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## “Untouchable?” Treatment of Tariff-Based Claims

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In the course of many bankruptcy cases, federal regulations requiring utilities to provide their services to the public pursuant to filed tariffs frequently raise the question of the scope of the bankruptcy court's jurisdiction to treat tariff-based claims asserted against the estate. This article addresses the issue of bankruptcy court's jurisdiction to invalidate tariff-based claims, with a particular focus on tariff-based claims for early service termination liability.

Suppose the following scenario. Acme Co. orders telephone services from SuperTel, a provider of telecommunications services, pursuant to the terms of SuperTel's filed tariff. The SuperTel tariff sets forth the terms and conditions upon which SuperTel is required to provide telephone service to all those who order services pursuant to the tariff. Under the tariff, if a customer of SuperTel commits to a longer term of service, the customer is charged a lower monthly rate. If the customer subsequently elects to terminate the service prior to the expiration of the term commitment, the tariff requires such customer to immediately pay SuperTel the monthly charges for the remaining balance of the term commitment. Acme Co. commits to a 36-month term under the SuperTel tariff to obtain a lower rate for SuperTel's services. Two years later, Acme Co.'s financial condition drastically deteriorates and it files for bankruptcy protection.



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and its connecting carrier” and “the classifications, practices and regulations affecting such charges.”<sup>2</sup> This statute “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.”<sup>3</sup> The rights, “as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier.”<sup>4</sup>

The filed-rate doctrine (also referred to as the filed-tariff doctrine) is the central principle of the regulatory scheme for interstate telecommunications carriers. It “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.”<sup>5</sup> The Federal



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After filing for bankruptcy, Acme Co. decides that it no longer needs the services provided by SuperTel and rejects the contract. At the time of Acme Co.'s rejection, there are 10 months remaining under Acme Co.'s term commitment. Acme Co.'s rejection triggers early termination liability pursuant to the SuperTel tariff, and SuperTel files a proof of general unsecured claim for damages against Acme Co.'s bankruptcy estate in the amount equal to the 10 months of the charges remaining due under Acme Co.'s

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term commitment. Acme Co. objects to the SuperTel proof of claim, arguing that the claim should be disallowed because early termination liability represents a penalty.

The foregoing hypothetical raises the following questions: Does the bankruptcy court have jurisdiction to invalidate a claim derived from and calculated pursuant to a filed tariff? If the bankruptcy court has jurisdiction, is an early termination charge of the type described above a penalty that should be disallowed?

The tariffs establishing the basis for early termination claims are filed pursuant to §203(a) of the Federal Communications Act.<sup>1</sup> Section 203(a) requires common carriers to file tariffs, and keep open for public inspection those tariffs, that set out “all charges for itself

Communications Act does not permit “either a [customer's] ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate.”<sup>6</sup> “Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and [customer]. Knowledge of the publicly published rates to be charged is presumed, and is binding on both the carrier and its customer.”<sup>7</sup> And since “rates do not exist in isolation” and are a function of the nature and quantity of

<sup>1</sup> 47 U.S.C. §203(a).

<sup>2</sup> *Id.*

<sup>3</sup> *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 69 L.Ed.2d 856, 101 S.Ct. 2925 (1981).

<sup>4</sup> *American Tel. & Tel. v. Central Office Telephone Inc.*, 524 U.S. 214, 227, 118 S.Ct. 1956, 1965, 141 L.Ed.2d 222 (1998); *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163, 67 L.Ed. 183, 43 S.Ct. 47 (1922).

<sup>5</sup> *Arkansas Louisiana Gas Co.*, 453 U.S. at 577.

<sup>6</sup> *Maislin Indus., U.S. v. Primary Steel Inc.*, 497 U.S. 116, 120, 111 L.Ed.2d 94, 110 S.Ct. 2759, 2763 (1990) (citations omitted).

<sup>7</sup> *Maislin Indus. U.S. Inc. v. Primary Steel Inc.*, 497 U.S. 116, 126, 111 L.Ed.2d 94, 110 S.Ct. 2759, 2766 (1990).

services, the publicly filed rate and the same services must be afforded to all pursuant to the same terms.<sup>8</sup>

Based on the foregoing principles, a common carrier must charge all similarly situated customers the same rate and assess the same charges based on the tariff. If a customer is charged pursuant to a tariff, such customer is presumed to know the terms and conditions governing the terms of service set forth in the tariff, including early termination liability arising under the tariff. The challenges to the rates established by the tariffs are barred by operation of the filed rate doctrine.

