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Detariffing:
New Rules Pave the Way for Customer Contracts

By Neil S. Ende

Over the last 20 years, a feeling has grown that tariffs are antiquated and do more harm than good. The FCC's new regulatory regime eases this feeling by requiring customer contracts and giving consumers more say. For most of the 20th century, domestic interstate services were provided pursuant to tariffs common carriers were required to file, as a byproduct of the old interstate commerce act that was incorporated into the Communications Act of 1934.

Specifically, Section 203 of that Communications Act required all common carriers to file tariffs showing "all charges" for the "interstate and foreign wire or radio communication services" they provided, as well as "the classifications, practices, and regulations affecting such charges."

In addition, Section 203 declared it unlawful for any carrier to "demand, collect or receive a greater or less or different compensation" for such communication services.

This came to be known as the "Filed Rate Doctrine." (See "Unholy Contract: The Legacy and Abuse of the Filed Rate Doctrine" May 1999, PHONE+ magazine).

Some may argue that tariffs were necessary to ensure that all customers could obtain telecommunications services in a nondiscriminatory manner, and that they facilitated the efficient distribution of information regarding service offerings to the population. But over the last 20 years, and particularly with the growth of competition, a feeling has grown that tariffs are antiquated and do more harm than good.

Indeed, many began to believe that carriers used tariffs as legal cover for abusive bait and switch tactics and outright fraud. As recently as two years ago, in *AT&T vs. Central Office Telephone Inc.*, the U.S. Supreme Court ruled the legal effect of a filed tariff as follows: "... even if a carrier intentionally misrepresents its rates and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff."

As a matter of law, the customer must pay the tariffed rate, even though fraudulent means may have been used to induce the customer into taking the service.

For this and other reasons, the FCC (www.fcc.gov) has attempted since the early 1980s to eliminate the tariff filing requirement.

However, the courts rebuffed the FCC's efforts in a series of cases. The courts held that the FCC has neither the right to forbid the filing of tariffs--i.e., mandatory detariffing--nor to forebear from enforcing the tariff filing rules.

Newfound Power

The Telecommunications Act of 1996, however, opened the door to eliminating the Section 203 tariffing requirement. The Telecom Act requires the FCC to forebear from applying the tariffing requirement if it concludes the following: the enforcement of the tariffing requirement is not necessary to ensure that carrier rates remain just and reasonable; enforcement is not necessary for consumer protection; and the public interest would be served by eliminating the tariffing requirement.

In its 1996 Detariffing Order, the FCC began to prohibit carriers from filing tariffs governing domestic interstate interexchange services.

This caused a number of carriers to challenge the FCC's Detariffing Order. The carriers offered a series of legally flawed arguments, which argued the FCC's mandatory detariffing order exceeded its authority.

These carriers also argued that detariffing was not in the public interest because it required them to mail individual contracts to their customers. They reasoned this would increase their costs, which in turn would raise prices for the cost of telecommunications services to consumers.

The FCC rejected these arguments, so the carriers took their fight to the courts.

Again, they argued that mandatory detariffing exceeded the FCC's authority, and that it was contrary to the public interest. The court ruled in favor of the commission, saying it had the authority to prohibit the filing of tariffs for domestic interstate interexchange services.

The FCC's New Regulatory Regime

With its victory in court, the FCC was free to issue a new regulatory scheme. Some of its essential elements are:

* As of Jan. 31, 2001, the FCC will no longer accept tariffs for domestic, interstate interexchange service, except for dial-around 1+ services using the carrier access code (e.g., 10-10-XXX) and new customer services for the first 45 days. All other tariffs for domestic, interstate interexchange services must be canceled or withdrawn by that date.

* Until Jan. 31, carriers may file new or revised tariffs for mass-market, domestic, interstate, interexchange services. However, they must be withdrawn by that date.

* Effective immediately, carriers may not file new or revised domestic, interstate, interexchange tariffs for contract tariff offerings and long-term service offerings such as AT&T Tariff 12, MCI special customer arrangements or Sprint customer network service arrangements.

* IXCs now are required to implement and/or to amend their customer service contracts whenever they make changes to their service rates and other terms.

Seeking Comment

The FCC has requested comment on an AT&T Corp. (www.att.com) suggestion that IXCs should be permitted to continue tariffing bundled domestic and international services during the transition period.

Upon consideration of public comment regarding the transition requirements, the FCC may forbid new or revised tariff filings for service offerings that bundle domestic and international service.

To facilitate the availability of information to customers, IXCs currently are required to maintain a website, if the carrier has one, and an office where it publishes rate terms and conditions for mass-market and individually negotiated service arrangements.

The FCC has not set a deadline for when the website must be operational. However, it has sought comment on how quickly IXCs should be required to fully comply with the requirements that they post their rates, terms and conditions. Those comments were due May 31.

Where Do We Go From Here

The practical effect of eliminating domestic interstate interexchange tariffs is that long-distance carriers no longer can use tariffs to govern their customer relationships.

Most importantly, this means the most egregious elements of the Filed Rate Doctrine--elements that allowed carriers to engage in bait and switch tactics and to be excused from their fraudulent conduct--are a relic of the past.

Under the FCC's new regulatory regime, telecommunications carriers--like providers of other mass-market services--will have to interact with their customers through contracts. Carriers also will have to provide customers with actual notice of any changes they wish to make to those contracts.

However, several points should be kept in mind. First, since the FCC only has jurisdiction over interstate and international services, its detariffing order has no effect on intrastate services. Thus, in states where tariffs still are required, customers will continue to be subject to those tariffs and to the abusive tactics that can result from purchases under tariff. Second, the detariffing order does not apply to purely international services. Those services may continue to be provided pursuant to tariff.

As indicated, the FCC still is considering whether it will allow carriers to continue to tariff bundled domestic and international services during the transition period.

Moreover, the FCC has not addressed many of the practical and consumer protection issues that arise in connection with moving mass-market services to a contract-based system, including choice of law and applicability of state consumer protection or credit laws. The resolution of these issues will be critical to ensuring that customers realize additional protections from the detariffing of their telecommunications services.

Finally, now that customers will be obtaining their domestic interstate interexchange services pursuant to contract, it is critical that the contracts be reviewed carefully.

While carriers will continue to be subject to the "just and reasonable" requirements of Section 201 of the Communications Act, customers must be vigilant to ensure that the contracts they sign accurately reflect the rates, terms and conditions under which they agreed to take service, and that they agreed to any subsequent change to those rates, terms and conditions. (Some of the risks found in carrier contracts are discussed in "Carrier Contracts: A Minefield of Avoidable Risk," August 1999, PHONE+ magazine, page 48.)

The FCC has leveled the playing field a bit for consumers. It now is up to them to stand their ground and demand that the contracts are presented clearly, fairly and set forth the parties' rights and obligations.

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