

COMMUNICATIONS ACT AMENDMENTS—COMMON CARRIER TARIFF PROCEEDINGS

MAY 25, 1976.—Ordered to be printed

Mr. MAGNUSON (for Mr. PASTORE), from the Committee on Commerce,
submitted the following

REPORT

[To accompany S. 2054]

The Committee on Commerce, to which was referred the bill (S. 2054) to amend Sections 203 and 204 of the Communications Act of 1934, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SUMMARY AND PURPOSE OF LEGISLATION

S. 2054 was introduced July 8, 1975 by Senators Magnuson and Pearson at the request of the Federal Communications Commission (FCC).

As reported by the Committee, S. 2054 would:

(1) Amend section 203(b) of the Communications Act of 1934 to extend from 30 to 90 days the period of notice required before a new or revised common carrier tariff may become effective; and

(2) Amend section 204 of the Act:

(a) To extend from 3 to 5 months the period for which the Commission may suspend the effectiveness of new or revised tariff schedules;

(b) To authorize the Commission to conduct a preliminary written proceeding to determine whether a tariff filing should become effective or be suspended in whole or in part pending hearing and decision thereon; or whether temporary authorization of a tariff filing should be permitted; and

(c) To provide that accounting order procedures shall be applicable to tariff filings proposing charges for a new service, as well as increased charges for existing services.

NEED FOR LEGISLATION

Amendment of section 203(b)—Tariff notice period

Subsection 203(b) of the Communications Act presently provides that no change shall be made in common carrier tariff charges, classifications, regulations or practices which have been filed with the FCC except after 30 days notice to the Commission and the public. The Commission may, however, modify this notice requirement if particular circumstances so warrant.

In requesting this legislation, the FCC has submitted that the current 30-day notice period is inadequate for the agency to review a tariff filing fully and effectively. After compliance with the FCC's procedural rules, the existing 30-day notice period leaves the Commission with only 4 to 6 days, including weekends and holidays, to review the tariff filing, the submission of interested parties, and to reach a decision on whether or not to suspend the tariff.¹

In the Committee's judgment, the extension of the section 203(b) notice period from 30 to 90 days, as proposed by S. 2054, is essential for the FCC to meet its tariff review responsibilities consistent with the demands of due process. Given the complexity and detail of contemporary common carrier tariff filings, the existing 30-day notice period is unrealistic and no longer serves the public interest. Current tariff filings are often thousands of pages in length and may take up to 6 months for a carrier to prepare. Neither the Commission nor interested parties can be expected to review and analyze such filings within the constraints of the existing 30-day notice period.

As discussed below, S. 2054, as reported by the Committee, would authorize the FCC to conduct a preliminary written proceeding on a tariff filing and based thereon grant partial or temporary tariff changes pending full hearing on the lawfulness of the filing. Extension of the notice period to 90 days is also necessary for effective FCC utilization of this new authority as additional time will be required for the Commission to determine in the case of a particular tariff filing whether a temporary or partial change should be approved.

While judicial construction of existing subsection 203(b) has affirmed the Commission's authority to "modify" the notice requirement to 60 days in the case of tariff increases,² the Committee is of the view that the notice period should be established by statute for all tariff changes rather than left to agency discretion and litigation. As discussed below, the bill, as reported, would specifically provide that the authority of the Commission to modify the requirement of section 203 does not include extending the notice period to more than 90 days.

Amendment of section 204

Tariff Suspension Period.—Section 204 of the Communications Act presently provides that the Commission, upon complaint or upon its own initiative, may designate a tariff filing for hearing on its lawfulness, and, pending such hearing, suspend the operation of the tariff for

¹ FCC procedural rules provide that petitions for suspension of a tariff filing may be submitted as late as 14 days before the effective date of the tariff. (See 47 C.F.R. 1.773 (h)). The carrier filing the opposed tariff then has 3 days to file or reply; however, this filing period is often extended to 8 to 10 days due to the complexity of the submissions and the bona fide need for additional time. (See 47 C.F.R. 1.4 (f) and (g) which permit additional time where short filing periods are involved.)

