

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Hi-Tech Furnace Systems, Inc.,	)	
	)	
and	)	
	)	
Robert E. Kornfeld,	)	
	)	File No. E-98-36
Complainants,	)	
	)	
v.	)	
	)	
Sprint Communications Company, L.P.,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 16, 1999**

**Released: April 16, 1999**

By the Commission:

**I. INTRODUCTION**

1. Hi-Tech Furnace Systems, Inc. and Robert E. Kornfeld (collectively, Hi-Tech) filed a Complaint against Sprint Communications Company, L.P. (Sprint) alleging that certain of Sprint's tariff revisions are unlawful.<sup>1</sup> Hi-Tech originally filed a class action complaint concerning these allegations in the United States District Court for the Western District of Missouri, Western Division (the District Court).<sup>2</sup> After the District Court referred this matter to the Commission for further proceedings pursuant to the doctrine of primary jurisdiction,<sup>3</sup> the Complainants filed this action. The Complainants seek resolution by the Commission of two claims raised in the District Court action. The first count of the Complaint before us alleges that Sprint's April 1996 revisions to its "Fridays Free" tariffed promotion violated section 201(b) of the Communications Act of

<sup>1</sup> *Hi-Tech Furnace Systems, Inc. and Robert E. Kornfeld v. Sprint Communications Company, L.P.*, File No. E-98-36 (filed April 17, 1998) (Complaint).

<sup>2</sup> Hi-Tech Initial Brief (filed Dec. 17, 1998) at 2 (Hi-Tech Brief).

<sup>3</sup> Complaint at Ex. C, *Hi-Tech Furnace Systems, Inc. v. Sprint Communications Company, L.P.*, Order, Case No. 96-0566-CV-W-3 (W.D.Mo. Aug. 29, 1997) (District Court Order).

1934, as amended (the Act).<sup>4</sup> The second count of the Complaint alleges that such revisions violated section 203(c) of the Act.<sup>5</sup> For the reasons described below, we conclude that Sprint's tariff revisions were lawful because they were not unjust or unreasonable under section 201(b) and did not violate section 203(c). Accordingly, we deny Hi-Tech's Complaint in its entirety.

## II. BACKGROUND

2. Complainant Hi-Tech Furnace Systems, Inc. is a business located in Shelby Township, Michigan.<sup>6</sup> Complainant Robert Kornfeld is the president and principal stockholder-owner of Hi-Tech.<sup>7</sup> Defendant Sprint is a common carrier as defined in section 3(10) of the Act.<sup>8</sup>

3. On December 14, 1995, Sprint filed tariff revisions, effective January 1, 1996, to offer its new and existing "Business Sense" customers a promotion under which they would receive free outbound long distance calls, including international calls, on one day of the week for a period of 12 months.<sup>9</sup> Sprint selected Friday as the day free service would be available and began to promote the program as "Fridays Free."<sup>10</sup> Sprint's tariff required all Business Sense subscribers who wanted to participate in the 12-month Fridays Free promotion to fulfill a minimum monthly usage requirement of \$50, and to undertake a two-year term commitment to the Business Sense program, with penalties for the subscriber's early termination.<sup>11</sup>

4. On February 29, 1996, Hi-Tech enrolled in Sprint's Business Sense/Fridays Free program by signing the "Sprint Business Sense Term Plan/Usage Agreement" (Term Agreement).<sup>12</sup> Hi-Tech did not negotiate with Sprint regarding any particular provisions of the Term Agreement, but signed Sprint's standard order form, which clearly stated that the rates, terms, and conditions of Sprint's Business Sense service and Fridays Free promotion "are governed by the applicable Sprint

---

<sup>4</sup> Complaint at 9-10, *citing* 47 U.S.C. § 201(b).

<sup>5</sup> *Id.* at 8-9, *citing* 47 U.S.C. § 203(c).

<sup>6</sup> See Joint Stipulation at 1, *acts & issues* (filed June 17, 1998) at 1 (Joint Stipulation).

<sup>7</sup> Hi-Tech Petition, Exhibit A at 9 (Affidavit of Robert E. Kornfeld).

<sup>8</sup> See Joint Stipulation at 1, *acts & issues* / U.S.C. § 153(10).

<sup>9</sup> Sprint Answer (filed Dec. 18, 1998), Exhibit 1 at 1, Sprint Tariff F.C.C. No. 11, §10.21, 6th Revised Page 421.10, filed Dec. 14, 1995 (Fridays Free Tariff).

<sup>10</sup> Joint Stipulation at 2.

