.g., Ex. B, at ¶ 4.7(A)(1), and includes a provision that permits Sprint to bill certain access-related charges directly to customers that choose not to presubscribe to a long distance carrier. Ex. B, at ¶ 4.6(A).⁷ In addition to the tariffs concerning access to long distance service, the long distance carriers themselves file FCC tariffs specifying the terms and rates for their service, as would Sprint if it were such a carrier.⁸

The Act requires Sprint not simply to file the tariffs, but to apply them universally to all consumers of the tariffed service without any deviation whatsoever:

No carrier . . . shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) 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.

47 U.S.C. § 203(c). Under Section 203(c), Sprint may offer no different terms and charge no more or less than the charges set forth in the filed tariff for its service. "Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and [customer]. The rights as defined by the tariff cannot be varied or enlarged by either contract or

⁷ Although plaintiff=s allegations appear to concern Anon-primary lines@ (as defined in Sprint=s tariff, Ex. B, at ¶ 4.6(A)), that is a different concept from the selection of a Primary IC.@ Under the tariff provisions cited in the text, customers must be asked to select a Primary IC@ when ordering either Aprimary@ or Anon-primary@ lines.

⁸ For example, the tariffs of long distance carriers AT&T and GTE were attached as Exhibits 2 and 3 in support of their motion to dismiss. Sprint would be required to file additional tariffs of this type stating the terms and rates for long distance service, if it provided such a service.

tort of the carrier.” Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 163 (1922); see also Cahnmann, 133 F.3d at 487 (“Once a tariff is filed and until it is amended, modified, superseded, or disapproved, the carrier may not deviate from its terms.”); Milne Truck Lines, Inc. v. Makita U.S.A., Inc., 970 F.2d 564, 569 (9th Cir. 1992) (“[A] carrier may not charge or receive a different rate than that specified in its filed and published tariff.”).⁹

Compliance with Sections 203(a) and (c) “is ‘utterly central’ to the administration of the Act.” MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 226 (1994) (quoting Maislin Indus., U.S. v. Primary Steel, 497 U.S. 116, 132 (1990) (quoting Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986))). To ensure such compliance, the Supreme Court has developed a body of law known as the filed tariff (or rate) doctrine, which, among other things, “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.” Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981).

The classic statement of the filed tariff doctrine, as recently quoted in American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 222 (1998), comes from Louisville & Nashville Railroad Co. v. Maxwell, 237 U.S. 94, 97 (1915):

[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon 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

⁹ The Court should be wary of plaintiff=s attempts to rely on the law concerning cellular telephone service (or Acommercial mobile radio service@). See Response to GTE/AT&T Motion to Dismiss at 5. Cellular service is not subject to a tariffing statute like Section 203, and the scope of federal preemption is far narrower, as dictated by statute. See 47 U.S.C. § 332(c)(3)(A); Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983 (7th Cir. 2000).

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.

The filed tariff doctrine is “designed to insulate from challenge the filed rate deemed reasonable by the regulatory agency” on the ground that the regulatory agency is more “familiar with the workings of the regulated industry” than a court and thus in a better position to evaluate the reasonableness of a proposed rate. Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20-21 (2d Cir. 1994). To attack the filed rate or term in judicial proceedings “would unnecessarily enmesh the courts in the rate-making process,” “unduly subvert the regulating agencies’ authority,” and discriminate among ratepayers because “victorious plaintiffs would wind up paying less than non-suing ratepayers.” Id., at 19, 21; see also Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998) (the filed tariff doctrine both “keep[s] courts out of the rate-making process” and prevents carriers from discriminating between ratepayers).¹⁰

Under the filed tariff doctrine, a court cannot award relief (for example, in the form of damages, an injunction, or restitution) that would have the effect of retroactively imposing any rate or term other than the filed tariff rates and terms. See Taffet v. Southern Co., 967 F.2d 1483, 1491-92 (11th Cir.), cert. denied, 506 U.S. 1021 (1992). A ratepayer “can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.” Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co., 341 U.S. 246, 251 (1951). In accordance with the filed tariff doctrine, “any ‘filed rate’ – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings

¹⁰ As the Supreme Court has made clear, the doctrine protects not only the filed rates, but also the other terms and conditions of service provided in the tariffs. Central Office Tel., 524 U.S. at 223-24.

brought by ratepayers.” Wegoland , 27 F.3d at 18; see also Hargrave v. Freight Distrib. Serv., Inc., 53 F.3d 1019, 1022 (9th Cir. 1995).

