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### *The Beast That Will Not Die: Federal District Court Applies Filed Rate Doctrine To Detariffed Services*

*Washington, D.C., May 2, 2002* -- A federal district court in the Northern District of Illinois has upheld the application of the filed rate doctrine to telecommunications services provided after the tariff governing those services had been withdrawn.

The case involved a reseller that purchased services from a carrier under an initial contract that was executed before the carrier withdrew its tariffs. The successor contract, which was executed after the carrier had withdrawn its tariffs, contained a provision that incorporated certain tariff provisions by reference into its new Customer Guide.

Unfortunately, in pursuing its claims, plaintiffs only made the standard arguments; i.e., that the carrier misrepresented their rates, that the reseller did not have knowledge of the actual rate and that it would be inequitable to allow the carrier to impose its tarified rates. Not surprisingly, the Court's Memorandum Opinion and Order, released on April 9, 2002, rejects each one of these arguments, applying the same narrow construction of the Communications Act that has been utilized by courts for more than seventy years to uphold carrier tariffs:

- “Under the filed tariff doctrine, every common carrier was required to file tariffs with the FCC, showing all charges and regulations affecting such charges. 47 U.S.C. § 203(a), *AT & T v. Central Office Telephone, Inc.*, 524 U.S. 214, 221-222 (1998).”
- “The Act made it unlawful for a carrier to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." § 203(a).”
- “Thus, even if a carrier intentionally misrepresented its rate and the customer relied on the misrepresentation, the carrier could not be held to the promised rate if it conflicted with the published tariff. 524 U.S. at 223. In the instant case, the alleged misrepresentations regarding the rates were

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made in November and December of 1999.”

- Under the filed tariff doctrine, however, plaintiff may not claim reasonable reliance because it is presumed to have knowledge of the tariff.

Thus, while tariffs no longer apply to most interstate services, their legacy lives on. In some cases, this legacy takes the form, as in this case, of contract provisions that incorporate, either directly or indirectly, certain tariff provisions into the parties’ contracts by reference. Significantly, these provisions often permit the carrier to change the rates in the same manner as it could under tariff; that is, essentially at will and without actual notice of any kind to the customer. Other agreements provide that carriers can make unilateral changes in rates, terms and conditions merely by posting them on their website. And, of course, many states still require tariffs and apply their own version of the filed rate doctrine to intrastate services.

So, what’s the lesson here? Don’t be a victim. Read your agreements carefully (or retain expert telecommunications counsel to do so) and do not accept terms that incorporate tariffs by reference or otherwise allow the carrier to make unilateral changes without your actual knowledge and express consent. Do not be lulled into a false sense of security that you can now rely on the terms of your carrier agreements. You cannot. Absent extreme care in entering into agreements, carriers have and will continue to devise mechanisms that, on their face, give them the absolute right and ability to unilaterally change the terms of those agreements without the customers’ prior knowledge or consent.

We have extensive experience in drafting and negotiating carrier agreements that protect reseller customers from being exposed to unilateral changes in their rates, terms and conditions. We also have an extensive understanding of the filed rate doctrine and have developed strategies and arguments that can limit its scope or overcome its application entirely. We have used these strategies and arguments to **successfully litigate** filed rate issues for reseller customers before federal courts across the country.

If you need assistance with your telecommunications contracts or if you confront a filed rate issue, please do not hesitate to give us a call.

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