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March 19, 2003

Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: Petition for Arbitration of US LEC for Declaratory Order
Docket No.: 02-00890

Dear Chairman Kyle:

Enclosed for filing in the above-captioned docket are copies of two court decisions referred to by US LEC in its March 14, 2003 filing.

In both cases, which involved the same kind of fraudulent scheme as US LEC has alleged here, the courts referred the disputes to the FCC under the primary jurisdiction doctrine.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

Henry Walker

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HW/bb
cc: Eugene J. Podesta, Jr.
Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUDIOTEXT INTERNATIONAL, LTD.	:	CIVIL ACTION
v.	:	
AT&T CORPORATION	:	NO. 00-5010

MEMORANDUM AND ORDER

Fullam, Sr. J. January 17, 2002

The defendant has filed a motion to dismiss this action with prejudice, invoking the "filed tariff" doctrine, and an alternative motion to dismiss without prejudice, in deference to the "primary jurisdiction" of the Federal Communications Commission. In a companion case involving virtually identical issues, Audiotext International, Limited v. MCI WorldCom (Civil Action No. 00-3882), my colleague Judge Waldman, on December 11, 2001 filed a comprehensive opinion, in which he concluded that the issues should first be addressed by the Federal Communications Commission. In the interest of consistency, and because I am in substantial agreement with Judge Waldman's decision, I conclude that the same course should be followed in this case.

An Order follows.

PICS No 01-2600 (15)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUDIOTEXT INTERNATIONAL, LTD.	:	CIVIL ACTION
v.	:	
MCI WORLDCOM COMMUNICATIONS, INC.	:	NO. 00-3982

MEMORANDUM

December 11, 2001

WALDMAN, J.

I. Introduction

This case arises from a telephone service agreement between the parties and defendant's blocking of calls from the United States to certain telephone numbers in the United Kingdom. Plaintiff claims that in taking such action defendant breached the parties' contract, breached an implied covenant of good faith and fair dealing and committed fraud.

The parties are corporations of diverse citizenship. The amount in controversy exceeds $75,000. The court has subject matter jurisdiction under 28 U.S.C. § 1332(a).

Defendant has filed a motion for summary judgment on the ground that plaintiff's claims are preempted by federal law, particularly by the filed rate doctrine, and in any event are the subject of a release. Defendant has filed an alternative motion

to dismiss in favor of a FCC proceeding under the doctrine of primary jurisdiction.[1]

Audiotext International ("Audiotext") is a corporation wholly owned and operated by its president and sole officer James A. Hausman. The primary business activity of Audiotext is the purchase and sale of international telephone minutes and directing long-distance telephone calls originated in the United States for termination in foreign countries including the United Kingdom ("UK"). The calls relay recorded messages, live conversation and computer images to callers who dial Audiotext's service numbers.

On March 29, 2000, Audiotext and MCI WorldCom Communications, Inc. ("WorldCom") entered into an On-Net Service Agreement (the "Agreement") whereby WorldCom agreed to supply international telephone service lines for Audiotext's use.[2] The Agreement was for an initial term of one year and was to be automatically renewed for an additional year unless either party delivered written notice of an intent to terminate at least

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[1] The only matters submitted with defendant's motion for summary judgment beyond the pleadings are a copy of the contract and defendant's tariff which was incorporated therein, the release on which defendant relies and three affidavits stating in conclusory terms why calls were blocked. Plaintiff submitted an affidavit of an industry expert and documents to show that the release was executed on behalf of a party other than plaintiff.

[2] The contract is fully integrated and contains a New York choice of law provision. The parties accept that plaintiff's claims are accordingly governed by New York law.

thirty days prior to expiration of the term. Plaintiff received a preferred rate of $0.067 per minute for calls to the UK and agreed to an annual volume commitment of $60,000, representing approximately 900,000 minutes, over the initial one year term of the agreement.[3]

Plaintiff provided defendant with a list of telephone numbers that plaintiff intended to use to complete calls to the UK. Defendant assured plaintiff that the calls would be completed "with no technical or other problems." Plaintiff requested that defendant make test calls to ensure that calls would complete without technical problems. Defendant did so.

On WorldCom's recommendation, Audiotext ordered four dedicated service lines ("DSLs") to facilitate diversion of the calls to the UK. On April 17, 2000, WorldCom installed two DSLs and activated them the following day. After activation, WorldCom observed a high volume of call traffic over the lines which it deemed "fraudulent." It then blocked the DSLs and restricted any calls from being transmitted over WorldCom's lines to Audiotext's

[3] In its memorandum in opposition to defendant's motion for summary judgment, plaintiff states that defendant understood that Audiotext intended to process a minimum volume of 1,200,000 minutes per month. A statement in a brief, of course, is not evidence. In any event, defendant has not claimed that the contract imposed a ceiling.