The plaintiff in this case is attempting to challenge terms and rates that Sprint filed in its tariff and duly submitted to the FCC. Sprint is required by law to offer the terms and charge the rates on file with the FCC. Plaintiff’s requested relief would require this Court to interfere with the tariffed terms and rates on file with the FCC – which specifically provide the procedures and charges for long distance access service, the very subject of the complaint. The filed tariff doctrine prevents the Court from such action. Accordingly, plaintiffs’ claims are barred by the filed tariff doctrine and should be dismissed.¹¹

**B. Plaintiff Is Conclusively Presumed To Know The Contents Of The Tariff
And Cannot Claim Deception By
Sprint**

Under the filed tariff doctrine, the subscriber’s “knowledge of the lawful rate is conclusively presumed.” Kansas City S. Ry. Co. v. Carl, 227 U.S. 639, 653 (1913); see also Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1372 (9th Cir. 1985). Subscribers “must take notice of the rate applicable, and actual want of knowledge is no excuse.” Kansas City S. Ry. Co., 227 U.S. at 652. “[T]he likelihood or unlikelihood of a shipper’s actually reading all the applicable tariffs is simply irrelevant, for carriers and shippers alike are charged with constructive notice of tariff filings.” Security Servs., Inc. v. K Mart Corp., 511 U.S. 431, 443 (1994). Moreover, “[t]he [FCA] does not permit either a [customer’s] ignorance or the carrier’s misquotation of the applicable rate to serve as a defense to the collection of the filed rate.” Maislin Indus., 497 U.S. at 120 (citations omitted).

¹¹ Likewise, the claims against Sprint as a long distance provider are equally unsound because such services would be governed by tariff if offered by Sprint. See supra note 8.

A carrier's misrepresentation or nondisclosure of a tariff term is irrelevant to a ratepayer's liability to pay the filed rate, and a ratepayer can claim no injury from the payment of the filed rate, even when that payment is induced by "tort of the carrier." Keogh, 260 U.S. at 163; see also Farley, 778 F.2d at 1372. Provided that the carrier has complied with its statutory obligation to file its rates and terms, and the FCC has not found those rates and terms to be unlawful, see 47 U.S.C. §§ 204, 205, no evidence of the carrier's misrepresentation or concealment of the filed rate or term can overcome the conclusive presumption that the subscriber knew the terms of the filed tariff.

For example, in the classic filed tariff case of Louisville & Nashville Railroad Co., the defendant, a passenger on the plaintiff railway, purchased tickets at a price quoted, "after repeated interviews and correspondence," by the railway's representatives. 237 U.S. at 95-96. The quoted price was lower than the filed rate, and the railway sued for the undercharge. Notwithstanding that the passenger "was in no way at fault in the matter," id. at 96, the Supreme Court held that the railway could recover the undercharge. The passenger was "charged with notice" of the tariff, although he not only was ignorant of it but had been misinformed by the railway. Id. at 97; see also Marco Supply Co. v. AT&T Communications, Inc., 875 F.2d 434, 436 (4th Cir. 1989).

Whether the carrier's motive in misrepresenting or concealing the filed rate is innocent or deceitful is irrelevant. "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper." Kansas City S. Ry. Co., 227 U.S. at 653. For example, in Consolidated Freightways Corp. v. Terry Tuck, Inc., 612 F.2d 465 (9th Cir.), cert. denied, 447 U.S. 907 (1980), a shipper asserted fraud as a defense to the carrier's suit to recover charges owed under a filed tariff, alleging that the carrier knowingly misquoted the shipping

rates. Id. at 466. The court held that “no claim for relief can be predicated on a carrier’s alleged fraudulent misquotation of tariffs.” Id.

Similarly, Aero Trucking, Inc. v. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979), involved a situation where a shipper alleged that a carrier had fraudulently represented that certain charges would not be assessed. At the time the alleged misrepresentation was made, unknown to the shipper, the carrier had on file a tariff that required the charges to be imposed. The court held that because the shipper was presumed to have knowledge of the applicable tariff rates, the shipper could not rely on the carrier’s erroneous statement that no charges would be assessed. Id. at 622; see also Cahnmann, 133 F.3d at 490 (rejecting fraud claim); Marco Supply Co., 875 F.2d at 436 (fraud claim dismissed because plaintiff “could not have relied on any misrepresentation as to the applicable rate inasmuch as customers of regulated carriers are presumed to know the actual applicable rates to be charged”); Paulson v. Greyhound Lines, Inc., 804 F.2d 506, 507 (8th Cir. 1986) (fraud claim dismissed because shipper was “deemed to have known” the relevant tariff provisions, despite carrier’s promises to the contrary); Transportation Data Interchange, Inc. v. AT&T Corp., 920 F. Supp. 86, 89 (D. Md. 1996) (carrier must charge the tariff amount and any reliance by a customer on a carrier’s misrepresentation of the published tariff rates is not reasonable as a matter of law).

