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Unholy Contract:
The Legacy and Abuse of the Filed Rate Doctrine

By Neil S. Ende

In America, the contract is a fundamental and indispensable part of our culture and business life. Virtually no significant business transaction is consummated without the execution of a contract. The enforceability, indeed the "sanctity" of the contract, is at the very heart of the capitalist system.

In the telecommunications world, however, the contract has long had a diminished and subservient role. Under Section 203 of the Communications Act of 1934 as amended, 47 U.S.C. 203, all common carriers are required to file tariffs showing "all charges" for the "interstate and foreign wire or radio communication services" that they provide as well as "the classifications, practices, and regulations affecting such charges." In addition, Section 203 declares it unlawful for any carrier to "demand, collect or receive a greater or less or different compensation" for such communication services.

The requirement that carriers file tariffs and provide service pursuant to those tariffs generally is referred to as the Filed Rate Doctrine (also referred to as the Filed Tariff Doctrine). In a 1915 case (*Louisville & Nashville Rail Co. vs. Maxwell*), the Supreme Court explained the operation and purpose of the Filed Rate Doctrine as follows: "The rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. [Customers] are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for charging either less or more than the rate filed. ... [The Filed Rate Doctrine] has been adopted by Congress in the regulation of interstate commerce in order to prevent discrimination."

While it reads like innocuous legalese, the Filed Rate Doctrine is a ticking time bomb that can destroy a reseller's business at any time and without notice--even if it has binding written contracts with its carriers that lock in a contract or a tariffed rate. Here's the problem. As the U.S. Supreme Court has explained, carriers cannot charge rates other than those set forth in their tariffs. Moreover, because the tariffs are publicly filed, a reseller, as the customer, is deemed as a matter of law to have complete knowledge of all rates, terms and conditions set forth in those tariffs even though most tariffs filed by major carriers may contain tens of thousands of pages of detailed and often arcane terms and conditions.

Thus, if a carrier offers a reseller a rate that is not found in its tariffs, that carrier cannot lawfully provide service at that rate. Indeed, as recently as this past summer, in *AT&T vs. Central Office Telephone Inc.*, the Supreme Court reaffirmed that "even if a carrier intentionally misrepresents its rates and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." The customer is required, as a matter of law, to pay the tariffed rate even though the customer was induced into taking the service by fraudulent means.

As unbelievable as this seems when stated in the abstract, it is even more troubling when viewed against real-world facts. For example, let's assume the following scenario: A carrier promises a reseller a rate of 5 cents per minute for domestic switched terminations nationwide and executes a seemingly binding agreement that sets forth that rate. In return for this rate, a reseller commits to purchase 1 million minutes per month for a three-year period. A reseller then enters into binding agreements with third parties to resell the service for 6 cents per minute. Then, either through negligence or fraudulent intent, it turns out that the underlying carrier's tariffs do not contain a 5-cent rate for the described service, only a 10-cent rate. The result is that the carrier is required by law to charge the reseller the 10-cent rate, even though this means the reseller's resale rate to third parties will be below cost. An even worse outcome is possible if a reseller remains liable to the carrier for the full three-year, 36 million-minute purchase commitment.

Moreover, because the resale customer is deemed to have complete and ongoing knowledge of all aspects of the carrier's tariff, it also may, depending on the specific circumstances, be obligated to pay the higher rate where the carrier's tariff had a particular rate on the day the agreement was executed, but where the carrier unilaterally modified its tariff to increase the rate at a later date. This means it is not sufficient merely for a reseller to check the carrier's tariff prior to executing an agreement. Since carriers can modify their domestic tariffs on one day's notice, daily review is required to ensure that the promised rate continues in effect. Thus, in certain circumstances, even daily review will only provide knowledge of the rate increase or change in terms or conditions, not the ability to demand continued application of the promised rate, term or condition.

When confronted by these facts, most resellers, and even most "telecommunications counsel," argue that the law cannot possibly sanction this result, particularly where it is the byproduct of intentional misconduct by a carrier. When they are assured that the law, in fact, sanctions this result, most counsel argue that the courts will certainly invoke considerations of equity to protect the rights of the resellers. Again, however, this is not the case. Indeed, the Supreme Court has repeatedly rejected equitable defenses asserted by resellers to the application of the Filed Rate Doctrine as it did in the 1990 case *Maislin Industries vs. Primary Steel*: "We have never accepted the argument that such 'equities' are relevant to the application of [the Filed Rate Doctrine]. Indeed, strict adherence to the filed rate has never been justified on the grounds that the carrier is equitably entitled to that rate, but rather that such adherence, despite the harsh consequences in some circumstances, is necessary to the enforcement of the Act."

To make matters worse, the application of the Filed Rate Doctrine is not limited to the carrier's rate alone, but frequently also applies to the terms and conditions of service found in the carrier's tariffs. (Thus, the term Filed Tariff Doctrine.) These terms and conditions address such critical matters as deposit requirements, quality of service (QoS) issues, liability for fraud and litigation or arbitration of disputes. (Tariffed terms relating to litigation and/or arbitration rights can be particularly egregious as they significantly can limit a reseller's legal rights should they need to assert a claim. Careful attention should be paid to such terms, whether they appear in a tariff or a carrier agreement.) As with the carrier rate, resellers may be bound to these additional terms and conditions whether they have actual knowledge of the term or condition or what they require.

Given the consequences of inaction, it is critical that a reseller take appropriate steps to protect itself against the harsh application of the Filed Rate Doctrine. For a reseller, the Filed Rate Doctrine often is a terminal illness--once subject to it, there is little that can be done to eradicate the disease if a carrier increases the rate. There are, however, a number of strategies that can be employed by experienced telecommunications counsel to discourage misconduct by a carrier, to protect a reseller's business and customer base and to obtain damages where such misconduct cannot be deterred.

First, a reseller should read its agreements carefully or have them reviewed by experienced telecommunications counsel. Second, if a reseller is taking service under tariff, it should demand to be provided with a copy of all applicable tariff provisions before signing. Third, a reseller should insist on prior notification of changes in tariff provisions. Fourth, a reseller should insist on the right to cancel the agreement without liability upon the filing of tariff revisions affecting the applicable rate or other critical terms and conditions. The list goes on and on and varies depending on the terms and circumstances of each service arrangement.

Other preventative measures include entering into agreements pursuant to Section 211 of the Communications Act, which specifically allows direct agreements between carriers. (Contrary to popular belief, it is not sufficient merely to state in an agreement that the rates set forth therein supersede the tariff; generally they do not.) Properly drafted, these agreements can set forth all rates, terms and conditions under which telecommunications services are being provided, thereby limiting or eliminating the risks associated with services taken under tariff. Agreements under Section 211 also can be drafted to incorporate certain tariff provisions without subjecting a reseller's business to all terms and/or conditions found in the tariff. Again, careful drafting and attention to detail can result in an agreement that provides adequate protection for carrier and reseller alike without imposing the uncertainties and risks associated with tariffed service arrangements on either party.

The bottom line is that a reseller needs to be vigilant. It should insist on comprehensive, carefully drafted agreements that properly address the applicability of the carrier's tariffs; specify all rates, terms and conditions applicable to the service arrangement; and define with certainty the circumstances under which changes can be made. A reseller that takes its agreements seriously is far less likely to be victimized by unscrupulous carriers and is more likely to respond immediately and forcefully should the need arise.

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