² AT&T v. FCC, 503 F. 2d 612 (2d Cir. 1974).

a period of not longer than 3 months beyond the time when it would otherwise go into effect. If the hearing process is not concluded at the end of the suspension period, the tariff becomes effective. Where an increased rate is at issue, the Commission may require a carrier to account for all funds received under the increase following the suspension period, and may order refunds with interest as may be appropriate upon conclusion of the hearing.

In requesting an extension of the suspension period, the FCC has submitted that it is impossible for it to conclude a tariff proceeding within the existing 3 month statutory limit. In this regard, the Commission has observed that section 204 was enacted in an era when regulated common carrier communications were less complex and the demands made upon the agency's hearing process were considerably lighter.

Under the Administrative Procedure Act (APA), the Commission is required to give reasonable notice (generally 30 days by administrative interpretation) of the time and place of the hearing. Following the close of hearings and prior to issuance of an initial decision, the APA requires that parties be given "reasonable opportunity" to file exceptions to proposed findings of facts and conclusions or "reasonable opportunity" to file exceptions to an initial decision. The Commission's procedural rules provide a 20-day period for the filing of proposed findings of fact and conclusions after the close of the hearing record. This 20-day period is generally inadequate and must be extended. The FCC rules also provide a 30-day period for the filing of exceptions to an initial decision, and this period is often extended at the request of the parties. Beyond these due process requirements, time is required for the Commission to hold the hearing itself and to prepare a reasoned decision which is subject to judicial review.

Given these time demands and procedural constraints, the Commission cannot realistically be expected to complete a tariff hearing within the existing 3-month statutory suspension period. As a result, most tariff filings, some involving revenue increases amounting to several hundred million dollars annually, go into effect before hearings on their lawfulness are concluded. In this regard, the imposition of an accounting and refund order is an imperfect protection against rate increases which may ultimately be held unlawful. Consumers lose the use of their money during the time such increased rates are in effect, and the accounting and refund procedures entail considerable expense and administrative burden to the carriers.

In addition, many tariff proceedings involve new or reduced rates where the issue presented is whether an unlawful discrimination or preference exists. The accounting and refund provisions, being applicable only in rate increase situations, afford no protection or remedy against new or reduced rates which are ultimately found to be unlawful but have become effective at the end of the suspension period before a decision can be reached. In such cases, users may have made substantial changes in their communications operations based on the new or reduced rate schedule, and may experience serious dislocations should the schedule be finally declared unlawful and hence void. An extension of the suspension period would enable the Commission to minimize these effects.

The Committee, for these reasons, believes that a longer suspension

period is clearly justified as necessary for the Commission to keep pace with its regulatory responsibilities. As discussed below, however, the Committee is of the view that an extension of the suspension period to 5 months, rather than the 9 months requested by the FCC, is appropriate and has adopted an amendment to S. 2054 accordingly.

Partial or Temporary Tariff Approval.—Existing section 204 does not specifically authorize the Commission to separate questionable from legitimate aspects of a tariff filing prior to hearing and thus does not permit the Commission to suspend the former tariff elements and allow immediate implementation of the latter. The Commission is also without authority to permit a temporary tariff change. As a result, legitimate changes must await hearing on questionable aspects of the tariff and an unnecessary regulatory delay is created.

S. 2054 would amend section 204 to allow the Commission to make a preliminary judgment as to whether a tariff filing should become effective or be suspended in whole or in part pending hearing. In particular, new section 204(b) would enable the Commission to permit part of a tariff filing to go into effect based upon a written showing by the affected carrier or carriers, with opportunity for written comment by affected persons, that such partial authorization is just, fair, and reasonable. The new provisions would also enable the Commission, upon a similar written showing, to allow all or part of a tariff filing to become effective on a temporary basis subject to further Commission orders.

In the Committee's judgment, this new authority to approve temporary or partial tariff changes will provide the Commission with the flexibility needed to mitigate unnecessary effects of regulatory delay which presently attend the hearing and suspension process.³ In this regard, the Committee notes that the Commission has stated its intention to reach decisions pursuant to this new authority within the extended 90-day notice period proposed by this legislation. The Committee fully expects the Commission to be able to do so.

Accounting and Refund Orders.—Existing section 204 authorizes the Commission to impose accounting and refund orders only in cases of tariffs involving increased charges. S. 2054 would amend section 204 to provide that the Commission may also issue accounting and refund orders in connection with tariffs involving charges for a new service.

