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I. INTRODUCTION

After nearly two decades[1] and several trips to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court"),[2] the Federal Communications Commission's wish to rid itself of the burden of processing and warehousing reams of long-distance domestic tariffs[3] became a reality on July 31, 2001.[4]

In a May 9, 2000 *Public Notice*[5] following the D.C. Circuit Court's decision upholding the FCC's mandatory detariffing order,[6] long-distance

1 *See* MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 762 (D.C. Cir. 2000) ("Starting in the early 1980s, the Commission tried to prohibit tariff-filing by nondominant carriers—in essence, those other than AT&T—but that effort was successfully challenged in this court in *MCI Telecommunications Corp. v. FCC* . . . where we struck down 'mandatory detariffing' as inconsistent with the 1934 Act."); *see also* Susan Bahr, *Detariffing Long Distance: Detariffing Spells Liability for Carriers, But There's Room for Maneuvering*, AM. NETWORK, May 1, 1999, at 23, *available at* http://www.americasnetwork.com/issues/99issues/990501/990501wash.htm ("The FCC has been trying to detariff long distance service for more than 16 years.").

2. *See* MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (holding that the Commission's mandatory detariffing order was against the Communications Act of 1934); *see also* MCI WorldCom, 209 F.3d 760 (holding that the Petitioner's challenges to the Commission's detariffing order were unfounded, and that the Commission could establish detariffing under the Telecommunications Act of 1996).

3. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 872 (16th ed. 2000) (Tariffs are "[d]ocuments filed by a regulated telephone company with a state public utility commission or the Federal Communications Commission. The tariff, a public document, details services, equipment and pricing offered by the telephone company (a common carrier) to all potential customers.").

4. *See generally* MCI WorldCom v. FCC, 209 F.3d 760 (holding that the Petitioner's challenges to the Commission's detariffing order were unfounded and, therefore, the Commission could establish detariffing under the Telecommunications Act of 1996).

5. *See* Domestic, Interexchange Carrier Detariffing Order Takes Effect; Common Carrier Bureau Implements Nine-Month Transition Period; Comment Sought on Modifications to Transition Plan, *Public Notice*, 16 F.C.C.R. 3688 (2000) [hereinafter *Detariffing Public Notice*].

6. *See MCI WorldCom*, 209 F.3d 760.

carriers were required to withdraw their paper tariffs for domestic long-distance mass market services from the Commission.[7] In the place of filed tariffs, long-distance carriers were required to post their "rates, terms and condition[s]" on their Internet Web sites or, if they did not maintain a Web site, to make this information available in one central location where the public could inspect them during regular business hours.[8] Similar requirements applied to carriers offering specialized customer arrangements, or "contract tariffs."[9] The deadline for posting contract tariffs on the Internet was also January 31, 2001.[10]

In what can be described as a paroxysm of overzealous consumerism, the FCC, in effect, announced its opinion that as a result of detariffing, carriers may no longer rely upon the Filed Tariff Doctrine (a.k.a. Filed Rate Doctrine).[11] The chief effect of this announcement, expressly encouraged

7. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Notice of Proposed Rule Making*, 11 F.C.C.R. 7141, para. 30, 3 Comm. Reg.2d (P & F) 2259 (1996) [hereinafter *Notice of Proposed Rule Making*] ("Finally, we tentatively conclude that forbearing from imposing tariff filing requirements on non-dominant interexchange carriers is consistent with the public interest."); *see also MCI WorldCom*, 209 F.3d at 766 ("Indeed, the 1996 Act provides that [i]f the Commission determines that . . . forbearance will promote competition . . . that determination may be the basis for a . . . finding that forbearance is in the public interest. It was certainly reasonable to move regulation in that direction even if it ostensibly raises transaction costs for the carriers.) (internal citations omitted). The ultimate date to effect contract tariff detariffing was January 31, 2001.

8. *Detariffing Public Notice*, *supra* note 5, at 36913.

> Section 42.10 (a) of the Commission's rules requires that: '[a] nondominant interexchange carrier shall make available to any member of the public, in at least one location, during regular business hours, information concerning its current rates, terms and condition for all of its detariffed interstate, domestic, interexchange services. Such information shall be made available in an easy to understand format and in a timely manner.' . . . Section 42.10 (b) of the Commission's rules states that: 'a nondominant IXC that maintains an Internet website shall make such rate and service information specified in paragraph (a) of this section available on-line at its Internet website in a timely and easily accessible manner, and shall update this information regularly (sic to omit end single quotation mark).) (internal citations omitted).

Id.

9. *See* Common Carrier Bureau Extends Transition Period for Detariffing Consumer Long Distance Services, *Public Notice*, 16 F.C.C.R. 3747 (2000) [hereinafter *Public Notice*] ("IXCs must still complete the process of detariffing domestic contract-type services by January 31, 2001.").

10. *Id.*

11. *See* Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The filed rate doctrine is a judicially-created doctrine created under the Interstate Commerce Act. In *Louisville & Nashville R.R. Co. v. Maxwell*, the Supreme Court described the rules of the doctrine:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext . . . . 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

by the FCC, is to open the carrier-customer relationship to the scrutiny of state authorities, like the State Attorneys General and state consumer-protection laws. In addition, legal challenges based upon the principles of contract law were also "endorsed" by the FCC.[12]

The consequences of such an environment are directly linked to the financial bottom line of long-distance carriers. Today it can cost a long-distance carrier approximately $300 to acquire a new customer[13] or to retain an existing customer. Without tariffs, it is certain that these costs will rise and even explode to $1,000 or more. A carrier's costs of complying with the strict liability standard of the anti-slamming,[14] anti-cramming,[15] and other consumer-protection rules[16] have been extremely high. Now that the Attorneys General of the states and other state consumer agencies are able to attack the sales and marketing practices of long-distance carriers under state consumer-protection laws, compliance and appeasement costs are

> interstate commerce in order to prevent unjust discrimination.

Id.

12. *See* Thomas K. Crowe, *Detariffing: The Transition Begins*, BUS. COMM. REV., Aug. 2000, at 30, *available at* http://www.bcr.com/voicecon/articles/b0006p28.asp [hereinafter *Crowe*]. The article states:

> The FCC's detariffing rulings also may complicate the issue of who governs the legal relationship between carriers and their customers. Under a tariffed regulatory regime, disputes between end users and carriers were often subject to federal communications law. In the absence of tariffs, the FCC has indicated that state consumer protection and contract laws will apply, as well as the Communications Act of 1934, as amended, with respect to the lawfulness of rates, terms and conditions. In short, both federal and state law will apply to the carrier/customer relationship. Such shared jurisdiction will almost certainly complicate disputes and contested cases between end users and carriers.

13. *See* Peter McCullagh et al., *Drumming for the Mass Market's Attention May Yet Pay Off*, ELECTRIC, LIGHT & POWER, Feb. 1999, at 20. The article states:

> In the telecommunications industry, the cost to acquire a residential long distance customer is between $200 and $300 . . . . This cost, which includes sales, order processing and the service expenses associated with bringing on a new customer, requires that the customer stay with the long distance carrier for at least 12 months for the company to simply break even.

Id.

14. *See* Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecomm. Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, *First Order on Reconsideration,* 15 F.C.C.R. 8158, para. 1, 20 Comm. Reg.2d (P & F) 395 (2000). Slamming is the "unauthorized change of a subscriber's preferred carrier." *Id.*

15. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 178 (17th ed. 2001). Cramming is the "practice in which customers are billed for unexpected telephone charges, which they typically didn't order, authorize or use." *Id.*

16. *See*, *e.g.*, State of Maryland, Office of the Attorney General, *Consumer Education Publications*, *at* http://www.oag.state.md.us/consumer/edunit.htm (last visited Sept. 27, 2001) (providing a list which gives links to state consumer protection laws and publications).

likely to skyrocket.[17] This is even more troubling in the current regulatory environment in which State Attorneys General offices, utility commissions, and the FCC use a handful of customer complaints to extract costly settlements from carriers. The bottom line is that the incentives created by the enforcement of the slamming rules (to make headlines and political hay and gain revenues for state and federal coffers through this telecommunications version of the "speed trap") have never been greater and will only increase as a result of detariffing.

The bad news does not end there for long-distance carriers. Single plaintiff and class action civil suits for misrepresentation, fraud, breach of contract, and even unfair competition are all now certain to become a larger part of the regulatory fabric of telecommunications. While this view of the FCC's detariffing action can and will be disputed, and the argument will be made that consumers must be protected, it cannot be denied that the FCC and its state brethren have not paid the slightest attention to the other side of the story. That is, the costs that will be imposed on all consumers because of the desire to penalize carriers, without limits, for the allegations of a few consumers. This will be the real legacy of FCC-mandated detariffing.

Since detariffing has only been in effect for a short while, it is too early to gauge even the near term economic and operational impacts of the detariffing mandates and Internet posting requirements. But the FCC and state regulatory agencies have already acted to use consumer protection laws to affect the legal relationship of carriers with their existing and future customers, and to change the fundamental jurisdictional environment in which carriers must market, price, and operate. This Article will explore some of these issues.

This Article reviews the history of the FCC's detariffing efforts. It then addresses the major issue raised not so much by detariffing itself, but by the FCC's view of the detariffing order's impact on the Filed Tariff Doctrine. This legal doctrine is one under which long-distance carriers have operated for decades. Its principal effect is to override general contract and state consumer protection laws that are designed to protect *individuals* in order to advance and protect broader *public* interests. Notwithstanding the existence of the Doctrine for nearly a century or the Supreme Court's recent unequivocal affirmation of its continued validity and vitality, the

17. *See* Judianne Triglia, *Qwest Gets Out of Slam-Jam*, AM. NETWORK WEEKLY, May 4, 2001, *at* http://www.americasnetwork.com/enews/2001/May/20010504.htm. "Creany [Pennsylvania's Senior Deputy Attorney General] says the reason for a reduction in slamming is most likely due to more strict regulations as opposed to the general goodwill and concern of carriers." *Id.*

FCC, through detariffing, has declared the Doctrine dead. The Authors have formally opposed the FCC's declaration[18] and restate and update that opposition herein. In Part III, this Article shows that the Doctrine is alive and well, and in a government of laws, not men, the doctrine will stay that way until the U.S. Supreme Court or Congress explicitly says otherwise. This Article moreover suggests that the FCC's motivations behind detariffing have failed to consider, much less attempted to properly balance, the conflicting public interests involved. Instead, the FCC has substituted political expediency and populous pandering for its congressionally-imposed duty to regulate in the public interest.[19]

This Article also compares and contrasts the legal rights enjoyed by long-distance carriers under the Filed Tariff Doctrine to the rights and potential liabilities of carriers in its absence. Finally, this Article discusses the actions several states have taken immediately following the July 31, 2001 effective date of the FCC's mass-market detariffing order and simultaneous declaration that the Filed Tariff Doctrine is dead. The Article concludes that the FCC's action is a manifest injustice to both carriers and consumers alike, and is a prime example of irresponsible agency regulation.