<sup>11</sup> Fridays Free Tariff.

<sup>12</sup> Joint Stipulation at 2-3, Complainant's Proposed Paragraph 6, Defendant's Proposed Paragraph 5.

tariffs, as they may be amended from time to time."<sup>13</sup> Pursuant to the Term Agreement, Hi-Tech switched its presubscribed long-distance carrier to Sprint and became a participant in the Fridays Free promotion.<sup>14</sup>

5. Shortly after the inception of the Fridays Free promotion, Sprint's international call volume increased to the point of threatening Sprint's ability to complete calls on its network on Fridays during the promotion.<sup>15</sup> After attempting unsuccessfully to decrease the overload on its network by such measures as installing a new processor in the relevant switch, Sprint decided to curtail its Fridays Free promotion to decrease the number of international calls on Fridays.<sup>16</sup> Therefore, on April 4, 1996, Sprint filed a tariff revision, to be effective April 18, 1996, deleting ten countries from the over 200 international destinations to which free calling on Friday was permitted.<sup>17</sup> In a subsequent tariff revision, Sprint restored one country, the Dominican Republic, to the list of countries eligible for free calling, leaving a total of nine countries that were deleted from the Fridays Free promotion.<sup>18</sup>

6. Sprint notified its Business Sense subscribers by mailgram in early April 1996 that calls to the deleted countries would no longer be free on Fridays.<sup>19</sup> In lieu of free Friday calling to the deleted countries, Sprint offered its subscribers an alternative benefit consisting of discounted calling to these countries on all seven days of the week for the remaining eligibility periods of these subscribers.<sup>20</sup> Sprint also gave those subscribers who informed Sprint that the modified Fridays Free program was no longer of any interest to them the ability to terminate their subscription to the Fridays Free program without penalty.<sup>21</sup>

---

<sup>13</sup> Sprint Initial Brief (filed Dec. 17, 1998) at 3-4 (Sprint Brief).

<sup>14</sup> Joint Stipulation at 2-3, Complainant's Proposed Paragraph 6, Defendant's Proposed Paragraph 5. In addition, because complainant Kornfeld was the principal owner of Hi-Tech and represented to Sprint that he worked in part at home, his home telephone service was also enrolled in the Business Sense program. *Id.*

<sup>15</sup> *See, e.g.*, Sprint Brief at 4-7.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> Sprint Answer, Exhibit 1 at 2, Sprint Tariff F.C.C. No. 11, §10.21, 6th Revised Page 421.10, filed April 4, 1996 (April Tariff Revision). The countries deleted were Bolivia, China, the Dominican Republic, Ecuador, India, Iran, Israel, Myanmar, Pakistan, and Thailand. *Id.*

<sup>18</sup> Sprint Answer, Exhibit 1 at 3, Sprint Tariff F.C.C. No. 11, §10.21, 6th Revised Page 421.10, filed May 14, 1996 (May Tariff Revision).

<sup>19</sup> *See* Joint Stipulation at 4, Complainant's Proposed Paragraph 9, Defendant's Proposed Paragraph 8.

<sup>20</sup> *Id.*

<sup>21</sup> Sprint Answer, Appendix A at 2, Findings of Fact and Conclusions of Law; Letter from Michael B.

7. Based on the foregoing events, Hi-Tech filed a complaint and amended complaint in the District Court, asserting breach of contract and violations of sections 201(b) and 203(c) of the Act.<sup>22</sup> On August 29, 1997, the District Court entered an order stating that Hi-Tech's claims alleging violations of sections 201(b) and 203(c) of the Act "are hereby referred to the FCC for all further proceedings."<sup>23</sup>

8. On April 17, 1998, Hi-Tech filed its Complaint against Sprint with the Commission.<sup>24</sup> Hi-Tech's Complaint seeks a determination that Sprint's curtailment of free calling on Fridays to the nine deleted countries was (1) unjust and unreasonable in violation of section 201(b) of the Act, and (2) breached the applicable tariff in violation of section 203 of the Act. Hi-Tech asks the Commission to find that the Fridays Free promotional calling benefits should be reinstated for all Business Sense program subscribers as of April 16, 1996 for the remaining duration of each subscriber's enrollment. Hi-Tech also asks the Commission to issue an "order remanding this matter to the District Court for class certification and other proceedings consistent with the Commission's determination."<sup>25</sup>

### III. DISCUSSION

#### A. Sprint Did Not Violate Section 201(b) of the Act by Revising its Tariff to Curtail Free Calling to Nine Countries.