Under the existing law, customers of a new service are unprotected against charges which become effective and are later found to be unlawfully excessive. The accounting and refund procedures should be available to the Commission to close this gap in remedy.

As amended by S. 2054, section 204 would authorize the FCC to impose accounting and refund orders in connection with new or increased charges which go into effect either pursuant to a temporary authorization or upon the expiration of a period of suspension.

COMMITTEE HEARINGS

Hearings on S. 2054 were held before the Subcommittee on Communications on September 17, 1975.

³ The Committee notes that these new provisions substantially embody the recommendation of the Administrative Conference of the United States. See *Administrative Conference of the United States Annual Report* (1972), p. 64, Recommendation #724, Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies.

Testifying at the hearings were the Federal Communications Commission, MCI Telecommunications Corp., Continental Telephone Corp., United Telecommunications, Inc., and American Telephone and Telegraph Co. (AT&T).

Written submissions were also received from other common carriers and users of telecommunications services.

The Committee has fully considered all testimony and submissions in recommending enactment of the legislation here reported.

COMMITTEE AMENDMENTS

Length of extended suspension period

During the course of the hearings, the Committee received comments on S. 2054 from the Office of Telecommunications Policy (OTP) which endorsed extending the notice period from 30 to 90 days and providing the FCC with partial or temporary tariff approval authority, but opposed extension of the suspension period to 9 months as it would result in "regulatory lag."⁴

At the suggestion of the Communications Subcommittee Chairman, the FCC and the OTP further discussed the legislation and by letters informed the Committee that a maximum suspension period of 5 months would meet earlier objections.⁵

The Committee believes that an extension of the section 204 suspension period from 3 to 5 months is appropriate and has adopted an amendment to S. 2054 accordingly.

In the Committee's judgment, such an extension strikes a necessary and reasonable balance between two competing considerations.

On the one hand, the carriers should not be subjected to inordinately long suspension periods which may deny them the timely implementation of increased charges made necessary by increased costs.

On the other hand, fairness to the rate-paying public and basic principles of administrative justice require that the regulatory agency be afforded a reasonable opportunity to pass upon increased charges and other tariff changes before they become effective. In view of the complexity of current tariff filings and the requirements of due process, as detailed above, the present 3-month suspension period is clearly an inadequate time frame for the Commission to make substantial progress, let alone conclude a tariff proceeding. Extending the suspension period to 5 months should remedy this procedural inadequacy.⁶

Although in many cases it has taken the Commission years, rather than months, to conclude its tariff proceedings, several administrative reforms may make 5 months a reasonable target period for completion of proceedings in the future. The Commission is in the process of streamlining its tariff hearing procedures and decision-making, as well

⁴ The letter from OTP, dated September 17, 1975, is included in the Agency Comments section of this report (*infra*).

⁵ The FCC and OTP letters, dated January 26, 1976 and March 22, 1976 respectively, are included in the Agency Comments section of this report (*infra*).

⁶ Other Federal regulatory agencies dealing with utilities or carriers have statutory suspension periods ranging from 5 to 7 months; Civil Aeronautics Board—6 months (49 U.S.C. 1482(g)); Federal Maritime Commission—3 months (46 U.S.C. 845); Federal Power Commission—5 months (15 U.S.C. 717c(e) (Power)); 16 U.S.C. 824d(e) (Natural Gas); Interstate Commerce Commission—7 months (49 U.S.C. 15(7)).

Three States (Hawaii, Kansas, Ohio) have indefinite suspension authority, while four States (Georgia, South Dakota, Wyoming, Texas) have no suspension power at all. The other States have suspension periods ranging from 90 days (Arkansas, Tennessee) to 12 months (Iowa, Virginia).

as increasing staff assigned to major rate matters. The agency is also engaging in discussions with the principal carriers for the purpose of developing methods of obtaining service cost data more expeditiously.

The Committee emphasizes that a 2-month extension of the maximum suspension period should not result in unnecessary "regulatory lag" in view of the Commission's authority to approve justified partial or temporary tariff increases based upon an expedited written proceeding to be conducted during the 90-day notice period. The Committee believes that both the carriers and the rate-paying public will benefit from this procedure.