II. MARCH TOWARDS DETARIFFING

The FCC's determination to eliminate tariffs immediately followed the breakup of the Bell System (also referred to in this Article as "the AT&T monopoly").[20] The Commission's motivation, although cloaked in consumer protection rhetoric, has always been derived from the more selfish desire to rid itself of the administrative burdens associated with tariffing.[21]

18. *See generally* 2000 Biennial Reg. Review, Policy and Rules Concerning the Int'l, Interexchange Marketplace, *Comments of Global Telecompetition Consultants, Inc.* [today "GTC Consultants"] *in Response to Notice for Proposed Rulemaking*, IB Docket No. 00-202, 2000 WL 1532401 (F.C.C. Oct. 18, 2000) [hereinafter *2000 Biennial Reg. Review*].

19. *See generally* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.), as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.) (The FCC's duty to regulate in the public interest is strewn throughout the Act).

20. *See generally* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore, *Notice of Inquiry and Proposed Rule Making*, 77 F.C.C.2d 308 (1979) [hereinafter *Notice of Inquiry*]. *See also* MCI Telecomms. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (The FCC's *Sixth Report and Order*, which called for mandatory detariffing, was challenged in the D.C. Circuit Court of Appeals by MCI Telecommunications Corp. The Court of Appeals determined that the FCC did not have the statutory authority to mandate detariffing.).

21. *See* Bahr, *supra* note 1, at 23 ("But as stated by [former] FCC Commissioner Susan Ness, tariffs are deposited in an 'obscure corner' of the FCC and consumers do not have

Section 203 of the Communications Act of 1934 (the 1934 Act)[22] requires all common carriers[23] to file tariffs showing "all charges" for the "interstate and foreign wire or radio communications services" they provide, as well as "the classifications, practices, and regulations affecting such charges."[24] For over sixty years, when the AT&T monopoly alone dominated the long-distance industry, the Commission felt little burden administering its duties under Section 203. With the proliferation of competitive carriers in the 1980s, however, the burden seemingly proved too onerous for the FCC, and thus the Commission began its unrelenting campaign in favor of detariffing.[25]

The FCC's campaign was immediately halted in its tracks when in 1985 the D.C. Circuit Court overturned the Commission's initial attempt to order mandatory detariffing.[26] Subsequently, the FCC adopted a permissive—that is, optional—detariffing policy[27] which met the same fate in the D.C. Circuit Court.[28] The court opined that the 1934 Act did not legally authorize the FCC to implement a detariffing policy, permissive or otherwise.[29] Nearly a decade later, the tide turned in the FCC's favor when Congress passed the Telecommunications Act of 1996 (the 1996 Act), giving the FCC the authority to forbear from regulatory measures determined to be unnecessary to protect consumers.[30]

ready access to them.").

22. 47 U.S.C. § 203 (1994).

23. *See* 47 U.S.C. § 153(h) (1994) ("'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . .").

24. *See* 47 U.S.C. § 203 (1994).

25. *See generally Notice of Inquiry*, *supra* note 20. The FCC's Competitive Carrier rule-making began in 1979 with this notice.

26. *See MCI Telecomm. Corp*., 765 F.2d 1186.

27. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Fourth Report and Order*, 95 F.C.C.2d 554, para. 31, 56 Rad. Reg.2d (P & F) 1219 (1983) ("We conclude that these carriers are non-dominant currently and are likely to be so in the future . . . . Non-dominant carriers not treated by forbearance . . . will be subject to streamlined regulation.").

28. *See* AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (holding that forbearance or permissive detariffing treatment, as extended to certain carriers by the Commission's *Fourth Report*, is plainly contrary to Section 203 of the Communications Act of 1934).

29. *Id.* at 736 ("We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction. The Commission will have to obtain congressional sanction for its desired policy course.").

30. See MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 762 (D.C. Cir. 2000), which states:

> The landscape changed, however, when Congress passed the Telecommunications Act of 1996, which requires the FCC to forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or

With its new forbearance authority, the FCC resurrected mandatory detariffing through its 1996 Detariffing Order.[31] Although carriers succeeded in staying the *Order* pending judicial review for several more years, on April 28, 2000 the D.C. Circuit Court denied the appeals, and on May 1, 2000 lifted the stay.[32] Days later, the FCC issued its *Public Notice* establishing a Transition Plan and cementing its detariffing mandate.[33]

The Transition Plan required all carriers to cancel and withdraw their existing interexchange domestic tariffs, including contract tariffs, within nine months, or by January 31, 2001.[34] The FCC later extended the deadline for mass-market tariffs until July 31, 2001.[35]

Now that both of these critical dates have passed, domestic detariffing is in full effect.[36] One would think that an industry that had operated pursuant to tariffs throughout its existence, and had battled the FCC's attempts to detariff for nearly twenty years, would be making a great deal of noise about transitioning to the new environment. For the most part, however, the industry has been very quiet. Why is this the case? This silence quite possibly stems from uncertainty and fear. Fear that uncertainty about the status of the key component of tariffing, the Filed Tariff Doctrine,[37] and fear that their chosen method of addressing the FCC's mandates (i.e., Internet posting of rates, terms and conditions[38] and

> telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. . . .
>
> Armed with this new statutory authority, the FCC moved once more to detariff the interstate, domestic, interexchange services of nondominant carriers—now all of the interexchange companies. (internal citations omitted).

31. *Second Report and Order*, *infra* note 40.

32. *MCI WorldCom*, 209 F.3d 760.

33. *Detariffing Public Notice*, *supra* note 5.

34. *See Public Notice*, *supra* note 9.

35. *See* Common Carrier Bureau Extends Transition Period for Detariffing Consumer Long Distance Services, *Public Notice*, 16 F.C.C.R. 2906, para. 1 (2001).

36. *See* Detariffing of Long Distance Telephone Industry to Become Effective at the End of the Month, *FCC News Release*, July 25, 2001, *at* http://www.fcc.gov/bureaus/common_carrier/news_releases/2001/nrcc0130.html.

37. David Rohde, *Court Upholds FCC Detariffing Order*, NETWORKWORLDFUSION, May 1, 2000, *at* http://www.nwfusion.com/news/2000/0501fcctariff.html, "[T]he [*MCI WorldCom*] ruling likely signals the end of the road for the 'filed rate doctrine,' an obscure legal concept that nevertheless has bedeviled users over the years. Under this long-standing principle, any tariff filed with a government agency in a regulated industry has legal precedence over a private contract." *Id.*

38. *See*, *e.g.*, Sprint's Web page, *at* http://www.sprint.com/ratesandconditions (last visited Sept. 26, 2001) (describing Sprint's rates, terms and conditions); *see also* WorldCom

establishing carrier-customer relationship in a detariffed environment)[39] not only complies with the FCC's expectations, but also offers adequate legal protections in the event that the Filed Tariff Doctrine ceases to exist, as the FCC insists.

In its October 1996 *Order* directing the mandatory detariffing of domestic interstate, interexchange services, the FCC repeatedly announced its philosophy that the absence of tariffs will eliminate the possible invocation of the filed rate (or tariff) doctrine.[40] Most companies, carriers and legal analysts have interpreted these proclamations as doing away with the Doctrine. The FCC may have done away with tariffs, but has it only succeeded in throwing out the baby with the bathwater by abolishing the Filed Tariff Doctrine through detariffing?

III. DETARIFFING AND THE FILED TARIFF DOCTRINE: IS IT DEAD OR ALIVE?

A. *The Filed Tariff Doctrine*[41]

The Filed Tariff Doctrine originated from the interpretation of the Interstate Commerce Act (ICA) of 1887.[42] The first case discussing the ICA's prohibition against discrimination and requirement that published rates be followed was *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission.*[43] In that case, the U.S. Supreme Court stated that the purpose of the ICA was:

> [T]o secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by

Web page, *at* http://www.worldcom.com/publications/service_guide/products/ (last visited Sept. 26, 2001) (listing WorldCom's products, services, terms and pricing).

39. *See, e.g.*, WorldCom Web page, *at* http://www.worldcom.com/publications/services_guide/product_packages_currently_available (last visited Sept. 26, 2001) (listing various special customer arrangements offered by WorldCom).

40. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Second Report and Order,* 11 F.C.C.R. 20,730, 4 Comm. Reg. (P & F) 1199 (1996) [hereinafter *Second Report and Order*].

41. The terms "filed rate doctrine" and "Filed Tariff Doctrine" are synonymous in this Article. The phrases are interchanged throughout in order to be consistent with the documents from which they are quoted.

42. *See* Interstate Commerce Act, 49 U.S.C. §§ 301-327, repealed by Pub. L. No. 95-473, §§ 4(b)-4(c), 92 Stat. 1466, 1470 (1978). The Interstate Commerce Act, among others, required motor carriers to file their rates with the Interstate Commerce Commission in the form of a tariff (49 U.S.C. § 10762(a)(1)); prohibits motor carriers from transporting goods at rates other than their tariff rates (49 U.S.C. § 10761(a)); and requires them to treat like customers alike (49 U.S.C. § 10741).

43. 200 U.S. 361 (1906).

> prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes, the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.[44]

The Supreme Court has recognized that the doctrine may create hardship in certain cases, "but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."[45]

Congress enacted the 1996 Act with language similar to the ICA.[46] Courts have applied the Filed Tariff Doctrine under the ICA to the Communications Act using the same rationale.[47] The Filed Tariff Doctrine under the Communications Act requires a regulated carrier to charge the tariff rate established with the regulatory agency, even if it has quoted a lower rate to its customer. To do otherwise would give a preference to, and discriminate in favor of, one customer over another.[48] Even where the carrier's representation is fraudulent, the aggrieved customer cannot assert that he should be charged the quoted rate because customers are presumed to know the terms of the applicable tariff.[49]

In 1998, two years following passage of the 1996 Act and the FCC's adoption of its October 1996 *Order* mandating detariffing, the Supreme Court, with Justice Scalia writing for the majority, unequivocally reaffirmed the principles and applicability of the Filed Tariff Doctrine to

44. *Id.* at 391. *See also* Armour Packing Co. v. United States, 209 U.S. 56, 80 (1908):

> If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart . . . . Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

45. Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915).

46. *See* 47 U.S.C. §§ 201-213 (1994).

47. *See* AT&T Co. v. New York City Human Res. Admin., 833 F. Supp. 962, 979 (S.D.N.Y. 1993); *see also* MCI Telecomm. Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990) ("The Communications Act, of course, was based upon the ICA and must be read in conjunction with it."); *see also* ABC v. FCC, 643 F.2d 818, 820-21 (D.C. Cir. 1980) ("To understand the purposes of the Communications Act . . . we must look to the legislative history of the Interstate Commerce Act of 1887, for the Communications Act borrowed its language and purpose from the Interstate Commerce Act."). Additionally, cases decided under the ICA are controlling precedent for interpreting the effect of tariffs filed under the Communications Act because common carrier communications companies were regulated under the ICA prior to the enactment of the Communications Act. *See* MCI Telecomms. Corp. v. Best Tel. Co., 898 F. Supp. 868, 872 n.1 (S.D. Fla. 1994); *see also ABC*, 643 F.2d at 821 n.2; Elec. Indus. Assoc. v. FCC, 554 F.2d 1109, 1115 n.16 (D.C. Cir. 1976).

48. Marco Supply Co. v. AT&T Comm., Inc., 875 F.2d 434, 436 (4th Cir. 1989).

49. *Id*.

telecommunications carrier services.[50] Justice Scalia stated that strict application of the doctrine was necessary to avoid discriminatory pricing and noted that this policy is at the heart of Title II, the Common Carrier Section of the 1996 Act.[51]

Clearly, the Filed Tariff Doctrine is a long-standing, judicially-created doctrine that the courts continue to apply, even in the aftermath of the October 1996 Detariffing Order.[52] In its numerous Notices of Proposed Rule Making ("NPRM")[53] and Orders on the issue of detariffing,[54] the FCC has time and again recognized that the filed rate doctrine is a long held legal doctrine created by judicial decisions applying the express words of a federal statute.[55] Given that the doctrine is a judicially-created mandate, the principle of *stare decisis*[56] prevents the FCC from interpreting the same

50. AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998) ("Accordingly, the century-old 'filed rate doctrine' associated with the ICA tariff provisions applies to the Communications Act as well.").

51. *Id*.

52. *See* Allworld Commun. Network, L.L.C. v. MCI WorldCom, Inc., No. 99 Civ. 4256, 2000 WL 1013956, at *3 (S.D.N.Y. July 24, 2000) (filed rate doctrine bars state law claims which seek to alter the terms and conditions provided for in the tariff but the filed rate doctrine does not bar this claim of interference with contractual relations). *See also* Evanns v. AT&T Corp., 229 F.3d 837, 841 (9th Cir. 2000) (filed rate doctrine bars challenge of carrier's pass-through fee of Universal Service Fund); Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co., 111 F. Supp. 2d 867, 874 (S.D. Tex. 2000) (filed rate doctrine is inapplicable where the defendants charged plaintiffs above tariffed rates); Guglielmo v. WorldCom, Inc., No. Civ.C-00-160-B, 2000 WL 1507426, at *6 (D.N.H. July 27, 2000) (artful pleading doctrine cannot be used to circumvent general rule that a preemption defense like the filed rate doctrine does not justify removal, therefore remanding the case to state court).

53. *See* discussion *supra* Part II.

54. *See* discussion *supra* Part II.

55. *See Second Report and Order*, *supra* note 40, paras. 55, 60. The FCC notes that "courts have long held that, in a situation where a filed tariff rate, or other term or condition, differs from a rate, term, or condition set in a non-tariffed carrier-customer contract, the carrier is required to impose the tariffed rate, term or condition." *Id.* para. 55. In discussing permissive detariffing, the Commission again recognized that "the filed rate doctrine is a legal doctrine developed by judicial precedent . . . ." *Id.* para. 60. *See also* Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Comms. Act of 1934, as Amended, *Order on Reconsideration*, 12 F.C.C.R. 15014, para. 3, 9 Comm. Reg. (P & F) 145 (1997) [hereinafter *Order on Reconsideration*] (noting that the concepts behind the filed rate doctrine are "pursuant to the 'filed rate' doctrine articulated by the courts."); Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Comms. Act of 1934, as Amended, *Second Order on Reconsideration and Erratum*, 14 F.C.C.R. 6004, para. 1, 15 Comm. Reg. (P & F) 316 (1999) [hereinafter *Second Order on Reconsideration and Erratum*] ("[U]nder the judicially created 'filed-rate' doctrine, the tariffed rate for a service is the only lawful rate that the carrier may charge for that service.").

56. *See* BLACK'S LAW DICTIONARY 1414 (7th ed. 1999) (defining "stare decisis" as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial

language in a contradictory manner. Once a court has determined "a statute's clear meaning," courts must adhere to that determination and judge "an agency's interpretation of the statute" against the court's "prior determination of the statute's meaning."[57] The Filed Tariff Doctrine is a result of the Supreme Court's interpretation of the ICA and the Telecommunications Act of 1996.[58] As such, the Commission lacks the authority and jurisdiction to interpret the 1996 Act in any way that conflicts with the Supreme Court's interpretation.

Aside from the Supreme Court itself, the only authority that can alter Supreme Court precedent is Congress.[59] In concluding that the doctrine is dead, the FCC rationalized that in today's competitive environment, the doctrine does not protect consumers and goes against the public interest.[60] This bootstrap rationalization does not and cannot support the FCC's intent and desire to abolish the Filed Tariff Doctrine. A regulatory agency's mere belief that circumstances have changed to such a degree as to undermine established policies, laws, or regulations—no matter how seemingly well-documented—does not vest in the agency the power to change the laws or regulations put into effect by Congress, and interpreted and applied by the Supreme Court.[61] Only Congress, by legislative enactment, may modify or overturn Supreme Court precedent.[62] Until Congress does so, the courts are bound to enforce precedent and the FCC's conclusion that the doctrine is dead is legally meaningless and without effect.

The Supreme Court has recognized these basic principles as far back as 1908.[63] In *Armour Packing Co. v. United States,* the Court stated that the filed rate doctrine:

> it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate, upon the faith of which

decisions when the same points arise again in litigation").

57. *See* Maislin Indus., U.S. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990).

58. *See* discussion *supra* Part II.

59. *See* Maislin Indus., U.S. v. A.J. Hollander Co., 176 B.R. 436, 445 (Bankr. E.D. Mich. 1995) ("Through its legislative power, Congress can overturn or modify any United States Supreme Court decision, other than one turning on an interpretation of a constitutional provision.").

60. *See Second Report and Order*, *supra* note 40, para. 38 ("Moreover, we note that in the absence of tariffs, consumers will be able to pursue remedies under state consumer protection and contract laws in a manner currently precluded by the 'filed-rate' doctrine.").

61. *See* Town of Deerfield v. FCC, 992 F.2d 420, 428 (2d Cir. 1993) ("Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power.").

62. *See A.J. Hollander Co.*, 176 B.R. at 444.

63. *See generally* Armour Packing Co. v. United States, 209 U.S. 56, 81-82 (1908) (detailing the benefits of the filed rate doctrine).

> contracts have been entered into [and, thus, should not be applied]. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, *and such considerations of inconvenience or hardship address themselves to the lawmaking branch of the Government.*[64]

The Supreme Court continues to apply the above principle, with vigor and persistence, to agency attempts to contravene the filed rate doctrine. For example, in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[65] a case brought under the ICA, the Court determined that an Interstate Commerce Commission ("ICC") policy effectively negating the Filed Tariff Doctrine was invalid as being inconsistent with the Act and further noted that such action is strictly within Congress's legislative powers.[66] Under the ICA, motor common carriers must publish and file rates with the ICC and are prohibited from providing services at any rate other than the filed rate.[67] The Supreme Court "has frequently stated, the statute does not permit either a shipper's ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate."[68] This statement notwithstanding, in 1986 the ICC determined that due to changes in the motor carrier industry, greater flexibility of this harsh rule was warranted; accordingly, the ICC implemented a policy of allowing carriers and shippers to negotiate rates.[69] The ICC reasoned, "the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified the change in policy, for the new competitive atmosphere made strict application of § 10761 [the File Tariff Doctrine] unnecessary to deter discrimination."[70] Moreover, it reasoned that the passage of the Motor Carrier Act of 1980 and the Commission's exemption of all motor contract carriers from the filing requirements justified its policy.[71] Finally, the ICC argued that, in the more competitive environment, strict adherence to the filed rate doctrine was not necessary to avoid

64. *Id*. (emphasis added) (citation omitted).

65. 497 U.S. 116 (1990).

66. *See id.* at 119, 131.

67. *See id.* at 120. ("The Act requires a motor common carrier to 'publish and file with the Commission tariffs containing the rates for transportation it may provide.' . . . The Act also specifically prohibits a carrier from providing services at any rate other than the filed (also known as the tariff) rate . . . .") (internal citation omitted).

68. *Id*.

69. *Id*. at 121 ("In 1986, however, the ICC concluded that changes in the motor carrier industry 'clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases.'") (quoting NITL—Petition to Institute RM on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99, 106 (1986)).

70. *Id*. (citation omitted).