Here, Sprint’s terms and rates were properly filed in a tariff pursuant to federal law. Under the filed tariff doctrine, plaintiff is conclusively presumed to know the terms and rates specified in the tariff. Accordingly, as a matter of law, plaintiff’s assertion that Sprint engaged in a “deceptive practice of non-disclosure” is irrelevant because all subscribers are charged with notice of the terms and conditions in the filed tariff – including, here, the terms for long distance

access and the rates for access service. Thus, all of plaintiff's claims, regardless of the relief sought, should be dismissed pursuant to the filed tariff doctrine.¹²

C. The "FDUTPA" Cannot Be Applied Against Sprint

Plaintiff's claims against Sprint under the Florida Unfair and Deceptive Trade Practices Act ("FDUTPA") are also invalid under the terms of that law's "regulatory exemption." The exemption provides that the statute does not apply to "[a]n act or practice required or specifically permitted by federal or state law," Fla. Stat. § 501.212(1), and has been interpreted to apply to analogous federal regulatory schemes. See Eirman v. Olde Discount Corp., 697 So.2d 865, 866 (Fla. Ct. App. 1997) (applying regulatory exemption where securities industry practice was permitted by federal law).

Significantly, courts in other jurisdictions, interpreting nearly identical regulatory exemptions in other states' consumer protection laws, have applied the exemptions to regulated, tariffed telecommunications services. See Cahnmann v. Sprint Corp., 961 F. Supp. 1229, 1233 (N.D. Ill. 1997) ("The damage claims under state law are untenable since both applicable state laws, found in the Illinois Consumer Fraud and Deceptive Business Practices Act, contain specific exemptions for 'actions or transactions specifically authorized by . . . any regulatory body . . . acting under statutory authority of . . . the United States' . . . and 'conduct in compliance with . . . rules of . . . a Federal . . . agency'"), aff'd, 133 F.3d 484 (7th Cir.), cert. denied, 524 U.S. 952

¹² The savings clause of 47 U.S.C. § 414 does not save plaintiff's claims here, as she contends. Response to GTE/AT&T Motion to Dismiss at 5. The Supreme Court rejected the same argument in Central Office Tel., 524 U.S. at 227-28, noting that the clause preserves only those rights that are not inconsistent with the statutory filed-tariff requirements. See also Cahnmann, 133 F.3d at 488. Allowing claims like these to go forward involving, as they do, matters directly addressed by Sprint's tariff and FCC regulations cannot have been the sort of thing intended by the savings provision. Id.; see also Bastien, 205 F.3d at 987 (We have read the savings clause narrowly and most complaints will involve rates or other issues specifically reserved to federal control).

(1998); D.J. Hopkins, Inc. v. GTE Northwest, Inc., 947 P.2d 1220, 1224 (Wash. Ct. App. 1997) (“even though the complaint is couched in the terms of deceptive practices, what actually is presented is a claim for overcharges, or an unreasonable charge for something not received. Billing practices are regulated by the WUTC and the trial court did not err in dismissing the [Consumer Protection Act] claim”); cf. Carr v. United Van Lines Inc., 345 S.E.2d 734, 737 (S.C. Ct. App. 1986) (“Because the Golden Guarantee is authorized under regulations and tariffs administered by the Interstate Commerce Commission, we hold the transaction involved in this case is exempt from the South Carolina Unfair Trade Practices Act.”).

And courts consistently have held under the filed tariff doctrine that state consumer protection laws may not be used to challenge the propriety of federally filed terms and rates. Kutner, 971 F. Supp. at 308 (“In so far as the filed tariff doctrine prevents the court from granting damages based on the reasonableness of the Original Tariff, plaintiff’s consumer protection statute claims are precluded”); Porr v. NYNEX Corp., 660 N.Y.S.2d 440, 448 (N.Y. Sup. Ct. 1997) (“The filed rate doctrine . . . forbids . . . collateral attacks on the PSC’s rate determinations”). Accordingly, plaintiff’s state statutory claims are also barred.

II. IF THIS CASE IS NOT DISMISSED, THE DOCTRINE OF PRIMARY JURISDICTION REQUIRES A STAY AND REFERRAL TO THE FEDERAL COMMUNICATIONS COMMISSION

The Supreme Court has defined the doctrine of primary jurisdiction as

a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining

and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

“The judge-made doctrine of primary jurisdiction is ‘concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.’” The Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897, 919 (5th Cir. 1983) (quoting United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956)). “It applies where a claim is ‘originally cognizable in the courts,’ but where ‘enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.’” Id. (quoting Western Pac. R.R., 352 U.S. at 64).