When a bankrupt customer objects to the allowance of the carrier's claim that arises from and is calculated pursuant to the filed tariff, the customer essentially asks the bankruptcy court to modify the terms of the tariff and afford the customer special treatment in contravention of the filed rate doctrine. Tariffs are not simply contracts; they have the force of federal law.<sup>9</sup> Accordingly, the rates expressed in the tariff are the legal rates customers are obligated to pay for the services.<sup>10</sup> A court cannot question the rates of a filed tariff.<sup>11</sup> Therefore, a strong argument can be made that a bankruptcy court lacks jurisdiction to disallow a valid tariff-based claim by operation of the filed rate doctrine and because determining the reasonableness of filed rates is the province of the Federal Communications Commission (FCC), and not the courts (especially a non-Article III court like the bankruptcy court).<sup>12</sup>

Assuming a customer in bankruptcy could challenge the tariff's early termination charge as a penalty, the FCC has opined that early termination (or shortfall) charges are valid under 47 U.S.C. §201. The FCC has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments.<sup>13</sup>

<sup>8</sup> *Central Office Telephone*, 118 S.Ct. at 1963.

<sup>9</sup> *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 488 (2d Cir. 1998).

<sup>10</sup> *AT&T Corp. v. Douglas-Hanson Co.*, 2005 U.S. Dist. LEXIS 24801 (D. Wis. 2005).

<sup>11</sup> *Id.*

<sup>12</sup> *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d at 488-89.

<sup>13</sup> *In the Matter of Ryder Communications Inc.*, 2003 FCC LEXIS 3746; 18 FCC Rcd 13603, 13617 (FCC 2003); *see, e.g., Southwestern Bell Telephone Company Tariff F.C.C. No. 68*, Tr. No. 1921, Order, 5 FCC Rcd 2523 (Com. Car. Bur. 1990) ("SWB Tr. No. 1921 Order"); *Southwestern Bell Telephone Company Tariff F.C.C. No. 68*, Tr. No. 1963, Order, 5 FCC Rcd 3790 (Com. Car. Bur. 1990) (both allowing five-year service contract containing early service-termination provision that required the customer to pay charges as if minimum volume commitment would be met, minus Southwestern Bell's interstate

The FCC explained the rationale for allowing these charges as follows:

Many of these provisions required individual customers, like Ryder, to pay charges similar, if not equivalent, to the charges that the customers would have paid had they continued service and fulfilled their minimum volume commitments. In approving these provisions, the Commission recognized implicitly that they were a valid *quid pro quo* for the rate reductions included in long-term plans. The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs. In other words, the Commission has allowed carriers to use early service termination provisions to allocate the risk of investments associated with long-term service arrangements with their customers.<sup>14</sup>

In the case of *Telecom Int'l Am., Ltd. v. AT&T Corp.*, a party tried to claim a tariffed charge was an unenforceable penalty, and the court held:

TIA contends that summary judgment is inappropriate because the shortfall charges constitute unenforceable penalty provisions void as against public policy, because the filed tariff doctrine is inapplicable in situations where the customer disputes liability and because AT&T has made numerous misrepresentations with respect to the enforcement of the shortfall charges and the Business Downturn Clause. I hold that

special-access authorized rate of return at the time of the termination); *AT&T Communications Revisions to Tariff F.C.C. No. 1*, Tr. No. 2422, Order, 5 FCC Rcd 5988 (Com. Car. Bur. 1990) (allowing long-term service plans that required customers who discontinued service prior to the end of the plan to pay shortfall charges for the remainder of the term, and also required repayment of the discounted amounts customers paid for years in which they actually purchased service); *AT&T Communications Tariff F.C.C. Nos. 2 and 14*, Tr. Nos. 4974, 5149, and 5383, Order, 8 FCC Rcd 4543 (Com. Car. Bur. 1993) (allowing 800 service term plans containing early-service termination provisions that required customers who discontinued service prior to the end of the plan to pay charges based on a percentage of the remaining, unfulfilled commitments). *See, also, Telecom International America Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 219-221 (S.D.N.Y. 1999), *aff'd in part, rev'd in part on other grounds*, 280 F.3d 175, 189-90, 193 (2d Cir. 2001) (upholding the validity of a shortfall provision that obligated the customer to pay termination charges if it failed to purchase a minimum amount of communications services during the three-year term of the contract tariff).

<sup>14</sup> *Ryder*, 18 FCC Rcd 13603, 13617 (FCC 2003).

these arguments are meritless.