71. *See Maislin Industries,* 497 U.S. 116, 121.

discrimination in this day and age.[72]

The Supreme Court rejected these arguments and deemed the ICC's policy inconsistent with the ICA and subsequently invalid.[73] The Court rationalized that the doctrine, which has long governed the legal relationship between shippers and carriers, is essential to preventing price discrimination.[74] Given the close interplay between the duty to file a tariff and not stray from its rates, and also given the prohibition on discrimination in the statute, the Court held that it must "read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff."[75] As part of the rationale for its holding, the majority noted:

> Congress has not diverged from this interpretation and we decline to revisit it ourselves . . . . Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.[76]

Finally, the Court rejected the ICC's arguments that the Motor Carrier Act of 1980 (MCA), the exemptions from tariffing, and the more competitive environment justified its policy. The Court stated that, "[a]lthough the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute."[77] Accordingly, the Court concluded: "If strict adherence to [the ICA requirements] as embodied in the filed rate doctrine has become an anachronism in the wake of the MCA, *it is the responsibility of Congress to modify or eliminate these sections*."[78]

Ultimately, Congress did address this issue with the Negotiated Rates Act of 1993,[79] which effectively overturned the *Maislin* decision invalidating the ICC's Negotiated Rates Policy. It was held that Congress's actions in overturning this decision through legislative enactment were not

72. *See id.*

73. *See id.* at 130.

> For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. . . . By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent.

Id. (citations omitted).

74. *See id*. at 126.

75. *Id.* at 127.

76. *Id.* at 131 (internal citation omitted).

77. *Id*. at 134-35 (internal citation omitted).

78. *Id*. at 135-36 (emphasis added).

79. Pub. L. No. 103-180, 107 Stat. 2044 (1993).

violations of the Separation of Powers Doctrine, because "[t]hrough its legislative power, Congress can overturn or modify any United States Supreme Court decision, other than one turning on an interpretation of a constitutional provision."[80] The same should hold true for the 1996 Act requirements embodied in the filed rate doctrine.

The final defense against the FCC's action is the Separation of Powers principle. Under this principle, judgments of Article III courts, and most importantly the Supreme Court, are not subject to review by the other branches of government. As a constitutional principle, Article III courts may not render advisory opinions.[81] Accordingly,

> A judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of the government, for if a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court's decision would in effect be merely advisory.[82]

Additionally, "[s]ince neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power."[83] This, without a doubt, precludes the FCC from reviewing, let alone abolishing, Supreme Court doctrine. The FCC's attempt to overturn the long-held, Supreme Court-created Filed Tariff Doctrine can only be described as *ultra vires* and contrary to the rule of law.

B. *The FCC's Decision Was Arbitrary and Capricious*

Typically, FCC decisions like its detariffing *Order* are entitled to *Chevron*[84] deference, meaning that agency interpretations of their own regulations are entitled to substantial deference.[85] While this may be true, such agency interpretation may be set aside where a court finds that "it is the product of a decisionmaking process deemed arbitrary or capricious, or if it lacks factual support."[86] This authority is vested in the courts under the

80. *See A.J. Hollander Co.*, 176 B.R. at 445.

81. *See Town of Deerfield*, 992 F.2d at 427.

82. *Id*. at 428 (citation omitted).

83. *Id*. at 428.

84. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

85. *See id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court . . . .'") (citations omitted).

86. *See* Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575-76 (10th Cir. 1994) (citation omitted); *see generally* Necketopoulos v. Shalala, 941 F. Supp. 1382 (S.D.N.Y. 1996) (applying the arbitrary and capricious standard to the issuance of a regulation by the

Administrative Procedure Act.[87] In reviewing an agency action under this standard, a court must determine "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made."[88] Moreover, a court must find that the agency made clear its course of inquiry, analysis, and rationale for its ultimate decision.[89]

The FCC's conclusion that detariffing eliminates the possible invocation of the Filed Tariff Doctrine does not meet the above standards and should have been found arbitrary and capricious by the D.C. Circuit Court of Appeals. First, in its March 25, 1996 *NPRM*,[90] the FCC made the conclusory statement, with nothing more, that "the absence of tariffs would eliminate possible invocation by carriers of the filed rate doctrine."[91] Moreover, it did not directly seek any comments on this conclusion.[92]

Second, in its October 31, 1996 *Second Report & Order*,[93] which mandated full detariffing, the FCC concluded that the Filed Tariff Doctrine is not in the public interest and does not protect consumers, but neglected to provide any analysis for this conclusion.[94] Specifically, the Commission found that "[c]omplete detariffing would also further the public interest by eliminating the ability of carriers to invoke the 'filed-rate' doctrine."[95] While, in the next breath, the Commission recognized this doctrine as a long-held legal precedent, it made no attempt to analyze how detariffing would eliminate the filed-rate doctrine or to justify its apparent position that it has authority to overturn long-held judicial precedent.[96]

Third, in rejecting the concept of permissive tariffing in the August 20, 1997 *Order on Reconsideration*,[97] the Commission discussed the harmful effects of the Filed Tariff Doctrine to carrier-customer relationships and to customers who sign up for long-term service

Secretary of Health and Human Services).

87. 5 U.S.C. §§ 500-596 (2000). Specifically, Section 570 of the Administrative Procedure Act provides for the possibility of judicial review if otherwise provided by law.

88. *See Olenhouse*, 42 F.3d at 1574 (internal footnote omitted).

89. *Id*. at 1575.

90. *See Notice of Proposed Rule Making*, *supra* note 7.

91. *Id.* para. 34.

92. *See id.*

93. *See Second Report and Order*, *supra* note 40.

94. *Id.* para. 55.

95. *Id*.

96. *Id*. para. 60 ("Because the filed rate doctrine is a legal doctrine developed by judicial precedent, it is not entirely clear how courts would apply the filed rate doctrine . . . .").

97. *See Order on Reconsideration*, *supra* note 55.

contracts.[98] In addition, it rejected arguments that the doctrine benefits customers "by creating certainty in the carrier-customer relationship."[99] The Commission, however, never set out its analysis and rationale for concluding that detariffing would eliminate the invocation of the Filed Tariff Doctrine.[100] In its October 18, 2000 *Notice of Proposed Rule Making*[101] the Commission again set forth the same conclusions without the requisite analysis.[102]

Finally, in its March 31, 1999 *Second Order on Reconsideration and Erratum*[103] the Commission made the sweeping conclusion that the filed rate doctrine should not apply to the public disclosure requirement because the public disclosure requirement is not a "filing requirement" under the 1996 Act.[104] Again, the Commission failed to provide any analysis or rationale for this determination.[105] Rather, the Commission's conclusion elevates form over substance, completely disregarding the fact that the "posting" or "public disclosure" requirement achieves the same goal as the Filed Tariff Doctrine does: protection of both consumer and carrier interests. It should be noted that the Commission's view is not always the last word on the subject. Agency statutory interpretation is subject to judicial review and, while such interpretation is afforded a certain degree of deference, courts have the final word on statutory interpretation.[106]

In short, the Commission's statements are replete with conclusions that detariffing will kill the filed rate doctrine and contain only minor discussions of the rationale for killing the doctrine.[107] Nonetheless, the FCC completely failed to set out any analysis and rationale *why* the mere refusal

98. *Id.* paras. 12, 13.

99. *Id*. para. 13.

100. *See id.* para. 12 (The Commission merely stated, "We are not persuaded that a permissive detariffing regime would eliminate possible invocation of the 'filed-rate' doctrine.").

101. *2000 Biennial Reg. Review*, *supra* note 18.

102. *Id.* para 15 ("In accordance with our conclusions in the *Detariffing Order on Reconsideration*, we tentatively conclude that tariffs for international interexchange services may have negative consequences for consumers because of the application of the 'filed-rate' doctrine.") (internal citations omitted).

103. *Second Order on Reconsideration and Erratum*, *supra* note 55.

104. *Id.* para. 17.

105. *See id.*

106. Chevron, U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *see also* Sicard v. Sioux City, 950 F. Supp. 1420, 1435 (N.D. Iowa 1996) ("[T]he final power of interpretation is in the courts.").

107. *See 2000 Biennial Regulatory Review*, *supra* note 18.

to continue to accept paper/electronic filings at the FCC[108]—the only legitimate aspects of detariffing the FCC may have the power to pursue—overturns and nullifies the doctrine. More importantly, the Commission totally fails to provide any analysis or justification supporting its authority to make such a determination.[109] All of the rationale in the Commission's *Orders* supports the conclusion that tariff requirements are no longer necessary.[110] Ancillary to this conclusion, the Commission concludes that the absence of tariffs will eliminate the Filed Tariff Doctrine. Just as it justified its primary conclusion, the Commission must justify this secondary conclusion. Its failure to do so clearly evidences a decision-making process that is arbitrary and capricious, lacking any rational connection between the facts found and the decision made.[111]

Tangentially, but equally relevant, the FCC's decision is arbitrary and capricious because it circumvents the balancing of interests Congress sought to achieve in enacting the language of Section 203(c).[112] Courts have repeatedly held that the specific scheme intended by Congress's enactment of Sections 203 through 205[113] of the Communications Act was based on a careful balance of competing interests, and the Commission may not ignore that balance or rewrite this statutory scheme based on its own interpretation of the interests involved.[114] While these cases admittedly predate the 1996 Act, the rationale remains unscathed. In asserting that its detariffing policy abolishes the Filed Tariff Doctrine, the FCC effectively discounts the delicate balance of interests Congress recognized in enacting Section 203(c).[115] The Commission may not "rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation."[116] It bears repeating that if the Commission believes that the mandates of the 1996 Act are "inadequate to the task of regulating the telecommunications industry in light of changed circumstances, the Commission must take its

108. *See id.*

109. *See* discussion *supra* Part II.

110. *See 2000 Biennial Regulatory Review*, *supra* note 18, para. 15 ("Because of carriers' rights to invoke the 'filed-rate' doctrine and bind customers to tariffed offerings, tariffs, even if filed on a permissive basis, preclude consumers from pursuing remedies under state consumer protection and contract laws that are generally available to consumers in any other unregulated, competitive environment.").

111. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994).

112. 47 U.S.C. § 203(c) (1994).

113. 47 U.S.C. §§ 203-205 (1994).

114. *See* Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995); MCI Telecomms. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); AT&T Co. v. FCC, 487 F.2d 865 (2d Cir. 1973).

115. *See* 47 U.S.C. § 203(c) (1994).

116. *See Southwestern Bell Corp.*, 43 F.3d at 1520.

case to Congress."[117] Any other FCC action under such circumstances is clearly arbitrary and capricious and thus subject to doubt.