Maximum notice period

The Committee has adopted an amendment to S. 2054 which would provide that the 90-day notice period under section 203(b) may be shortened by the Commission where appropriate but may not be lengthened. This amendment reflects the Committee's judgment that a notice period of 90 days should be the maximum necessary for the Commission to complete its initial review of a tariff filing. In this regard, the Commission has indicated to the Committee that a full 90-day notice period will not be required in all cases, and that the maximum notice will be applied only where there is a compelling reason to do so.

This amendment would work no other change in existing law.

Burden of proof

As introduced and referred to the Committee, S. 2054 would have deleted the provision of existing section 204 which states that the burden of proof is on the carrier to prove the legitimacy of increased charges. In proposing this deletion, the FCC submitted that this provision is superfluous in view of section 556(d) of the subsequently-enacted Administrative Procedure Act which states that except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

The Committee has adopted a technical amendment retaining the existing burden of proof provision in new section 203(a) for purposes of clarity, certainty, and convenience.

S. 2054, as reported, also contains certain technical conforming amendments which do not affect the substance of the legislation.

CONCLUSION

In the Committee's judgment, S. 2054, as reported, will provide the FCC with the flexibility needed to meet its regulatory responsibilities and to do equity to both carriers and the consumer public.

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 203(b) of the Communications Act of 1934 (47 U.S.C. 203(b)) is amended to extend from 30 to 90 days the period of notice required before a tariff may be changed, and to provide that the Commission may allow tariff changes upon less (but not more) than 90 days' notice.

SECTION 2

Section 204 of the Act (47 U.S.C. 204) is in effect redesignated section 204(a) and is amended to extend from 3 to 5 months the period during which the Commission may suspend the operation of a tariff filing in whole or in part pending hearing on the lawfulness thereof. Other minor language changes in the subsection clarify that the provisions of the subsection are applicable to new, as well as revised, charges, classifications, regulations or practices. The accounting and refund order provisions of the subsection are made specifically applicable to charges for a new service, as well as increased charges. The subsection substantially retains the provision of existing section 204 which specifies that in any hearing involving an increased charge or proposed increase the burden of proof shall be upon the carrier to show that the increased charge or proposed increase is just and reasonable.

A new subsection 204(b) is added, providing that notwithstanding the provisions of subsection (a), the Commission may allow part of a charge, classification, regulation, or practice, to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. The new subsection (b) also provides that additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. The subsection further provides that authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

COST ESTIMATE

In accordance with section 252(a) of the Legislative Reorganization Act of 1970, the Committee estimates that no additional costs will accrue to the government as a consequence of the legislation. The Committee is not aware of any estimate by any government agency to the contrary.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is enclosed by black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

COMMUNICATIONS ACT OF 1934

* * * * *

TITLE II—COMMON CARRIERS

* * * * *

SCHEDULE OF CHARGES

SEC. 203. * * *

(b) No changes shall be made in the charges, classification, regulations, or practices which have been so filed and published except after [thirty] 90 days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, *allow changes upon less than the notice herein specified* or modify the requirements made by or under authority of this section *either* in particular instances or by a general order applicable to special circumstances or conditions.

* * * * *

HEARINGS AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION

SEC. 204. [Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.]

(a) *Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than 5 months beyond the time when it would otherwise go into effect; and after full*

hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may be order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice, to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

TEXT OF S. 2054, AS REPORTED

To amend section 203 and 204 of the Communications Act of 1934.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 203(b) of the Communications Act of 1934 (47 U.S.C. 203(b)) is amended to read as follows:

“(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after 90 days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified or modify the requirements made by or under authority of this section either in particular instances or by a general order applicable to special circumstances or conditions.”

SEC. 2. Section 204 of the Communications Act of 1934 (47 U.S.C. 204), is amended to read as follows:

“SEC. 204. (a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Com-

mission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than [nine] 5 months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

“(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice, to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).”.