With respect to the issue of the reasonableness of the shortfall charges, I hold that the filed tariff doctrine and the doctrine of primary jurisdiction prevent me from entertaining such determinations. In short, I cannot void the shortfall charges because I would be substituting my judgment as to what would be a reasonable rate—something prohibited by the filed-tariff doctrine and the doctrine of primary jurisdiction. Moreover, I would also be providing TIA with an extra-tariff benefit, unavailable to any other potential subscriber to CT 1192.<sup>15</sup>

Each court or administrative agency examining the issue has allowed a carrier to charge an early termination fee. Even if bankruptcy courts have jurisdiction to consider the penalty issue, early-termination charges asserted and calculated under a filed tariff should not be deemed a penalty. Following objection, a filed proof of claim may be disallowed if it is unenforceable under state law.<sup>16</sup> The rule against penalty clauses, though it lingers, has come to seem rather an anachronism, especially in cases in which commercial enterprises are on both sides of the contract.<sup>17</sup> As noted by the Seventh Circuit, "it is easy to assign nonexploitive reasons for contractual penalties and hard to give convincing reasons why, in the absence of fraud or unconscionability, consenting adults that are, moreover, substantial organizations rather than mere consumers should be prohibited from agreeing to such provisions."<sup>18</sup> The rule hangs on but is chastened by an emerging presumption against interpreting liquidated damages clauses as penalty clauses.<sup>19</sup>

Indeed, courts have apparently

<sup>15</sup> *Telecom Int'l Am. Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 219 (S.D.N.Y. 1999), *aff'd in part, rev'd in part on other grounds*, 280 F.3d 175, 189-90, 193 (2d Cir. 2001).

<sup>16</sup> 11 U.S.C. §502(b)(1); *In re Morris*, 289 B.R. 783, 784 (Bankr. D. Ga. 2002).

<sup>17</sup> *XCO Int'l, Inc. v. Pac. Sci. Co.*, 369 F.3d 998, 1002-1003 (7th Cir. 2004).

<sup>18</sup> *Operating Engineers Local 139 Health Benefit Fund v. Gustafson Construction Corp.*, 258 F.3d 645, 655 (7th Cir. 2001).

<sup>19</sup> *MetLife Capital Financial Corp. v. Washington Ave. Associates L.P.*, 159 N.J. 484, 493, 732 A.2d 493, 499-500 (N.J. 1999); *Circle B Enterprises Inc. v. Steinke*, 1998 ND 164, 584 N.W.2d 97, 101 (N.D. 1998); *Wallace Real Estate Investments Inc. v. Groves*, 881 P.2d 1010, 1013-14, 124 Wn.2d 881 (Wash. 1994); *Rohlin Construction Co. v. City of Hinton*, 476 N.W.2d 78, 79-80 (Iowa 1991); *Pierce v. B & C Electric Inc.*, 104 Ill. App. 3d 309, 432 N.E.2d 964, 966, 60 Ill. Dec. 65 (Ill. App. 1982); 24 Lord, Richard A., *Williston on Contracts*, §65:13 (4th ed. 2004); *cf. Penske Truck Leasing Co. v. Chemetco Inc.*, 311 Ill. App. 3d 447, 725 N.E.2d 13, 20, 244 Ill. Dec. 218 (Ill. App. 2000); *Pav-Saver Corp. v. Vasso Corp.*, 143 Ill. App. 3d 1013, 493 N.E.2d 423, 427-28, 97 Ill. Dec. 760 (Ill. App. 1986).

approved termination fees when such fees are part of an overall rate structure.<sup>20</sup> Courts have not disapproved termination fees when there are lower monthly rates on term plans that include termination fees to allow a carrier to recoup revenue lost by the early termination. One court has held that “there is no question that a cellular provider could fashion an LDP that is undisputedly an integral part of its rate structure.”<sup>21</sup>

When a sophisticated commercial customer chooses to pay a lower monthly rate in exchange for a long-term commitment and the possibility of a termination fee if the contract is terminated prior to the expiration of the agreed-upon term, such customer makes a calculated business decision and there appears no reason why it should not be bound by that decision. A fee based on early termination is charged by a carrier to recoup its losses from the lower monthly fees, the investment in the product and the lost revenues. When such fees are charged to all of the carrier’s similarly situated customers in a nondiscriminatory manner, there appears to be no reason why a bankruptcy court should construe them as a penalty and disallow such tariff-based claim against the estate. ■

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<sup>20</sup> *Chandler v. AT&T Wireless Servs.*, 2004 U.S. Dist. LEXIS 14884, 4-5 (S.D. Ill. 2004).

<sup>21</sup> *Kinkel v. Cingular Wireless, et al.*, Civil No. 02-CV-999-GPM (S.D. Ill. Nov. 8, 2002).