C. The FCC Violated the Regulatory Flexibility Act by Not Outlining How the Elimination of the Doctrine Would Affect Small Businesses

Under the Regulatory Flexibility Act, final agency rules must contain certain information:

> Each final regulatory flexibility analysis shall contain . . . a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[118]

The FCC shirked its responsibility in clear violation of the Regulatory Flexibility Act. In making its analysis in the October 1996 *Detariffing Order*,[119] the FCC only notes that its decision to detariff will benefit all consumers, some of whom are small business entities.[120] It also summarily rejects arguments that full detariffing will harm small nondominant interexchange carriers.[121] The analysis mentions the Filed Tariff Doctrine only in the context of rejecting permissive tariffing, where the Commission states:

> We believe that detariffing on a permissive basis would not definitively eliminate the possible invocation of the 'filed-rate' doctrine and would create the risk of price signalling. We believe that only with complete detariffing can we definitively eliminate these possible anticompetitive practices and protect consumers, some of which are small business entities.[122]

In addition, the Commission asserts that the "public interest benefit of removing carriers' ability to invoke the 'filed-rate' doctrine applies equally with respect to terms and conditions as to rates."[123]

Such perfunctory analysis of the doctrine does not meet the requirements set out in the Regulatory Flexibility Act.[124] The FCC's analysis fails to address (1) how the Commission reached such a

117. *Id*. at 1519.
118. 5 U.S.C. § 604(a)(5) (2000).
119. *See Second Report and* Order, *supra* note 40.
120. *Second Report and Order*, *supra* note 40, para. 57.
121. *Id*.
122. *Id*. para. 154.
123. *Id*. para. 155.
124. *See* 5 U.S.C. §§ 601-612 (2000).

conclusion; (2) how mandatory detariffing would definitively eliminate the possible invocation of the doctrine; (3) how the elimination of the doctrine would affect small carriers; or (4) the steps it has taken to minimize these effects. Thus, even assuming that the Commission has the power to reconsider and overturn established Supreme Court doctrine, it neglected to follow the necessary procedural steps in doing so.

D. *Conclusion: The FCC's Mandatory Detariffing is an* Ultra Vires *Attempt to Overturn the Filed Tariff Doctrine*

In effecting mandatory detariffing, the FCC has attempted to overturn the Filed Tariff Doctrine through assumptions of fact and authority that do not exist. While the Commission may have authority to order mandatory detariffing, it does not have the authority to abolish judicial precedent, or Congressional mandates as interpreted and applied by such precedent, both of which have unequivocally reaffirmed the Filed Tariff Doctrine. In addition to ignoring its lack of authority to act, the FCC also failed to follow the proper procedure under the Administrative Procedure Act and the Regulatory Flexibility Act, thus further undercutting its *ultra vires* attempts to do away with the doctrine.

IV. OPERATING IN A DETARIFFED ENVIRONMENT: IMPLICATIONS OF STATE CONSUMER PROTECTION AND CONTRACT LAW IN ABSENCE OF FILED TARIFF DOCTRINE

Casting aside the *ultra vires* nature of the Commission's action, the practical consequences can be summarized in one word: liability. With the stroke of a pen, the FCC has managed to expose carriers to a myriad of liabilities from which they were previously protected under the Filed Tariff Doctrine.[125]

Given the decreased exposure to carriers under the "Filed Tariff Doctrine" versus the "contract" environment, the dilemma for long-distance carriers is whether to proceed in the post-detariffing environment on the assumption that the Filed Tariff Doctrine is still applicable, or whether to alter their behavior to conform to an environment where the absolute protections of the Filed Tariff Doctrine are not available. This Section analyzes the exposure and protections available to carriers in both the Filed Tariff Doctrine and non-Filed Tariff Doctrine (i.e., contracts) environment, the ramifications of operating in a post-detariffing contract world, and the steps that companies must take to protect themselves in such a scenario.

125. *See* discussion *supra* Part II.

The key distinctions between a Filed Tariff Doctrine environment and a standard contract environment may be narrowed down to four fundamental concerns: (1) the cost of doing business; (2) the exposure to legal liability; (3) the ability to comply with regulatory requirements; and (4) the exposure of regulatory interference, control of business methodology, and management discretion.

First, looking at the changes that will affect the cost of doing business, the elimination of the Filed Tariff Doctrine will affect the degree of certainty that can be achieved in establishing and ordering business relationships with tens of thousands of customers spread throughout the country, as well as the efficiency and cost of doing so. The changes would affect not only the companies' external costs of customer acquisition, retention, and care; but also the costs of internal management of personnel, record retention, and upkeep, as well as potential increases in late and unpaid charges, uncollectibles, and bad debts.

Second, carriers' exposure to liability for monetary damages, fines, and penalties will increase on all fronts. Customer claims for overcharges, refunds, credits, and damages are all certain to rise. In addition, regulatory claims for unreasonable practices, fraud and misrepresentation, State Attorney General claims for consumer fraud and deceptive practices, class actions on behalf of consumers, and finally, competitor claims for unfair competition[126] will become increasingly likely in a world without the Filed Tariff Doctrine.

Third, carriers' ability to comply with regulatory policies and consumer-oriented regulations will be severely circumscribed as the claims for legal liability outlined above begin to grow. Both the number and nature of the claims will create a hostile environment for the carriers, which will breed overzealous enforcement actions and more exacting analysis of the carriers' continued qualifications to operate as carriers in the multiple jurisdictions in which they are located and must operate. In today's environment, in which state and federal agencies share and coordinate enforcement and investigative efforts, allegations from around the country can quickly produce joint enforcement efforts by multiple jurisdictions. Individual or joint enforcement efforts of this sort will attract class actions, although the threat of class actions exists independently as well.

The nature of the powers given regulators and especially Attorneys General under the consumer protection laws and consumer-oriented regulations is extremely broad and, hence, potentially destructive to

126. *See* Triglia, *supra* note 17 ("Qwest Communications reached a settlement with the Pennsylvania Attorney General's office after an investigation into customer complaints of slamming and deceptive billing.").

carriers. Should these authorities resort to injunctive remedies, they will have the right and power to coerce carriers to change their methods of doing business, particularly in the areas of marketing and sales. Without question, such remedies can be fashioned to require management's abdication of its discretion and acceptance of the standards and requirements created by outside authorities. In short, carriers will lose their rights to conduct their own businesses.

Finally, there is the threat of unfair competition claims which may be created because of new slamming rules that rely in major part on rewarding competitors with compensation when customers claim to have been slammed.[127] The threat is that this reward for "catching" competitors in a regulatory error may soon awaken the predatory tendencies of the largest carriers to bring even more monetary injuries on their smaller competitors. The larger carriers may claim that certain pricing schemes marketed without the fullest disclosure are unfairly competitive and subject to injunction and forfeiture of profits.

Whether and to what extent any or all of the aforementioned eventualities become a reality depends, to a large extent, on the legal policies of the individual states that, according to the FCC, are now charged with regulating the marketing and sales practices of long-distance carriers under traditional concepts of contract and consumer protection laws. Even more important, perhaps, is the extent to which carriers can achieve the same or similar protections under state laws and commercial codes as they previously enjoyed under the Filed Tariff Doctrine. An examination of the current conditions in some states may help predict the uncertainties that may befall carriers if this new legal environment is taken to its logical conclusion.

A. *California*

California recognizes and applies the Filed Tariff Doctrine, and therefore, the constructive notice component of the doctrine[128] which acts as

127. *See* 47 U.S.C. § 258(b) (1994).

> Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the [Federal Communications] Commission may prescribe.

Id.

128. *See* Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000)

> Not only is a carrier forbidden from charging rates other than as set out in its filed tariff, but customers are also charged with notice of the terms and rates set out in that filed tariff and may not bring an action against a carrier that would invalidate,

a bar to many claims based on fraud, misrepresentation, and contract principles.[129] The application of the doctrine has been refined in the state by distinguishing between activities found to be within the tariff and those outside the tariff.[130] The former type of activities or services is covered by the Filed Tariff Doctrine; the latter is not covered. A consequence of this approach is a narrowing of the protections of the Filed Tariff Doctrine under California law as applied to intrastate services only. For example, California's Filed Tariff Doctrine gives way to the state's Business and Professions Code's prohibition on misleading and deceptive advertising.[131] Such activities, if found to exist, may be enjoined under a strict liability standard.[132]

Contract law principles create the following legal environment. The Uniform Commercial Code ("UCC")[133] does not apply to services[134] and, hence, its constructive notice provisions are not helpful. However, the California Civil Code contains a constructive notice provision.[135] Under this Code, if a person can be shown to have actual knowledge of circumstances indicating a duty to inquire further into specific facts, and such inquiry is nevertheless not made, that person may be charged with constructive notice of those facts.[136] Hence, proper notice of the need to check a carrier's Web sites for a recitation of all applicable terms and conditions may place the customer in a position of being charged with constructive notice of the

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alter or add to the terms of the filed tariff.

Id.

129. *See* Seeger v. Odell, 115 P.2d 977, 980 (Cal. 1941) ("The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar . . . recovery, and it is well established that . . . [an individual] is not held to constructive notice of a public record which would reveal the true facts.") (internal citations omitted).

130. *See generally* Day v. AT&T Corp., 74 Cal. Rptr. 2d 55 (Cal. Ct. App. 1998) (differentiating between the actions protected by the Filed Tariff Doctrine and the actions the carrier would be liable for under the state's consumer protection laws where there are allegations of deceptive and misleading advertising with regard to phone cards).

131. *See generally* CAL. BUS. & PROF. CODE § 17500 (West Supp. 2001).

132. *Id.* ("Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.") (emphasis in original).

133. *See* U.C.C. § 2-106 (1998).

134. *See* U.C.C. § 2-105 (Supp. 2001) ("Goods" means "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .") (internal footnote omitted).

135. CAL. CIV. CODE § 19 (1982) ("Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.").

136. *See id.*

terms of which he may later claim he was unaware.[137]

In California there are multiple problems. Whereas the Filed Tariff Doctrine is an absolute and immediate defense,[138] the California Civil Code approach may result in a factual inquiry,[139] the results of which cannot be known except by a trial of the facts. Secondly, a court or state agency reviewing the matter will be persuaded by the nature of the facts not fully disclosed and the "clarity" of the disclosures made at the Web site. Therefore, in California, even if constructive notice requirements have been otherwise met, the Filed Tariff Doctrine will not be applied if a misrepresentation is found to exist. At that point, the state's Business and Professions Code's prohibition on misleading and deceptive advertising would be applied.

