

# UNDERSTANDING TARIFFS AND THE FILED RATE DOCTRINE

By Anthony Mendoza, Esq. and Garth Morrisette



## I. INTRODUCTION

Many telecommunications customers are vaguely familiar with the term tariffs. Perhaps they sometimes see the term in a telecommunications contract, but pass it off as legalese. But tariffs play a critical role in telecommunications contracts and regulation. This white paper is intended to provide an introduction to telecommunications tariffs. Understanding how tariffs and the filed rate doctrine (sometimes called the filed tariff doctrine) affect your contracts for telecommunications services necessarily requires a review of the mechanics of tariffs, the purposes of tariffs, the distinction between federal and state regulatory jurisdiction over telecommunications services, and recent actions at the FCC to detariff long distance telecommunications services.

## II. TARIFFS – THE BASICS

**A. What Are Tariffs?** Tariffs are documents filed by rate-regulated companies for approval by governmental authorities which contain terms and conditions of service between the rate regulated entity and the customers they serve. Once approved by the government authority, the terms and conditions contained in the tariff become binding on both the carrier and the carrier's customers.

**B. What Are the Purposes of Tariffs?** The use of tariffs by regulated service providers has its roots in the federal Interstate Commerce Act, which regulated the terms and conditions of shipping companies. The purposes of tariffs are to prevent monopolistic or dominant service providers from charging unreasonable rates and from discriminating between customers. See AT&T v. Central Office Tel., Inc., 524 U.S. 214, 222 (1998). Public policy makers in the area of common carrier regulation wanted to ensure that common carriers did not engage in favoritism in the provision of essential public services.

**C. How Do Tariffs Work?** Once approved by the governing authority, tariffs preempt all contrary contract language and state law. As the Supreme Court described in the case of Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915), "the rate of the carrier duly filed is *the only* lawful charge." (Emphasis added). This well-established legal concept is known as the filed tariff doctrine. The courts have often been confronted with compelling factual situations in support of arguments for making exceptions to the doctrine with little success. For example, the filed tariff doctrine has been held to bar claims for breach of contract where the customer of a common carrier was induced into signing a

contract in order to win the business, only to receive a bill for the higher tariffed rate. See, e.g., Maislin Industries v. Primary Steel, Inc., 497 U.S. 116, 130-31 (1990), AT&T, 497 U.S. at 223.

Tariffs are living documents. They are frequently updated with price changes, and other changes in the terms and conditions of service. Tariffs contain many of the same types of provisions one would find in a contract, including definitions, service descriptions, price, notice and default provisions, liability limitations, and termination penalties. Memo Enterprises has prepared an appendix to this Memorandum describing the formatting and organizational conventions used in telecommunications tariffs. See Appendix A. To see an example of a tariff currently in effect for Qwest in Minnesota, go to: <http://tariffs.uswest.com:8000/iiop/WAImap?objected=0-2834>. Tariffs often go into effect without any governmental review. On the other hand, some proposed tariff changes do catch the attention of affected parties, which may trigger a more rigorous review of the impact that a tariff change has on the public.

### **III. FEDERALISM PRINCIPLES IN TELECOMMUNICATIONS REGULATION.**

A basic understanding of the dichotomy between federal and state jurisdiction in telecommunications regulation is important to an understanding of how tariffs work in the telecommunications industry. Battles over whether there is federal or state jurisdiction over telecommunications services are waged constantly. There are many gray areas where the proper jurisdiction is not clear. However, stepping back for a broader look, the general division of jurisdiction between states and federal authorities can be understood.

Historically, the federal government (primarily the Federal Communications Commission (FCC)) has had jurisdiction over all interstate and international telecommunications services. The federal government also has jurisdiction over all wireless telecommunications services regardless of whether the call originates and terminates in the same state. State governments have jurisdiction over landline intrastate services. For example, a landline call from St. Paul, Minnesota to Madison, Wisconsin has historically been subject to federal jurisdiction. On the other hand, a call from St. Paul to Duluth would be governed by the state (primarily through public service or public utility commissions).

Telecommunications carriers have historically been required to file tariffs for interstate services with the FCC, and tariffs for intrastate services with state public utilities commissions. The filed rate doctrine has applied with equal force at the state level. Therefore, a rate, term or condition of intrastate telecommunications service filed with a state preempts contrary contract language executed between parties.