UK destination numbers.[4] On May 1, 2000, WorldCom advised Audiotext that it would not complete any calls to the UK numbers and disconnected the DSLs.[5]

The Agreement between the parties expressly incorporates the terms of a WorldCom tariff filed with the Federal Communications Commission ("FCC") in a clause which in pertinent part provides:

> MCI WorldCom will provide to Customer international, interstate, intrastate and local telecommunications service(s) pursuant to the applicable tariffs and price lists of MCI . . . including the MCI WorldCom Tariff F.C.C. No. 1. This Agreement incorporates the terms of each such Tariff. MCI WorldCom may modify its Tariffs from time to time to the extent permitted by law and thereby affect services furnished to Customer.

F.C.C. Tariff No. 1 in pertinent part provides:

> Without notice to customer, MCI WorldCom may block traffic from certain countries, country codes, city codes, NDXX exchanges, individual telephone stations, groups or ranges of individual telephone stations, or calls using certain customer authorization codes, when MCI WorldCom deems it necessary to take such action to prevent unlawful use of, or nonpayment for, its service or prevent the use of it's services in a manner that MCI WORLDCOM determines to be in violation of this tariff or when the customer's call volume or calling

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[4] For reasons not made clear, WorldCom removed the block on April 18, 2000 at Audiotext's request but when high volume traffic immediately resumed, WorldCom reinstituted the block on April 19, 2000.

[5] At this point, of course, calls were not being completed. This plaintiff alleges was contrary to the assurance that calls would be completed without problems. Plaintiff alleges that defendant knew or should have known this assurance was false when given and it is upon this assurance that plaintiff predicates its fraud claim.

pattern results, or may result in the blockage of MCI WORLDCOM's network or in the degradation of MCI WORLDCOM's service.

MCI WorldCom may discontinue the furnishing of any and/or all service(s) to a customer or cancel his account, without incurring any liability: Immediately and without notice if MCI WorldCom deems that such action is necessary to prevent or to protect against fraud or to otherwise protect its personnel, agents, facilities, or services.

Mr. Hausman had a prior business relationship with MCI International as the principal of A.I. Global, an entity incorporated in the Cayman Islands. A dispute between the parties arose and service was terminated on February 22, 2000. The dispute was settled by letter agreement of May 23, 2000 between A.I. Global and MCI WorldCom, Inc. The terms provide that the parties "agree to resolve the pending dispute with A.I. Global relating to or arising out of MCI WorldCom's decision to terminate audiotext services." In exchange for $8,047, Mr. Hausman on behalf of A.I. Global released MCI WorldCom and all of its predecessors, successors, subsidiaries and affiliates from all causes of action, claims, suits, debts, damages, judgments and any demands whatsoever, whether matured or unmatured and

whether known or unknown, it may have through the date of the execution of the settlement agreement and release.[6]

There are disputed issues of material fact regarding the identity or relationship between plaintiff and A.I. Global. It is thus unclear that plaintiff released defendant from liability on any claim. Summary judgment based on the release would thus be inappropriate.

Congress granted the FCC the authority and duty to oversee common carriers in connection with their provision of communication services. See 47 U.S.C. § 151 et seq. (2001). "All charges, practices, classifications, and regulations for and in connection with such communication service shall be just and reasonable," and any "charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b). It is unlawful for a carrier to employ or enforce practices not specified in schedules filed with the FCC. See 47 U.S.C. § 203(c).

Any claim by an aggrieved party that conflicts with a published tariff is preempted by the filed tariff doctrine. AT&T

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[6] The precise relationships among MCI International, defendant and MCI WorldCom, Inc. are not altogether clear. It does appear that defendant is a wholly owned subsidiary of MCI WorldCom Group, Inc. which may or may not be the entity contemplated by reference to MCI WorldCom, Inc. in the settlement agreement and release. In any event, it appears that all of these entities are at least affiliated and thus encompassed by the release.

v. Central Office Telephone, Inc., 524 U.S. 214, 222 (1998). The filed tariff doctrine applies not only to claims involving charges, but also classifications and practices embodied in a tariff. Id. at 223-224. The doctrine applies to claims in contract or tort. Id. at 227 ("rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier").

WorldCom asserts that plaintiff's claims are preempted because they stand in direct conflict with the filed tariff provision permitting WorldCom to block traffic when it "deems" such to be necessary to prevent fraud or unlawful use of its service. WorldCom submits an affidavit of an employee who monitors usage. He states the pertinent calls were blocked because he "detected massive amounts of fraud and arbitrage occurring" on the lines in question. He does not elaborate further. WorldCom submits an affidavit of a traffic engineer who states that he was directed to block the pertinent calls "to prevent the continuation of fraud and arbitrage." He does not claim that he has any first hand knowledge of fraud and does not elaborate further. WorldCom also submits an affidavit of an implementation manager who states that he "was told that the calls which [plaintiff] was trying to make were being blocked due to high toll, fraud and unlawful use of the designated lines."