AGENCY COMMENTS

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., September 17, 1975.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Office of Telecommunications Policy on S. 2054, proposed

legislation to amend Sections 203 and 204 of the Communications Act of 1934. This bill would:

(1) extend from thirty days to ninety days the period of notice required before a tariff may be changed;

(2) extend from three months to nine months the period during which the Federal Communications Commission may suspend new or revised tariff schedules;

(3) authorize the Commission to conduct preliminary written proceedings to determine whether a tariff filing should become effective in whole or in part pending a hearing and decision on the lawfulness thereof, or whether temporary authorization of a tariff filing should be permitted.

To summarize our position, we believe that statutory amendments to extend the notice period to ninety days and to enable the Commission to grant partial or temporary authorization of tariff changes are appropriate and desirable. However, we are skeptical, for the reasons discussed herein, about extending the statutory tariff suspension period from three months to nine months.

Extension of notice period

Section 203(b) of the Communications Act presently prohibits carriers from making tariff changes except after thirty days notice to the Commission and the public. The same section provides that the Commission "may, in its discretion and for good cause shown, modify [the notice requirement] in particular instances or by a general order applicable to special circumstances or conditions."

In the past, the Commission has found that the thirty day notice period was insufficient in cases involving tariff increases. Such filings generally draw considerable opposition, and the Commission was unable within the thirty day period to review the tariff filing, together with the contentions of parties opposing it, and to reach a decision on whether or not to suspend it and order a hearing. The Commission therefore has modified its rules to require that all tariffs involving increased rates be filed on sixty days notice. 47 C.F.R. § 61.58 (1973). This modification was challenged shortly after its adoption on the sole ground that it was beyond the Commission's statutory authority as set forth in the above-quoted language. The court disagreed, however, noting that the authority to "modify" included the power to lengthen as well as shorten the notice period. *AT&T v. FCC*, 503 F.2d 612 (2d Cir. 1974).

The proposed legislation would extend the notice period to ninety days for *all* tariff changes. The Commission notes in its Explanation of Proposed Amendments introduced with the bill (121 Cong. Rec. 11965, daily ed. July 8, 1975) that such an extension is "particularly necessary to facilitate effective utilization of the Commission's power to authorize temporary or partial tariff changes," proposed in Section 2(b) of the bill. We agree. As we discuss later, we believe that the proposed authority to grant partial or temporary rate changes pending a full inquiry by the Commission is a necessary and appropriate measure, and that the Commission will need additional time to make the requisite determinations prior to authorizing a temporary or partial change.

We do note that there may be a question concerning the necessity of a statutory amendment to achieve this objective. In view of the judicial construction of the Commission's existing power to modify the notice period, it would appear that the Commission could extend the period to ninety days without new statutory authority, and that it could do so for all tariff changes, decreases as well as increases, assuming it could show "good cause" for lengthening the period. Nevertheless, given the previous challenge to the Commission's prior exercise of its authority to modify the notice period, it is advisable, on balance, to seek an explicit statutory change and thereby avoid protracted litigation.

Suspension period

The Communications Act provides generally that tariff changes go into effect automatically at the end of the requisite notice period unless the Commission takes affirmative action to the contrary. Section 204 of the Act authorizes the Commission to designate a tariff filing for hearing and, pending completion of such hearing, to suspend the operation of the tariff for a period not longer than three months beyond the time when it would otherwise take effect. If the hearing process is not completed by the expiration of the suspension period, the tariff automatically takes effect, and, in the case of an increase in rates, the Commission may require a carrier to account for all funds received pursuant to the new tariff. Upon completion of the hearing, the Commission may order refunds with interest if the tariff, or a portion thereof, is found to be unlawful.

The Commission states in its "Explanation," *supra*, that it has been unable to conclude tariff hearings prior to the expiration of the present three month suspension period, and that a longer suspension time is therefore necessary. A longer suspension period, according to the Commission, will reduce the amount of time during which consumers are without the use of their money and simplify the accounting burden borne by the carriers.