### **IV. FEDERAL DETARIFFING.**

On July 31, 2003, the United States Court of Appeals for the District of Columbia upheld an FCC order detariffing interstate long distance service. MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 762 (2000); *Second Report and Order, In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61 (October 31, 1996) (herein the "*Detariffing Order*"); *Order on Reconsideration* (August 20, 1997). The FCC began the detariffing proceeding

in light of the passage of the Telecommunications Act of 1996 (1996 Act) and the increasing competition in the interexchange market over the last decade. Consistent with the intent of the 1996 Act to provide a "pro-competitive, deregulatory" national policy framework for telecommunications and information technologies and services, Congress directed the Commission to forbear from applying any provision of the Communications Act or the Commission's regulations if certain conditions are met.

*Order on Reconsideration* at ¶1. Taking this as a mandatory directive from Congress, the FCC found that the interstate long distance industry met all of the criteria for granting forbearance. An interesting aspect of this deregulatory step by the Commission is that the long distance industry vehemently opposed federal detariffing and appealed the FCC's order to the U.S. Court of Appeals, which upheld the order in the *MCI WorldCom* case.

In the *Detariffing Order*, the FCC ordered all interstate long distance carriers to cancel their tariffs. *Detariffing Order* at ¶3. The FCC also ordered interstate long distance carriers to make publicly available current information regarding each carrier's rates, terms and conditions of service. *Id.* at ¶84. The FCC did not specify any particular location or format for providing such information to the public. However, it did state that the information must be in an "easy to understand format" and updates must be made in a "timely manner." *Id.* at ¶84.

## **V. REACTION AND IMPLEMENTATION OF DETARIFFING ORDER.**

The long distance industry's response to the federal detariffing order can best be described as denial. Pro-industry commentators have attempted to inject confusion and ambiguity into unusually unambiguous language from the FCC. See, e.g., Charles H. Helein, et al., *Detariffing and the Death of the Filed Rate Doctrine: Deregulating the "Self" Interest*, 54 Fed. Comm. L.J. 281 (2001). In practice, the industry has attempted to carry on the filed rate doctrine and the tariff filing process by posting tariff-like documents such as "Service Publication Guides" and "Price Lists" on their web sites. See e.g.: <http://global.mci.com/publications/>; [www.sprintbiz.com/customer\\_center/product\\_support/schedules/](http://www.sprintbiz.com/customer_center/product_support/schedules/). Many carriers are attempting to incorporate such documents by reference into customer contracts, along with the ability to unilaterally amend such agreements. It is important to note that the *Detariffing Order* only required such rate information to be posted. It did not infuse these postings with any tariff-like binding legal authority. The filed rate doctrine does

not apply to these documents. See Ting v. AT&T, 319 F.3d 1126 (9<sup>th</sup> Cir. 2003)("There is nothing in the 1996 Act to suggest that Congress replaced the filing requirement with another preemptive provision.").

With the cancellation of federal tariffs and the abolition of the filed rate doctrine, state law has taken on a more prominent role in regulation of interstate long distance contracts. In implementing the detariffing order, many carriers began loading their contracts with provisions which have drawn the ire of state regulators and consumer protection advocates. An interesting line of case law has developed since the detariffing order became effective which has resulted in a sharp split between the 7<sup>th</sup> Circuit Court of Appeals and the 9<sup>th</sup> Circuit Court of Appeals.

The split results from an national advocacy position taken by AT&T that the *Detariffing Order* imposed only a minor change in the procedural manner in which the long distance industry is regulated, and that sections 201(b) and 202(a) of the federal Communications Act require nationwide uniformity of term and conditions of long distance services and therefore preempt state law. In *Boomer v. AT&T*, 309 F.3d 404 (7<sup>th</sup> Cir. 2003), the court agreed with AT&T's argument. Four months later, in *Ting v. AT&T*, the 9<sup>th</sup> Circuit Court of Appeals came to the opposite conclusion and expressly noted their disagreement with the 7<sup>th</sup> Circuit. Ting, at 1135.