There is no claim of first hand knowledge of fraud or unlawful use and no further elaboration.

Unsurprisingly, plaintiff asserts that it was not engaged in fraud or other unlawful conduct and submits an affidavit of an industry expert. She avers that "fraud" in connection with telephone traffic is understood in the telecommunications industry to mean only "traffic that is generated by a person and/or entity that has no intention of paying for such traffic" and thus "cannot be confirmed until a customer has refused to pay for questionable traffic." She avers that "in many instances" carriers which discover that contracted service is unprofitable "will shut down the service on the customer's telephone lines alleging that there has been fraud."

To determine conscientiously whether plaintiff's claims are inconsistent with the tariff and preempted, the court would have to construe the tariff in view of common industry practice and the understanding of the agency in approving it.[7] If fraud is a term of art limited to non-payment, as plaintiff's expert avers, then it should be uniformly so applied. If the term

[7] Plaintiff's contention that defendant may not invoke the filed tariff doctrine absent the existence of fraud is rejected. The tariff expressly provides for the termination of service whenever defendant "deems" such action necessary to prevent or protect against fraud. A determination of whether plaintiff's claims in fact conflict with the tariff, however, requires some understanding of the meaning of fraud in the provision of telecommunications services and even more importantly, the meaning of the term "deems."

"deems" is meant to confer absolute unfettered discretion, then plaintiff's claims appear to be preempted.[8] If the term imports some factual basis or exercise of considered judgment, the claims may not be preempted.[9] When this term appears in tariffs, its meaning should also be uniformly applied.[10] This brings us to the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction "creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the court can

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[8] The assurance that plaintiff's calls would be completed with no technical or other problems is not recited in the parties' agreement and is clearly not collateral or extraneous to the agreement, but rather relates to the core subject of the agreement. It thus appears that even if not preempted, plaintiff's fraud claim may not be viable. See Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc., 98 F.3d 13, 20 (2d Cir. 1996); International CableTel Inc. v. Le Groupe Videotron Ltd., 978 F. Supp. 483, 487 (S.D.N.Y. 1997); Sforza v. Health Ins. Plan of Greater New York, Inc., 210 A.D.2d 214, 214-15 (N.Y. App. Div. 1994).

[9] Where a contract term contemplates the exercise of discretion by a party, there is an implied covenant of good faith and fair dealing that such discretion will not be exercised arbitrarily. See Dalton v. Educational Testing Service, 663 N.E. 2d 289, 291 (N.Y. 1995). This covenant, however, imposes no obligation to perform in a manner inconsistent with the express terms of a contract. Id. at 292; Murphy v. American Home Products Corp., 448 N.E. 2d 86, 91 (N.Y. 1983).

[10] In common usage, the term suggests a considered judgment or belief. See Wester's Ninth New Collegiate Dictionary 332 (1988). In the context of drafting legal documents, the term is generally used to create a fiction by treating something as if it were actually something else. See Black's Law Dictionary 425 (7th ed. 1999). Indeed, it has been suggested that "other uses of the word should be avoided" and that phrases like "as he deems necessary" are "objectionable" and "dangerous." Id.

have the benefit of the agency's view on issues within the agency's competence." MCI Telecomm. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1105 (3d Cir. 1995). The principal justification for the doctrine "is the need for an orderly and sensible coordination of the work of agencies and courts." Cheney State College Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983). It is specifically applicable to claims involving an issue within the special competence of an administrative agency. See Reiter v. Cooper, 507 U.S. 258, 268 (1993); MCI Communication Corp. v. AT&T Co., 496 F.2d 214, 220 (3d Cir. 1974). In such a case, a court may defer to an agency to allow the parties to secure an administrative ruling. See Phone-Tel Communications, Inc. v. AT&T Corp., 100 F. Supp. 2d 313, 316 n.3 (E.D. Pa. 2000).

The FCC is empowered to adjudicate the fairness, reasonableness or lawfulness of a practice, and to award damages to a complainant injured by a practice which is unfair, unreasonable or prohibited under the Act. See 47 U.S.C. §§ 206; 207; 209. The doctrine of primary jurisdiction is applicable to any claim which however framed calls into question the fairness or reasonableness of a practice referenced in a tariff or that requires interpretation of a tariff. See MCI WorldCom v. Communications Network Int'l., Inc., 2001 U.S. Dist. LEXIS 15898, *13-15 (E.D. Pa. Aug. 28, 2001); IPCO Safety Corp. v. WorldCom, Inc., 944 F. Supp. 352, 357 (D.N.J. 1996). Were it otherwise, a

party could "avoid application of the primary jurisdiction doctrine simply by artfully drafted pleadings" and "effectively render inoperative the doctrine and the uniformity and consistency purposes of the FCC and the Act." Unimat, Inc. v. MCI Telecommunications Corp., 1992 WL 391421, *3 n.4 (E.D. Pa. Dec. 16, 1992).