Other expressions or iterations of the constructive notice doctrine under California law include the "duty to read"[140] and incorporation by reference.[141] Under the former, a party who signs an agreement has a duty to read it and under that duty is presumed to have read it.[142] This presumption or duty will not attach if there is unusual or unfair language involved that is not first explained.[143] Regarding the constructive notice doctrine, the terms and conditions of a Web-based tariff may be made binding by reference to it in the letters of agency, if certain conditions are met. The reference must be clear and unequivocal, it must be called to the party's attention so that his consent to accepting the terms by reference is shown or can be presumed, and the terms referred to must be understandable and readily available at the site of reference.

137. *See* Knox v. Modern Garage & Repair Shop, 229 P. 880 (Cal. Dist. Ct. App. 1924) (holding that absent evidence of fraud or mistake, the party was bound by the terms of the contract, which they should have known, even where the record indicated that the party attempting to avoid the contract did not read it and knew nothing of the relevant provision).

138. *See* Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000) ("Moreover, 'the filed rate doctrine bars all claims – state and federal – that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed.'") (internal citations omitted).

139. *See* previous discussion.

140. *See* Madden v. Kaiser Found. Hosps., 552 P.2d 1178 (Cal. 1976) (It is a general rule that a party is bound by contract provisions and cannot complain of unfamiliarity with the language of a contract).

141. *See* BLACK'S LAW DICTIONARY 770 (7th ed. 1999) (Incorporation by reference means "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one.").

142. *See supra* note 140.

143. *See* Williams v. Cal. Physicians' Serv., 85 Cal. Rptr. 2d 497, 508 (Cal. Ct. App. 1999) ("This duty to read the contract is insufficient to bind a party to unusual or unfair language unless it is brought to the attention of the party and explained.") (citation omitted).

As is nearly always the case, these theories will neither produce binding results in the face of allegations of fraud or misrepresentation, nor apply without the need for ad hoc factual determinations.

B. Texas

The Filed Tariff Doctrine is similarly recognized in Texas and serves as a bar to most contractual and fraud and misrepresentation claims based on the underlying concept of constructive notice. As with California, the doctrine is limited in coverage and applies only to activities within the scope of the tariff.[144] This limitation in coverage leaves open the possibility on the local, intrastate level of claims for false, misleading, or deceptive acts under the state Deceptive Trade Practices Consumer Protection Act.[145] This limitation could also lead to the raising of equitable issues and defenses.[146]

In the Texas UCC setting, a person can be shown to have knowledge where, from all of the facts and circumstances known at the time, he has reason to know of the existence of facts of which he claims ignorance.[147] A person has notice: (1) when he has actual knowledge; (2) he has received a notice of it (e.g., a notice has been sent to the person's residence or place of business); or (3) from all the facts and circumstances known at the time, the person has reason to know it exists.[148] While this concept of constructive notice is statutory, thereby providing the closest parallel to the Filed Tariff Doctrine, it will still require a subjective inquiry as to the facts and circumstances surrounding each particular customer. Accordingly, even under the UCC, companies will remain mired in the uncertainty of their contractual relations.

The Texas UCC also regulates contracts entered into over the Internet, so long as one party is in Texas and the other does not have an office or agent doing business in the state.[149] This allows companies the option to place notices and/or contractual terms (i.e., tariffs) on their Web sites, which the consumers may sign with an e-signature.[150] The benefit of this approach, of course, is the increased viability of the constructive notice provisions of the UCC.

144. *See* Kanuco Tech. Corp. v. Worldcom Network Serv., Inc., 979 S.W.2d 368, 373 (Tex. Ct. App. 1998) ("[T]he doctrine 'conclusively presumes' that both the carrier and its customers know the contents and effect of published tariffs.").

145. *See* TEX. BUS. & COM. CODE ANN. §§ 17.12, 17.46 (Vernon 2000).

146. *See id.* at § 17.506 (Vernon Supp. 2001).

147. *See* TEX. BUS & COM. CODE § 1.201(25) (West 1994).

148. *Id.*

149. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

150. TEX. BUS. & COM. CODE ANN. § 2A.110 (Vernon 1994).

The UCC, however, will not protect companies against claims for fraud and deceptive practices brought under the state's Business and Commerce Code. In addition, there are twenty-five specific acts expressly enumerated that will be construed as false, misleading, or deceptive under the Consumer Protection Act.[151] Violations of the state's Code and the Consumer Protection Act can also subject the companies to injunctive action that can place the state in a position of controlling the companies' marketing and business approaches.[152]

C. New Jersey

In New Jersey, the Filed Tariff Doctrine protects companies in the usual sense,[153] but does not provide absolute protection to misrepresentations outside the scope of the rates charged.[154] Moreover, like California, companies may be subject to fraud claims seeking remedies other than enforcement of the offered rate.

The New Jersey UCC[155] does not apply to services.[156] Hence, in a non-Filed Tariff Doctrine environment, companies will have to rely on protections derived from contract law principles such as constructive notice[157] and incorporation by reference.[158] These principles will apply as they do in most other states.

Such contract law principles will not protect against claims of misrepresentation, fraud, or material omissions under the New Jersey

151. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987).

152. *Id*. § 17.47.

153. *See* MCI Telecomms. Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D. N.J. 1995) ("[C]ustomers are charged with knowledge of the tariff rates and cannot enforce agreements for rates other than those provided in the tariff.").

154. N.J. STAT. ANN. § 56:8-2 (West 1989)

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate . . . is declared to be an unlawful practice . . . .

Id.

155. *See generally* N.J. STAT. ANN. §§ 12A:2-101 (West 2001).

156. *Id*. *See, e.g.,* Quality Guaranteed Roofing, Inc. v. Hoffman-La Roche, Inc., 694 A.2d 1077, 1078 (N.J. Super. Ct. App. Div. 1997) ("The UCC-Sales does not, however, apply to service contracts.").

157. Constructive notice is "notice presumed by law to have been acquired by a person and thus imputed to that person." BLACK'S LAW DICTIONARY 1088 (7th ed. 1999).

158. Incorporation by reference is "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." *Id.* at 770.

Consumer Fraud Act (CFA).[159] Affirmative misrepresentations are subject to strict liability,[160] except where the misrepresentation involves an omission or failure to disclose, in which case it must be shown that the company acted knowingly in making the misrepresentation.[161] In either case, under these principles, the companies must be careful to avoid knowingly making misrepresentations in their marketing literature.

Finally, unique to this state is the express prohibition of "bait and switch" schemes, which is also an unlawful practice under the CFA.[162]

D. Conclusions

Valuable practical conclusions may be derived from the current "contracts" environment reflected in these sample states; these conclusions, derived from our review of some state laws, may be used to guide carriers' practices in the detariffed environment:

1. A doctrine of constructive notice exists under contract law similar to that under the Filed Tariff Doctrine. This doctrine is not applicable, however, without an ad hoc determination in each case with regard to its particular surrounding circumstances. As such, companies cannot be certain whether contractual constructive notice will be a viable protection until after suit is brought. Conversely, the Filed Tariff Doctrine's constructive notice is absolute, comprehensive, and applies irrespective of individual circumstances.

2. The contract principle of constructive notice is not applicable if actual or constructive fraud is involved. The Filed Tariff Doctrine covers any fraud.

3. The Filed Tariff Doctrine is a complete defense against fraud claims based on omissions of material facts. Contract law principles provide no such protections.

4. Under contract principles, a complainant may use a number of theories to seek recovery, such as constructive fraud, the UCC, consumer protection laws, and state business and professional codes that incorporate

159. N.J. STAT. ANN. §§ 56:8-2 (Matthew Bender & Co. 2001).

160. *See id.* at § 56:8-13 ("Any person who violates any of the provisions of the act to which this act is a supplement shall, in addition to any other penalty provided by law, be liable to a penalty of no more than $7,500 for the first offense and not more than $15,000 for the second and each subsequent offense."); Gennari v. Weichert Co. Realtors, 691 A.2d 350 (N.J. 1997).

161. *See* Gennari v. Weichert Co. Realtors, 691 A.2d at 350.

162. N.J. STAT. ANN. § 54:8-2.2 (West 1989) ("The advertisement of merchandise as part of a plan or scheme not to sell the item or service so advertised or not to sell the same at the advertised price is an unlawful practice and a violation of the act to which this act is a supplement.").

the concept of unfair competition—meaning that a competitor, as well as a customer, could sue. Such theories have no viability under the Filed Tariff Doctrine.

5. Without the Filed Tariff Doctrine, post-sale disclosures offer no protection. Moreover, while post-sale disclosures may reduce damage claims, they do not immunize the companies against class actions or Attorney General actions seeking injunctive relief against pre-sale marketing materials and representations.

6. Under the UCC, a course of dealings between a seller and buyer can result in the buyer being bound by new terms and conditions unilaterally imposed by the seller. Any defense to recovery of charges grounded in the assertion that no consideration existed to bind the buyer to the new terms or rates would be overcome if it could be shown that the buyer had a continuous course of dealings with the seller after terms and prices were changed and the buyer had not objected to those changes. Under such principles, the right to unilaterally change rates could be defended, but the success in doing so is problematic compared to coverage by the Filed Tariff Doctrine.

First, under the Filed Tariff Doctrine, unilateral changes never require consideration or any continued course of dealings after changes have been made. Even under the UCC principle cited above, unless there is a sufficient period of time that elapses to establish a "course of dealing," no customer is bound by a unilateral change in terms or price. Second, under the UCC, ad hoc factual determinations would be required as to each customer. Third, there is no set time frame for the continued dealings to rise to the level of "course of dealings" that serves to defend against attack by the customer. Fourth, no course of dealings could arise if the customer claims fraud.

Most importantly, analysis of this UCC principle on "course of dealings" points to perhaps one of the most serious deficiencies in a world without the Filed Tariff Doctrine: the inability to unilaterally raise rates. At a very minimum, it would make effecting such changes extremely difficult and costly, and certitude that the changes could be defended as legal and proper would never be achieved, or achieved only after an indefinite period of time.

7. Under contract law protection, certain types of marketing could easily be cited as "bait and switch" tactics under consumer fraud laws. One remedy available to Attorneys General would be particularly draconian—namely, the ability to enjoin the marketing of products marketed without full disclosure of the relevant factors, with the Attorneys General defining the meaning of "full disclosure."