---

Fingerhut, counsel for Sprint, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Dec. 24, 1998.

<sup>22</sup> In its District Court complaint, Hi-Tech sought, *inter alia*, certification of a class of Business Sense subscribers whose free international call usage had been curtailed as described above. Complaint at Exhibit A, Amended Class Action Complaint at 3.

<sup>23</sup> The District Court also dismissed the breach of contract claim without prejudice and dismissed Hi-Tech's motion for class certification as moot. District Court Order.

<sup>24</sup> *See generally* Complaint. We note that when a party files a matter with the Commission as the result of a court referral, and the court retains jurisdiction to determine the final outcome of the proceeding, the filing with the Commission should be in the form of a petition for declaratory ruling, pursuant to section 1.2 of our rules, rather than a formal complaint pursuant to section 208. *See* 47 C.F.R. § 1.2; 47 U.S.C. §§ 207, 208. The Act prohibits a party from both bringing suit in federal district court and filing a complaint before the Commission. 47 U.S.C. § 207. In the instant case, the Complainants properly filed their matter as a formal complaint under section 208, because the District Court Order clearly states that Hi-Tech's section 201(b) and 203(c) claims "are hereby referred to the FCC for all further proceedings." District Court Order.

<sup>25</sup> Complaint at 11. Hi-Tech also requests bifurcation of the Complaint's liability issues from the damages issues and reserves the right to file a supplemental complaint on damages following an appropriate liability finding. *Id.*; *see* 47 C.F.R. § 1.722(b).

9. Section 201(b) of the Act states, in part, that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."<sup>26</sup> Hi-Tech contends that Sprint's curtailment of free calling to the nine deleted countries was unjust and unreasonable in violation of section 201(b) of the Act, because Sprint lacked "substantial cause" to make such revisions.<sup>27</sup> In response, Sprint contends that Hi-Tech has failed to demonstrate that Sprint's tariff revisions violated section 201(b), because such revisions were not subject to the "substantial cause" standard and were just and reasonable.<sup>28</sup> As discussed below, we find that Sprint's unilateral revisions to its tariffed Fridays Free promotion were just and reasonable and therefore did not violate section 201(b).

**1. Hi-Tech Bears the Burden of Proving that Sprint Violated Section 201(b) of the Act.**

10. Hi-Tech argues that Sprint, rather than Hi-Tech, bears the burden of proof to show that its tariff revisions were not unjust and unreasonable under section 201(b).<sup>29</sup> We disagree. It is well established that, in a formal complaint proceeding brought under section 208 of the Act,<sup>30</sup> the complainant has the burden of proof to demonstrate that the carrier has violated the Act or Commission orders.<sup>31</sup> This contrasts sharply with the burden of proof in tariff review proceedings under section 204 of the Act -- on which Hi-Tech improperly relies -- wherein the burden of proving the lawfulness of the filed tariff is with the filing carrier.<sup>32</sup> Thus, Hi-Tech bears the burden of proving that Sprint's actions violated the Act.

**2. Sprint's Tariff Revisions Were Just and Reasonable.**

---

<sup>26</sup> 47 U.S.C. § 201(b).

<sup>27</sup> Complaint at 3.

<sup>28</sup> Sprint Brief at 13-14.

<sup>29</sup> *See, e.g.*, Hi-Tech Brief at 3.

<sup>30</sup> 47 U.S.C. § 208.

<sup>31</sup> *See, e.g., AT&T, et al. v. Bell Atlantic - Pennsylvania*, Memorandum Opinion and Order, FCC 98-321 at ¶ 27 (Dec. 9, 1998), *citing Amendments to be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd 2614, 2616-17 (1993).

<sup>32</sup> Section 204 states in relevant part that "[a]t any hearing involving a new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the [filing] carrier . . . ." 47 U.S.C. § 204(a)(1).

11. Hi-Tech argues at length that Sprint's unilateral revisions to the terms of its tariffed Fridays Free promotion violated section 201(b) of the Act because Sprint lacked "substantial cause" to make such revisions.<sup>33</sup> In response, Sprint contends that the substantial cause test does not apply in this case, because (1) Sprint is not a dominant carrier, and (2) the Fridays Free promotion was not an individually negotiated contract tariff.<sup>34</sup> In reply, Hi-Tech does not argue either that Sprint is a dominant carrier or that the Fridays Free promotion was an individually negotiated contract tariff.<sup>35</sup> Hi-Tech essentially contends, instead, that the Commission should extend the established parameters of the substantial cause requirement to include revisions made by non-dominant carriers to "long-term contract-like" tariffs where, as here, the subscriber must sign a contract, make long-term service commitments, and attain minimum monthly usage levels.<sup>36</sup>