In assessing the merits of the proposed legislation, it is appropriate to address the rationale behind the present suspension provisions of the Act. The statutory limit on the duration of a tariff suspension represents a Congressional recognition of the economic harm to carriers resulting from lost revenues during the time it takes a regulatory agency to decide the lawfulness of a tariff change. This has been recognized by the courts on numerous occasions. The Court of Appeals for the Second Circuit, for example, has pointed out that the statutory scheme "reflects the realization of Congress that when a carrier is prevented from placing in effect new rate increases it may suffer irreparable loss which in turn may impede the provision of adequate service during a period of rising costs." *American Telephone and Telegraph Co. v. FCC*, 487 F. 2d 864 (2d Cir. 1973). Similarly, the Supreme Court, in discussing the limited suspension authority granted to the Federal Power Commission, stated:

"Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their

systems through equity and debt financing would become most difficult, if not impossible." *United Gas Pipeline Co. v. Memphis Gas Division*, 358 U.S. 103, 113 (1968).

The Congress has also recognized, however, that when a new tariff goes into effect prior to a determination of its lawfulness, rate-payers should be made whole if the tariff is ultimately found unlawful. Thus, in *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973), the Supreme Court noted in connection with the Interstate Commerce Commission's authority to suspend rate increases that:

"... Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful." 412 U.S. at 697.

The Act is thus an attempt to balance the interests between rate-payers and carriers with regard to tariff increases. We are sympathetic with this legislative proposal to lengthen the suspension period to nine months so as to reduce the amount of time during which rate-payers would be deprived of the use of their money. But we are mindful that the proposal would also increase the amount of time during which carriers would be precluded from receiving increased revenues under new rates. As a matter of equity in this regard, it is significant that even if the new rates were ultimately found lawful after completion of a hearing, the carrier would be unable to recover the revenues which it would have received but for the suspension, whereas customers have the benefits of the refund provisions if the rates are found unlawful.

The adverse effects of "regulatory lag," i.e., the delay between the time when increased costs occur and the time when they can be reflected in higher tariffs, can be significant, particularly in an inflationary period. If a carrier is prohibited for an extended period of time from instituting tariff increases to cover rising costs, its ability to attract capital, whether debt or equity, could be impaired, with a consequent and adverse impact on the provision of adequate service to its customers. The adverse effects of regulatory lag on the electric utilities, for example, was the genesis of the Administration's recent proposal to reform state regulatory processes by imposing a maximum limit of five months for rate and service proceedings. See White House Fact Sheet, p. 39, January 15, 1975.

The Commission has also stated that a longer suspension period is needed for situations involving tariffs for new services or reduced rates, in which case the accounting and refund provisions of § 204 are not applicable. The Commission notes that customers may make major changes in their operations based on the availability of rate schedules ultimately found to be unduly preferential or discriminatory, and that an order directing cancellation of the unlawful rate schedule would cause serious dislocations. The proposed nine month suspension period would, in the Commission's view, minimize this problem.

Tariffs for reduced rates or new services have often been the result of competitive pressures on the established carriers in various com-

munications submarkets. It has been recognized that long delays in the implementation of tariffs for new services and lower rates can also have an adverse impact on carriers. As the Court stated in *AT&T v. FCC*, *supra*, "the loss sustained when an agency delays a rate reduction can be equally as damaging, for during the delay customers may turn elsewhere and be permanently lost to the carrier." 487 F. 2d, *supra*, at n. 18.

On the other hand, if such a tariff were ultimately found unlawful, customers who might encounter "dislocations" as a result of an order directing cancellation of the rate or service would have no remedy comparable to the refund provisions available in the case of an unlawful increase. Similarly, no remedy would be available to competitors of the carrier who may have suffered a loss of customers who were attracted to the carrier's new services or lower rates. In view of these considerations, lengthening the suspension period for only those tariff changes involving new services or reduced rates may be an acceptable alternative.

In any event, we believe that there should be an increased emphasis on completing tariff proceedings as expeditiously as possible. In this regard, we note that the Commission, in its "Explanation" accompanying the bill, states that "improvements in procedures, together with expanded staff assigned to rate matters should shorten the time between tariff filing and decisions in hearing cases." In addition, the Commission refers to discussions it has had with carriers regarding the development of more expeditious methods of obtaining cost information relating to the various services. We applaud these measures and would encourage the Commission to pursue these and similar steps designed to expedite the tariff investigative process.

Partial and temporary rate increases

The proposed legislation would also amend § 204 to permit the Commission to authorize temporary or partial tariff changes. This change is generally consistent with the 1972 recommendation of the Administrative Conference that regulatory statutes should be amended, to the extent that existing authority is lacking, to authorize temporary and partial rate increases.