What these conclusions and inevitable uncertainties confirm is that the FCC did not consider the effect its proclamation about the Filed Tariff Doctrine would have on carriers. The FCC also did not consider the resulting ripple effect. That is, the increased exposure to carriers will undoubtedly increase their costs that, in turn, will have a detrimental effect on the ultimate consumer. All of this bolsters the conclusion that the FCC's actions were irresponsible and in defiance of its statutory obligation to balance competing interests.

V. IMMEDIATE STATE REACTION TO FEDERAL DETARIFFING

Shortly after the FCC's *Detariffing Order* became effective,[163] long-distance carriers began feeling its effects through the actions of several states. From the initiation of a class action lawsuit in California, to the delivery of letters from the Attorneys General and/or Consumer Protection Agencies announcing the respective state's interpretation of the federal detariffing mandate, the swift reactions to the federal detariffing mandate confirm the fears expressed throughout this Article. This Section describes and discusses some of these reactions and serves as an example of what long-distance carriers can expect in the future as a result of federal detariffing.

A. *California*

California residents wasted little time before attacking long-distance giant, AT&T. On July 31, 2001, the date the FCC's detariffing mandate became effective, Consumer Action,[164] a non-profit membership organization committed to consumer education and advocacy, and an individual representative plaintiff filed a class action lawsuit against AT&T in the Alameda Superior Court in Oakland, California, alleging violations of the California Consumer Legal Remedies Act[165] and the Unfair Business Practices Act.[166] The suit assailed AT&T's use of mailings to bind customers to terms and conditions of service—the most common method chosen by carriers as a substitute for filed tariffs.[167]

163. *See* Common Carrier Bureau Extends Transition Period for Detariffing Consumer Long Distance Services, *Public Notice*, 16 F.C.C.R. 3747 (2000).

164. *See* http://www.consumer-action.org (last visited Jan. 22, 2002).

165. *See* CAL. CODE §§ 1750-1756 (West 2001).

166. *See* CAL. BUS. & PROF. CODE § 17000 (West 2001).

167. *See* Complaint, Ting-Consumer Action v. AT&T, *at* http://www.consumer-action.org/Library/English/Alert/AT-I-10_EN/AT-I-10_EN.html (July 30, 2001) [hereinafter Ting Complaint].

The Complaint focused on the Consumer Services Agreement ("CSA") notice sent by AT&T to its customers which, among other things, imposed binding arbitration on customers, allowed AT&T to change terms and conditions unilaterally through mailings and Web postings, and significantly limited the carrier's liability.[168] Most importantly, the CSA bound customers to the terms and conditions through continued use of AT&T services, specifically stating that:

> BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS, DO NOT USE THE SERVICES, AND CANCEL THE SERVICES IMMEDIATELY . . . .[169]

The class action suit alleged that the provisions of the CSA and the method of presentment to AT&T's customers were "unlawful, unfair, fraudulent and unconscionable."[170] The plaintiffs argued that by sending the CSA in a monthly statement along with numerous other documents, AT&T deliberately camouflaged the arbitration provision in a way that assured that few customers would voluntarily, knowingly, and intelligently consent to it.[171] The allegation was that, under general contract law principles, the waiver of constitutional rights (such as the rights to due process or a jury trial) must be made voluntarily, knowingly, and intelligently.[172] The plaintiffs' argument was that if the customer does not actually read and fully comprehend the document purporting to waive her constitutional right, she cannot have voluntarily, knowingly, and intelligently consented to the waiver.[173]

Another key point of attack for the plaintiffs was a series of provisions within the CSA that were designed to limit the rights and remedies of AT&T's customers in the event of a dispute. The controversial provisions included binding arbitration, elimination of class actions, and limitations on damages (collectively, the "Legal Remedies Provisions"). The court initially denied the plaintiffs' request for an injunction,[174] but set the matter for trial to address the consumer protection law charges.[175]

168. *See id.* paras. 2-3.

169. *Id*. para. 22 (emphasis in original).

170. *Id*. para. 2.

171. *See id.* paras. 60-71.

172. *See id.* paras. 69-70.

173. *See* Ting Complaint, *supra* note 167, paras. 69-70.

174. *State Activities*, *Fed. Magistrate in San Francisco Rejected Plea*, COMM. DAILY, Aug. 29, 2001, at 6.

175. *See id.*

During the trial, the court focused its attention on the Legal Remedies Provisions. The plaintiffs argued that AT&T's arbitration provision stripped consumers of their substantive rights under the law because: (1) it imposed a two-year statute of limitations, which is shorter than all otherwise applicable statutes of limitations under California law,[176] and (2) it prohibited punitive damages claims in contravention of the California Civil Code.[177] The plaintiffs also argued that the arbitration provision sought to shelter AT&T from liability by preventing customers from initiating class action lawsuits, all the while knowing that class actions are the only effective means of recovery for consumers who typically have small claims and cannot otherwise afford to pursue individual recourse against large telecommunications carriers.[178] Plaintiffs argued that this was particularly unconscionable in light of the high fees associated with arbitration and the fact that the American Arbitration Association was not a neutral arbitrator because it was biased in favor of corporate defendants such as AT&T.[179]

On January 15, 2002, in a sweeping, seventy-five page decision, District Judge Bernard Zimmerman issued his Findings of Fact and Conclusions of Law and ordered that a permanent injunction be issued preventing AT&T from enforcing the Legal Remedies Provisions of its CSA against California residents.[180] The judge held that AT&T's "ban on class actions [was] unconscionable"[181] and declared illegal AT&T's provision seeking to impose a two-year limitations period for customers to file any claim in arbitration, even though nearly all California consumer protection laws allow consumers to file claims for at least three or four years from the time of injury.[182]

Consumer Action's press release on the subject notes that although Judge Zimmerman's decision did not reach the merits of the plaintiffs' basic formation of contract issues, he did comment on them indirectly by noting:

> [T]he terms and conditions of [AT&T's contract] were imposed on class members without an opportunity for negotiation, modification or

176. *See* Ting Complaint, *supra* note 167, para. 35.

177. *See id.* para. 36.

178. *See id.* paras. 38-39.

179. *See id.* para. 49.

180. *See* Ting v. AT&T, Findings of Fact and Conclusions of Law, No. C 01-02969 BZ, (N.D. Cal. Jan. 15, 2002), *available at* http://www.consumer-action.org/Library/English/Press_Release/PR-I-60_EN.pdf.

181. *See* Press Release, Consumer Action, Consumer Action Wins Landmark Ruling Against AT&T Over Binding Arbitration Clause (Jan. 15, 2002), *available at* http://www.consumer-action.org/Library/English/Press_Release/PR-I-60_EN.html.

182. *See id.*

> waiver. . . . [C]ustomers did not have any meaningful choice with respect to the Legal Remedies Provisions because the carriers who service two-thirds of the California market all include substantially similar dispute resolution provisions in their contracts.[183]

Standing alone, the court's resolution of the issues surrounding the Legal Remedies Provisions will have far-reaching effects on the industry. Among those who will feel the impact most are the long-distance carriers conducting business in California that followed AT&T, the industry leader's approach to detariffing compliance.[184]

Questions remain about the use of mail inserts, such as AT&T's CSA, to establish a carrier's right to act in its discretion to control the pricing and services it offers without having to re-execute in some formal manner individual contracts with its customers. Answers will, in turn, directly affect the all-important right of a carrier to market and bind consumers quickly, uniformly, and cost-effectively. This right clearly existed under the former tariffing regime and the resultant Filed Tariff Doctrine. And, although AT&T employed a Filed Tariff Doctrine defense, the judge dismissed it as it pertained to the Legal Remedies Provisions.[185]

The court did not, however, address the bigger question as to whether the right of carriers to bind consumers quickly, uniformly, and cost-effectively to their rates, terms, and conditions, and changes thereto, continues to exist irrespective of detariffing under the same concept of presumed, or constructive, knowledge effected by Web posting or some other method. Even though the judge avoided directly confronting the question, the tone of the decision alone will have widespread ramifications on the long-distance industry and the methods carriers use to pursue contractual relationships with customers on a going-forward basis.

B. Wisconsin

Wisconsin, like California, also reacted to federal detariffing swiftly when, on August 10, 2001, William Oemichen, Administrator of the State's

183. *See id.*

184. *See* Ting v. AT&T, Findings of Fact and Conclusions of Law, No. C 01-02969 BZ, para. 38 (N.D. Cal. Jan. 15, 2002), *available at* http://www.consumer-action.org/Library/English/Press_Release/PR-I-60_EN.pdf. ("The long distance providers who have imposed substantially similar legal remedies provisions have a combined market share of well over 65% of all California long distance customers.").

185. *See id.* para. 119. The judge states: "In light of the clear purpose of the filed rate doctrine, AT&T's reliance on the filed rate doctrine is misplaced." *Id.* By "purpose" is meant a concern for the potential for carriers to charge discriminatory rates to, or to impose discriminatory terms on, their customers, and not for whether their customers were able to resolve disputes before a court or an arbitrator, or whether their customers were able to file a class action.

Division of Trade and Consumer Protection, an office within the Department of Agriculture, Trade and Consumer Protection, mailed a letter to all long-distance carriers operating in the state.[186] The letter informs carriers operating in Wisconsin that, ". . . as of August 1, 2001, domestic long-distance communication providers no longer file rates with the FCC."[187] The letter warns that "[w]e have reviewed several consumer services agreements being sent by telecommunications service providers to Wisconsin consumers, and notice a number of potential violations of Wisconsin telecommunications law."[188] The letter goes on to review several violations of Wisconsin law that the Department had been made aware of in the few days following detariffing.[189] As evidenced by its letter, Wisconsin wasted no time in implementing procedures designed to protect the newfound rights of its consumers.