There is no fixed formula for determining whether a court should apply the doctrine of primary jurisdiction. See Phone-Tel, 100 F. Supp. 2d at 316; American Telephone & Telegraph Co. v. People's Network, Inc., 1993 WL 248165, *4 (D.N.J. 1993). The factors generally considered are whether the question presented is within the conventional experience of judges or involves technical or policy considerations within the agency's particular field of expertise; whether the question at issue is particularly within the agency's discretion; whether there is a substantial risk of inconsistent rulings; and, whether a prior application to the agency has been made. See Phone-Tel Communications, 100 F. Supp. 2d at 316; AT&T Corp. v. PAB, Inc., 935 F. Supp. 584, 589-90 (E.D. Pa. 1996). See also National Communications Ass'n, Inc. v. AT&T Co., 46 F.3d 220, 222-223 (2d Cir. 1993); Oh v. AT&T Corporation, 76 F. Supp. 2d 551, 557 (D.N.J. 1999).

What, if any, is the commonly understood meaning of fraud in connection with telephone traffic is particularly within

the expertise and discretion of the FCC. Whether the right of a carrier under a tariff to block any line it "deems" to be used fraudulently or unlawfully is unbridled or implies some limiting standards, and if so what standards, requires a construction and application of the tariff in a manner fairly requiring consistency. This is something particularly within the discretion of the FCC and there is a substantial risk of inconsistent rulings if each of numerous courts were to determine the meaning and application of the term as used in the same tariffs.

Deference to the FCC in this matter is highly appropriate. See Allnet Comm. Service, Inc. v. National Exch. Carriers Ass'n., Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992) ("(g)iven the concern for uniformity and expert judgment, it is hardly surprising that courts have frequently invoked primary jurisdiction in cases involving tariff interpretations"); Richman Bros. Records, Inc. v. U.S. Spring Communications, 953 F.2d 1431, 1435 n.3 (3d Cir. 1991) (invocation of primary jurisdiction particularly appropriate when claim raises question of validity of practice included in tariff). See also LO/AD Communications, BVI, Ltd. v. MCI WorldCom, 2001 WL 64741, *4 (S.D.N.Y. Jan. 24, 2001) (whether defendant's decision to block lines was reasonable involves technical and policy matters regarding practices within industry best resolved by FCC).

If the FCC determines that the term "deems" as used in the tariff confers absolute discretion, the agency may find that the tariff sanctions a practice which is unfair or unreasonable and thus unlawful. If the term is found to imply fair consideration and reasoned judgment, and particularly if fraud is held to be limited to non-payment, the FCC may find that defendant has employed a practice not in fact encompassed by its tariff and thus did something prohibited by the Act. If the FCC determines that fraud is sufficiently apparent from a particular level of telephone traffic and "deems" as used in the tariff is broad enough to permit termination without further ado, plaintiff's claims may be precluded. In any event, a determination of these matters by the agency may very well effectively resolve the parties' dispute.

The court will apply the doctrine of primary jurisdiction and defer to the FCC in a determination of the meaning of the term "fraud" in the context of telephone traffic in the telecommunications industry and of the proper application of the term "deems" as employed in the tariff.[11] Where there is

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[11] The court assumes that plaintiff will proceed before the FCC without a direct order to do so and thus such an order will not be entered at this time. See LO/AD Communications, 2001 WL 64741 at *7 (applying doctrine of primary jurisdiction to some of plaintiff's claim and expressly ordering plaintiff to submit such claims to FCC). The court also sees no need to direct the FCC on how to proceed, assuming it has the power to do so. See MCI WorldCom Communications, 2001 U.S. Dist. LEXIS 15898 at *17 (directing FCC to conduct appropriate hearings); IPCO Safety Corp., 944 F. Supp. at 358 (same). A review of pertinent cases suggests that such orders are the exception.

a risk of prejudice to the plaintiff, a court will ordinarily stay proceedings while the parties proceed before the agency with primary jurisdiction. The statute of limitations on plaintiff's claims in this case, however, will not lapse until April 18, 2006. See N.Y. CLS CPLR § 213 (2001). In these circumstances, the requested dismissal without prejudice is appropriate. See Allret, 965 F.2d at 1123.

Accordingly, defendant's Motion for Summary Judgment will be denied and defendant's Motion for Dismissal Pending Administrative Hearing will be granted. An appropriate order will be entered.