We believe that statutory authority to grant partial increases, as an adjunct to authority to suspend a proposed increase in full or allow it to go into effect without suspension, would mitigate somewhat the adverse effects of "regulatory lag" on carriers. Such authority is particularly appropriate given that, in many cases, an ultimate determination of the unlawfulness of a tariff increase goes to only part of the increase, rather than the entire tariff change.

We do note, that the language of the proposed amendment is somewhat unclear. The report of the Administrative Conference states that temporary increases should be authorized "only when the agency makes a preliminary judgment, on the basis of a written showing by the regulated company and an opportunity for comment thereon by affected persons, that a proposed increase is justifiable at least in part." (See Report of the Administrative Conference of the United States for 1971-72 at p. 86, emphasis added.) The language of the proposed amendment differs from this recommendation, in certain respects. The amendment, for example, eliminates the "preliminary judgment" as-

pects of the Administrative Conference recommendation, and the proposed standard of "just, fair, and reasonable" is somewhat ambiguous. We suggest that a more precise standard be developed, lest the deliberations regarding a partial or temporary authorization become as protracted as an overall rate inquiry.

The Office of Management and Budget advises that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN EGER,
Acting Director.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., January 25, 1976.

HON. JOHN O. PASTORE,
Chairman, Subcommittee on Communications, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for the opportunity to comment upon the letter submitted by the Office of Telecommunications Policy concerning S. 2054, a bill to amend sections 203 and 204 of the Communications Act of 1934.

Essentially, OTP supports as appropriate and desirable the provisions of S. 2054 to extend the notice period to ninety days and to enable the Commission to grant partial or temporary authorizations of tariffs. It expressed concern, however, that the proposed nine-month suspension period is too long and might result in greater regulatory delay than presently exists.

The period of nine months was chosen because it was felt that during such a period the Commission could realistically come to a conclusion on the lawfulness of a tariff. However, as I testified, there is nothing sacred about the period of nine months.

We have discussed this matter with OTP. While the Commission would prefer the nine-month suspension period, we believe an extension of the present three-month period to five months would be helpful and in the public interest. I understand OTP agrees that the five-month period would meet their earlier objections.

I trust that, with such change, you will be in a position to move promptly in enacting S. 2054.

If further information is needed, I would welcome the opportunity to provide it.

Sincerely,

RICHARD E. WILEY,
Chairman.

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., March 22, 1976.

HON. JOHN O. PASTORE,
Chairman, Subcommittee on Communications, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am advised that Chairman Wiley of the Federal Communications Commission has informed you of discussions

between his staff and this Office regarding the objections to S. 2054, a bill to amend Sections 203 and 204 of the Communications Act of 1934, set forth in my September 17, 1975 letter to Senator Magnuson. Briefly stated, those objections centered around the proposed extension of the tariff suspension period to nine months and the consequent adverse effects of lengthening the delay between the time when increased costs occur and the time when they can be reflected in higher tariffs.

For reasons I stated in my letter to Senator Magnuson, the adverse impact of such "regulatory lag" on the financial structure of a carrier can be significant, and can result ultimately in inadequate service to the public. We are still not convinced that the present three month suspension period is inadequate in cases of proposed tariff increases. However, we do believe that the adverse effects of the extended delay originally suggested by the FCC would be reduced significantly by limiting the proposed extension of the suspension period to five months.

Accordingly, the Office of Telecommunications Policy would not object to an extension of the suspension period of Section 204 of the Act to five months. The Office of Management and Budget has no objection to the submission of this letter.

Sincerely,

JOHN EGER,
Acting Director.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., May 11, 1976.

HON. JOHN O. PASTORE,
Chairman, Subcommittee on Communications, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This refers to your request for the Commission's views on a proposed Committee amendment to S. 2054 which, in extending the notice period from 30 days to 90 days, makes clear that the Commission may allow changes in tariffs on less than 90 days notice but not more than 90 days notice. This clarification is consistent with the Commission's intent in seeking the 90-day notice period and we support the Committee's amendment.

Thank you for the opportunity to present our views.

Sincerely,

RICHARD E. WILEY,
Chairman.

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