Of greater concern to carriers, Mr. Oemichen asked Wisconsin's Justice Department to file a lawsuit against AT&T and WorldCom for non-compliance with the new detariffing requirements and apparent conflicts with state law.[190] Oemichen claimed that the post-detariffing pricing disclosure policies of the carriers were in violation of state law.[191] The carriers were using consumer service agreements to notify customers of their prices.[192] Mr. Oemichen stated that such agreements are insufficient because they do not provide adequate customer notification of rate changes.[193] In order for customer notification to be satisfactory in Wisconsin, the service provider must give customers twenty-five to ninety days notice prior to any rate changes, provide customers adequate avenues by which to complain, and may not post the rate changes on their corporate Web sites.[194] Oemichen pointed out that not every Wisconsin citizen has Internet access.[195]

The Wisconsin action provides a clear example of the real and potential conflicts between state law and regulations and FCC expectations

186. *See* Letter from William L. Oemichen, Administrator, Division of Trade and Consumer Protection for the State of Wisconsin, to New Century Telecom, Inc. (Aug. 10, 2001) (on file with author) [hereinafter Letter from William L. Oemichen].

187. *Id*.

188. *Id*.

189. *See id.*

190. *State Activities*, *Wis. Dept. of Agriculture, Trade & Consumer Protection*, COMM. DAILY, Sept. 4, 2001, at 6.

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See* Letter from William L. Oemichen, *supra* note 186.

pertaining to detariffing.[196] One of the immediate dichotomies revealed by Wisconsin consumer protection law against Web posting is that it is in direct conflict with the FCC's requirement that carriers must post their tariffs (rates, terms, and conditions of service) on their corporate Web sites as opposed to filing those paper tariffs with the Commission.[197] In compliance with FCC mandates, AT&T has posted its tariffs on its Web site.[198] As predicted in this Article, however, AT&T and others in the future will now be subjected to actions brought by state governments such as Wisconsin, despite compliance with federal requirements.

C. Conclusion

Long-distance service providers such as AT&T and WorldCom have asserted that state laws cannot govern interstate services.[199] State officials tasked with protecting consumer interests argue, however, that through detariffing, the FCC has relieved itself of its regulatory responsibility and deferred to state laws.[200] This argument is consistent with previous court

196. *See State Activities*, *Wis. Dept. of Agriculture, Trade & Consumer Protection*, COMM. DAILY, Sept. 4, 2001, at 6.

> Both carriers [AT&T and Worldcom] have contended that FCC detariffing order superseded state laws so Wis. statutes couldn't govern interstate services. But consumer protection officials said FCC had removed itself from regulatory picture and so had deferred to Wis. law, which barred sellers from proposing service agreements that waived customer rights as condition of service.

Id.

197. Domestic, Interexchange Carrier Detariffing Order Takes Effect, *Public Notice*, 16 F.C.C.R. 3688 (2000).

> Section 42.10 (a) of the Commission's rules requires that: "[a] nondominant interexchange carrier shall make available to any member of the public, in a [sic] least one location, during regular business hours, information concerning its current rates, terms and condition for all of its detariffed interstate, domestic, interexchange services. Such information shall be make available in an easy to understand format and in a timely manner . . . . Section 42.10 (b) of the Commission's rules states that: "a nondominant IXC that maintains an Internet website shall make such rate and service information specified in paragraph (a) of this section available on-line at its Internet website in a timely and easily accessible manner, and shall update this information regularly."

Id. (internal citations omitted).

198. *See* http://www.attbroadband.com/tariffs/ (last visited Nov. 1, 2001).

199. *See Order on Reconsideration*, *supra* note 55. In its comments, AT&T contends that parties may interpret the statement in the Second Report and Order that, with complete detariffing, "consumers will also be able to pursue remedies under state consumer protection and contract laws" as allowing challenges under state law to the lawfulness of rates, terms, and conditions for these interstate services. AT&T argued that any interpretation that authorizes such challenges under state law is foreclosed by numerous judicial decisions recognizing that Sections 201 and 202 of the Communications Act preempt state law with respect to the reasonableness of rates, terms, and conditions for interstate telecommunications services.

200. *See id.*

rulings that states may regulate in areas involving interstate/intrastate telecommunications if the FCC abandons the field. However, as the Authors have argued throughout this Article, regardless of whether or not the FCC has in fact abandoned the field, *stare decisis* dictates that state courts cannot abandon the filed tariff doctrine.

VI. CONCLUSION

The Commission's detariffing actions are difficult to square with several fundamental precepts about regulation by a titular independent agency. By definition, the FCC is to act, make rules, and decide issues without undue influence from the sitting presidential administration. Under the 1934 Communications Act, as amended, the FCC is to regulate in the public interest and with regard to common carriers and their customers; the FCC has been charged to balance the interests of both carrier and customer. By law, the FCC cannot act inconsistently with its enabling statute, disregard the holdings of the United States Supreme Court, or waive or ignore statutory provisions. Under the Regulatory Flexibility Act, before the Commission issues regulations it must consider the impact of those regulations on small businesses. As this Article demonstrates, the FCC has done none of these things effectively and, in some cases, has acted contrary to these precepts.

While perhaps coincidental, the timing of the FCC's initial *Detariffing Order* was only a few days before the 1996 presidential election. The fact that the FCC has consistently promoted detariffing as an important consumer issue, and given the Clinton administration's adoption of the cloak of champion of communications at that time, created the appearance that detariffing found justification in its potential populous political capital rather than in the policy's inherent merits. Unfortunately, in the five years since the initial adoption of the policy, the FCC has done nothing to dispel this appearance. Indeed it has, if anything, enhanced it.

The Commission's approach to detariffing is clearly centered on its views of consumer protection. There is no debate that the Commission was created to protect consumers whose bargaining leverage with common carriers was nonexistent. Title II of the Communications Act is designed to eliminate unreasonable practices and undue discrimination and to provide everyone affected by the rates, terms, and conditions by which services are offered and rendered the same detailed notice of their existence and to thereby bind all users of those services by those rates, terms, and conditions without exception. At the same time, however, the Commission was not to favor one constituency over the other. While the Commission was to provide a balance for the lack of consumer bargaining power with carriers, it was not authorized, nor could it have constitutionally been authorized, to overrun and ignore the rights of carriers.

Yet, a case has been made that by mandating detariffing, the FCC has tipped the balance of rights it is charged to maintain. The Commission has moved over totally to the consumer camp, taking up their cause and empowering them with the rights to sick the dogs of a thousand disgruntlements on carriers. In doing so, the FCC has ignored not only Congress's directives that the rights of both parties are to be balanced, but also the Supreme Court's establishment of this same legal principle.

The Filed Tariff Doctrine's core justification resides not just in its major underpinning—anti-discrimination—nor in the means by which this goal is achieved: constructive notice and the force of law that tariffs have. The core justification rests in the balancing of individual rights against broader public interest rights. By promoting consumerism above all aspects of detariffing, the FCC has opted to favor the individual's right not to be misled or cheated. This is a noble end in theory, but what about it in the context in which the balance that is to be maintained between the rights of consumers and carriers is designed to protect the largest number of consumers? In the Commission's rush to add to its other consumer boons, such as the Gore-tax or e-rate charges, it failed to examine, much less consider, this concern for all consumers versus some consumers and the true costs of such a policy shift after a near century of existence has been ignored.

Why? Because the Filed Tariff Doctrine is based on the fundamental principal that if a carrier were subjected to thousands of disagreements with its customers, most involving small sums, the carriers' cost of operations would increase and those increased costs would be passed on to other consumers of the carriers' services through higher rates. To protect the broader public interests, the Filed Tariff Doctrine balances the rights of the parties involved. It required both parties to live by the terms of the tariffs that governed the services being provided. It delegated to consumers some duty of care, and some responsibility for their actions. It also required the carrier to be certain that the terms it adopted were those it could succeed with, because the carrier must, without deviation from the published terms, adhere to those rates.

By detariffing for the purpose of declaring that the Filed Tariff Doctrine no longer has application, the FCC has shown that it has lost the thread of proper regulation of carrier-customer relationships. It has abandoned its duty to preserve the balance of these respective rights that must be preserved by both congressional and Supreme Court directives.

The Commission attempts to counter such arguments by stating that it has only subjected telecommunications carriers to the same business methods used by other industries, that is, private contractual dealings. But this is simply not so, and is irrelevant in any event. While there are industries that deal with tens of thousands of customers, these industries have never operated in a regulatory environment in which all of their terms of service must be publicly filed and subjected to challenge before a federal agency. More importantly, no other industry is required to post its rates, terms, and conditions in detail on the World Wide Web as do telecommunications common carriers. The Filed Tariff Doctrine provided the *quid pro quo* for the duty to publish these terms. Each consumer has access to the same information, and in return, is bound by that information whether he knows of or understands it.

The consumer's protection is to ask before purchasing. Alternatively, if a consumer believes that a rate or term is unreasonable or discriminatory, he may complain after purchase. But if the consumer's complaint must show more than that the rate or term has been contained in the tariff, or that he claims he was told that another rate or term was available and, without checking the tariff or asking that the tariff be provided, he accepts the offer as presented, finding out later that the tariff did not provide for such a rate or term is not a basis to avoid the application of that rate or term. The fact that the system can lead—and has led—to some individual hardships is of no consequence, not because the law is unfair, but because the law balances the relative rights of the individual and the public at large and, in this instance, makes the necessary judgment that the public's rights must prevail. American jurisprudence is replete with such balancing of rights. The Commission not only has overlooked these principles, but also has simply ignored the lawful limitations on its authority. It knows that it cannot overturn a Supreme Court doctrine or ignore a congressional statute. But it attempts to sidestep these problems by emphasizing form over substance. It is one thing for a federal agency to get the law wrong; it seems quite another when the agency knows it has the law wrong, yet dodges the consequences with shallow reasoning and/or a refusal to address the issues, and actually promotes aggressive application of its erroneous policy. But this is what the FCC has done and continues to do. It has encouraged the states to assert state laws over interstate communications, and without any notice or public comment, has sought to empower state bodies to advance private consumer rights.

As is typical for a bureaucracy, the Commission has dismissed, without discussion or consideration of the evidence, the economic impact its policies will have on the industry in general, the public, and small businesses. It also appears to have ignored the fact that a statute requires it to address these issues.

The Commission's detariffing actions and subsequent promotions may constitute one of the more severe examples of bad government regulation, or in this case, bad "deregulation." Whether it will have similar adverse effects, as in the "deregulation" of power in California, remains to be seen. But the disregard for proper adherence to legal precedents, statutory directives, and sound administrative procedure should be disturbing to the industry, Congress, and those who are more enlightened within the Commission itself.