Both *Boomer* and *Ting* involved, in part, state law challenges to arbitration clauses included in AT&T's post-*Detariffing Order* contracts. The *Boomer* court held that the federal Communications Act demonstrates a Congressional intent that customers of long distance services receive uniform terms and conditions of service. Boomer, at 418. Allowing state law challenges to AT&T's interstate long distance contract would "result in customers receiving different terms based on their locality." Id. Moreover, the *Boomer* court reasoned that allowing state law challenges to contracts increases the rates for AT&T's services in that state, necessarily resulting in illegal discriminatory rate structures. Id. According to the *Boomer* court, these two findings lead to the conclusion that such state law challenges irreconcilably conflict with sections 201(b) and 202(a) of the Communications Act. State laws which form the basis of the challenge to AT&T's contract provisions were preempted. The *Boomer* court did acknowledge that federal law no longer completely preempts the field of long distance telephone regulation. Id. at 424. However, the court drew a distinction between, on the one hand, state laws which "invalidate the rates, terms or conditions of a long-distance service contract" which are preempted. Id. at 424. On the other hand, the court held that state laws which govern "whether a contract has been formed" are not preempted. Id. at 423.

The *Ting* court did not agree that state contract and consumer protection laws conflict with sections 201(b) and 202(a) of the Communications Act. The *Ting* court took exception with AT&T's argument that sections 201(b) and 202(a) forbid carriers from "offering its customers anything but precisely the same terms, rates, and conditions nationwide." Ting, at 1138. While sections 201(b) and 202(a) unquestionably evince Congress' intent that customers receive fair, reasonable, and non-discriminatory rates from carriers, the court held these two provisions must be read in light of Congress'

overall intent to move to a more flexible deregulatory method to achieve the mandate of sections 201(b) and 202(a). Id. at 1142. This regime included providing the FCC the ability to detariff long distance rates. Id. at 1141. The court stated that unlike the filing of tariffs, the "market-based method depends in part on state law for the protection of consumers in the deregulated and competitive marketplace." Id. This dependence, the court held "creates a complimentary role between federal and state law . . . ." Id.

Moreover, the Ting court held that section 202(a) of the Communications Act never mandated strict uniformity of rates, terms, and conditions, but only those which are "unjust or unreasonable." Id. at 1140 (citing 47 U.S.C. §202(a)). For example, the court, citing *Panatronic USA v. AT&T*, 287 F.3d 840 (9<sup>th</sup> Cir. 2002), held that even a difference in price is not unreasonable if there is a "neutral rational basis underlying the disparity." Id. at 1140. The *Ting* court also distinguished the procedural background of the case before it from the procedural situation in *Boomer*. In *Ting*, there was a complete factual record developed at the trial court level. No persuasive evidence was presented by AT&T that the application and enforcement of state law resulted in unreasonably high or discriminatory rates. In *Boomer*, the court made its findings absent a factual record.

Other federal courts that have considered the effect of the FCC's *Detariffing Order* have generally used similar reasoning and come to the same conclusion as the *Ting* court. In *Wisconsin v. AT&T*, 217 F.Supp.2d 935 (W.D. Wis. 2002), the State of Wisconsin sued AT&T over clauses in AT&T's post-*Detariffing Order* contracts which attempted to permit AT&T to unilaterally change prices and charges with limited notice, require arbitration of disputes, preclude class actions, and require application of New York law. AT&T attempted to remove the case to federal court, and the State of Wisconsin moved to remand the case back to state court.

The court ordered the case to be remanded to state court, holding:

Plaintiff's complaint is based exclusively on state law and is removable only if a federal law completely occupies the field of consumer telephone contracts. When the filed tariff requirement was in place federal law occupied the field concerning state contract claims. *Cahnmann v. Sprint Corp.* 133 F.3d 484, 489 (7<sup>th</sup> Cir. 1998). \*\*\* With the demise of filed tariffs, however, complete preemption no longer exists.

Wisconsin, at 937. In *Frontline Comm. International*, 178 F. Supp. 2d 432, 438 (S.D.N.Y. 2001), the court held that after detariffing federal tariffs ceased to have any effect and become nothing more than documents subject to the common law rules of contracts. Despite the difference in opinion between the 7<sup>th</sup> and 9<sup>th</sup> Circuit courts, one common thread emerges in an analysis of the post-*Detariffing Order* cases – the importance of traditional contract law analysis to long distance contracts. All of the courts employed well-established doctrines of contract law in their analyses. This is a dramatic change from the filed tariff doctrine analysis that historically characterized the jurisprudence in this field of law up through the *Detariffing Order*. It also highlights the

importance of ensuring that consumers of long distance service are paying attention to the terms and conditions offered in long distance contracts. It is important to note that all of the above cited cases involve complaints arising out of the *Detariffing Order* and do not implicate regulation of intrastate services, tariffs for such services filed with state regulatory commissions, or the viability of the filed rate doctrine as a matter of state law.