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TELECOMMUNICATIONS LAW UPDATES

FCC Issues Significant New Orders Affecting International Operations

FCC Orders Nondominant Carriers to Detariff International Interexchange Services

On March 16, 2001, the FCC announced that it will generally eliminate tariffs for nondominant international interexchange services by early next year. The removal of this "significant regulatory burden," an integral part of the Commission's 2000 Biennial Regulatory Review, was widely expected within the telecommunications industry. Predicting benefits for consumers and competitors alike, the Commission explained that "the competitive state of the international interexchange marketplace no longer requires non-dominant carriers to file tariffs to ensure that charges, practices, classifications or regulations are just and reasonable."

Under the "filed rate doctrine," a carrier operating under the traditional tariffing regime could unilaterally determine and even change the terms of service with its customers merely by filing tariffs with the FCC, subject to the Commission's general oversight of the reasonableness of those terms. Detariffing seeks both to address concerns about the fairness of that approach and to enhance competition in the market for international services. As a practical matter, mandatory detariffing requires carriers to establish contractual relationships with their customers to ensure payment for services. The Commission has noted that the transactional burdens of this approach will generally be small, "as carriers may issue short standard contracts for customers."

The Commission acknowledged that, in a few limited circumstances, carriers will be unable to establish contractual relationships or to give notice to customers without undue burden. And, with neither a contract nor a filed tariff, carriers would have no guarantee of payment for services. Accordingly, the Commission will continue to permit nondominant international carriers to file tariffs in four situations: (1) where end-users obtain access to international interexchange services by dialing a carrier access code such as 10-10-XXX (dial-around 1+ services); (2) where end-users receive inbound international collect calls; (3) where customers of "on-demand" Mobile Satellite Services ("MSS") have not entered into pre-existing contracts with a particular provider; and (4) where carriers first begin to provide international interexchange services to new residential and business customers who have selected or changed their interexchange carriers simply by calling their local exchange carriers (for the first 45 days of service or until the customer signs a contract, whichever comes first).

In a further step to protect consumers, the Commission will now require carriers to provide public access to clear, current rate information in at least one location during regular business hours and, if applicable, on their websites. Carriers must also inform customers of the availability and specific location of this information in response to consumer inquiries or complaints.

Carriers will have nine months from the effective date of the Order (*i.e.* until January 2002) to detariff

their nondominant international interexchange services. During the nine-month transition period, they may continue to file new or revised tariffs for mass market international interexchange services, but not "new or revised contract tariffs or other long-term arrangements[.]" Although the deadline gives carriers ample time to adjust to the new regime, the Commission believes that many carriers will act far more quickly in order to detariff all of their services — both domestic and international — simultaneously. In fact, in anticipation of the present detariffing Order, the Common Carrier Bureau recently gave carriers that option by pushing back the deadline for detariffing of domestic mass market consumer services until July 31, 2001.

FCC Announces Strict Enforcement Measures for Unauthorized International Operations.

On February 5, 2001, the FCC's International Bureau opened a 90-day window during which carriers currently providing international services (or owning or operating submarine cable facilities) without proper authorization may apply for such authorization under section 214 of the Communications Act. The Bureau announced that it "d[id] not expect to initiate enforcement action against these carriers and operators during this 90-day period," but it added that, at the end of the period, it will refer cases of noncompliance to the Enforcement Bureau. In adopting this policy, the International Bureau seeks "to ensure that international carriers and operators are in compliance with the rules and that its records regarding authorized carriers and operators are current and accurate."

The Bureau has expressed concern about the growing number of applications for *nunc pro tunc*, or retroactive, international authorization. Such retroactive applications are filed in a number of circumstances. Carriers often discover unlicensed international telecommunications facilities when conducting due diligence investigations for transactions, such as license assignments or investments, and then seek to remedy the problem after the fact. Similarly, carriers preparing an application for a new service or facility may belatedly discover an out-of-status service. In addition, carriers may inadvertently transfer or assign international section 214 authorizations without FCC approval in the course of corporate reorganizations or mergers.

In the past, retroactive authorizations have been granted on belatedly filed section 214 applications. The Notice declares, however, that, effective immediately, requests for *nunc pro tunc* approval will be considered only in extraordinary circumstances. The 90-day window, which will close on May 7, 2001, therefore presents a one-time opportunity for carriers to seek authorization for existing international services. The Notice makes clear that, after the window closes, the International Bureau will refer cases of unauthorized international service to the Enforcement Bureau.

This 90-day window should act as a powerful incentive for all carriers providing international telecommunications services (or owning or operating submarine cable facilities) to verify the status of their authorizations and, if necessary, to apply for additional authorizations between now and May 7. In addition, carriers should be careful in the future to ensure compliance with (among other things) the Commission's transfer-of-control rules when they undertake corporate reorganizations or other "substantial changes in ownership or control." After May 7, voluntary disclosure of noncompliance is still preferable, but it will not prevent an enforcement action; instead, the Enforcement Bureau will take such disclosure into account in determining an appropriate sanction.

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