The doctrine has a two-fold rationale. First, it ensures “[u]niformity and consistency in the regulation of business entrusted to a particular agency.” Far East Conference, 342 U.S. at 574. Second, it recognizes that deference to agency expertise is appropriate “where there is a need for the ‘expert and specialized knowledge of the agencies.’” The Avoyelles Sportsmen’s League, Inc., 715 F.2d at 919 (quoting Western Pac. R.R., 352 U.S. at 64). Application of the primary jurisdiction doctrine requires a court to “transfer an issue within a case that involves expert administrative discretion to the federal administrative agency charged with exercising that discretion for initial decision.” Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., 953 F.2d 1431, 1435 n.3 (3d Cir. 1991), cert. denied, 505 U.S. 1230 (1992). Thus, courts refer to administrative agencies matters that involve technical or policy considerations that are beyond

the court's ordinary competence and within the agency's particular field of expertise. MCI Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214, 220 (3d Cir. 1974).

The FCC is the administrative agency with expertise, skill, and knowledge concerning the telecommunications industry. It was established and is governed by the FCA and has a broad range of powers including regulation, investigation, adjudication, and enforcement. Under the FCA, common carriers such as Sprint must file tariffs with the FCC. 47 U.S.C. § 203(a). These tariffs include a schedule of rates and related classifications, regulations, and practices. Unreasonable and discriminatory tariffs are prohibited. 47 U.S.C. §§ 201-02. By the express terms of section 201(b) of the Act, all rates and practices of a carrier must be just and reasonable.

Issues that call into question the reasonableness of a carrier's rate, charge, or practice pursuant to Section 201(b) of the Act are within the FCC's primary jurisdiction. See Cahnmann, 133 F.3d at 488; In re Long Distance, 831 F.2d 627, 631 (6th Cir. 1987). As succinctly stated by the In re Long Distance court, "Congress has placed squarely in the hands of the [FCC]" authority to determine reasonableness of a carrier's rates, charges, and practices. 831 F.2d at 631 (quoting Consolidated Rail Corp. v. National Ass'n of Recycling Indus., Inc., 449 U.S. 609, 612 (1981)).

Plaintiff will likely argue that her claims are generic breach of contract and consumer protection matters, which are within this Court's area of expertise. Although plaintiff fails to directly allege a violation of Section 201(b) of the Act, however, at the heart of her complaint are Section 201(b) issues that challenge the terms and rates in Sprint's tariff and matters that are committed to FCC regulation under federal law. Plaintiff's complaint should be dismissed because her claims are prohibited by the filed tariff doctrine. In the event, however, that the Court determines that Sprint's conduct requires scrutiny, then it is the FCC that must do the

scrutinizing. The reasonableness of rates and practices is a question governed exclusively by Section 201 of the FCA. When such issues have arisen in other cases, courts routinely have stayed the litigation and referred the issues to the FCC.¹³

In sum, under the filed tariff doctrine, plaintiffs have failed to state a claim upon which relief can be granted and this case should be dismissed. Alternatively, in the event the Court finds that the filed tariff doctrine is not determinative of plaintiff's claims, those claims are within the primary jurisdiction of the FCC and this case should be dismissed or stayed pending a referral to the FCC for further proceedings.

Conclusion

Plaintiff's claims are barred by the filed tariff doctrine and should be dismissed. Alternatively, the case should be dismissed or stayed pending resolution of relevant issues before the FCC.

¹³ See Cahnmann, 133 F.3d at 488 (FCC is vested with primary jurisdiction to determine the validity of tariffs); IPCO Safety Corp. v. Worldcom, Inc., 944 F. Supp. 352, 356 (D.N.J. 1996) (issues which call into question the reasonableness of a carrier's rate, charge, or practice are within the FCC's primary jurisdiction); AT&T Corp. v. PAB, Inc., 935 F. Supp. 584, 590 (E.D. Pa. 1996) (noting that [t]he FCC is best suited to determine the reasonableness of a carrier's tariff rates or practices and deferring to primary jurisdiction of FCC where the issues this Court will be called upon to decide clearly go beyond mere contract interpretation); American Tel. & Tel. Co. v. The People's Network, Inc., 1993 WL 248165, at *7 (D.N.J. Mar. 31, 1993) (issues involving reasonableness and technical capabilities properly referred to FCC); Erdman Technologies Corp. v. US Sprint Communications Co., 1992 WL 77540, at *3 (S.D.N.Y. Apr. 9, 1992) (issues requiring interpretation of defendant's tariff, scrutinizing the reasonableness of defendant's actions and determining whether plaintiff has proprietary rights in telephone numbers sufficient to maintain a cause of action are issues involving policy matters that are directly within the FCC's particular field of expertise); Unimat, Inc. v. MCI Telecommunications Corp., 1992 WL 391421, at *3 (E.D. Pa. Dec. 16, 1992) (although plaintiff did not directly allege a violation of ' 201(b) of the FCA, issues that challenged the reasonableness of defendant's practice were referred to the FCC); Towne Reader Serv., Inc. v. MCI Telecommunications Corp., 1992 U.S. Dist. LEXIS 13569, at *19 (W.D.N.Y. August 11, 1992) (issues involving reasonableness and a factual inquiry into defendant's technical facilities were referred to the FCC).

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