12. The substantial cause test is not separate from the "just and reasonable" requirement of section 201(b) of the Act; instead, "the substantial cause for change test [is] a tool for defining the appropriate zone of reasonableness" under section 201(b) when particular circumstances exist.<sup>37</sup> Under the substantial cause test, the reasonableness of a revision to certain long-term service tariffs depends greatly on the "carrier's explanation of the factors necessitating the desired changes at that particular time."<sup>38</sup> Furthermore, the Commission must "take into account the position of the relying customer. . . ."<sup>39</sup> In general, the Commission will consider "on a case-by-case basis, in light of all relevant circumstances, whether a substantial cause showing has been made."<sup>40</sup>

13. To date, the Commission has applied the substantial cause test to revisions made to individually negotiated contract tariffs filed by both dominant and non-dominant carriers.<sup>41</sup> The

---

<sup>33</sup> See High-Tech Brief at 4-7; Hi-Tech Reply Brief (filed Dec. 23, 1998) at 5-6 (Hi-Tech Reply Brief).

<sup>34</sup> Sprint Brief at 14.

<sup>35</sup> See Hi-Tech Brief at 15.

<sup>36</sup> *Id.* at 7; Hi-Tech Reply Brief at 5.

<sup>37</sup> *In the Matter of RCA American Communications, Inc.*, Order on Remand, 94 FCC 2d 1338, 1340 (1983) (*RCA Americom 1983 Order*).

<sup>38</sup> *In the Matter of RCA American Communications, Inc.*, 86 FCC 2d 1197, 1201-02 (1981) (*RCA Americom 1981 Order*).

<sup>39</sup> *Id.*

<sup>40</sup> *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562, 4574 (1995) (*Reconsideration Order*).

<sup>41</sup> See *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Order on

Commission has also applied the substantial cause standard to revisions of generic long-term service tariffs filed by dominant carriers.<sup>42</sup> The Commission has not yet directly addressed, however, whether the substantial cause test applies to a non-dominant carrier's generic, long-term service tariff, such as the Fridays Free promotion at issue here.

14. We find it unnecessary to determine whether the substantial cause test should be applied to Sprint's tariff revisions in this case. Even assuming, *arguendo*, that the substantial cause test does apply, we find, as explained below, that Sprint's tariff revisions met the substantial cause standard, and were just and reasonable under section 201(b). Sprint has provided sufficient evidence on the record that it revised its tariff because the original promotion increased call volumes to the point of threatening Sprint's ability to complete calls on its network, as well as causing other significant network and traffic management problems.<sup>43</sup> We also find that Hi-Tech's reliance interests in the original form of the Fridays Free promotion were minimal. We conclude, therefore, that, in light of all the relevant circumstances, Sprint had substantial cause to revise its tariff, and Sprint's tariff revisions were, therefore, just and reasonable in accordance with section 201(b).

15. The first part of the substantial cause test requires us to examine "the carrier's explanation of the factors necessitating the desired changes at that particular time."<sup>44</sup> As discussed below, we find that Sprint has demonstrated that the tariff revisions were necessary to prevent the overloading of Sprint's network, despite reasonable efforts by Sprint to preserve the Fridays Free promotion in its original form.

16. The Fridays Free promotion began on January 1, 1996.<sup>45</sup> On each successive Friday in January, February, March, and the first two weeks of April, call volume increased dramatically.<sup>46</sup>

---

Reconsideration, 12 FCC Rcd 15014, 15023-24 (1997); *Reconsideration Order*, 10 FCC Rcd at 4574, and n.51 (1995); *RCA Americom 1981 Order*, 86 FCC 2d at 1201-02.

<sup>42</sup> See *Reconsideration Order*, 10 FCC Rcd at 4574; *RCA Americom 1981 Order*, 86 FCC 2d at 1201-02.

<sup>43</sup> See, e.g., Sprint Brief at 4-7.

<sup>44</sup> *RCA Americom 1981 Order*, 86 FCC 2d at 1201-02.

<sup>45</sup> Joint Stipulation at 2.

<sup>46</sup> For example, Friday call volumes increased from approximately 480,000 minutes of usage on January 5, 1996, to approximately 1,350,000 minutes of usage on February 9, 1996, the sixth Friday of free calling. See Letter from Marybeth M. Banks, Director, Federal Regulatory Affairs, Sprint to Magalie Roman Salas, Secretary, Federal Communications Commission, dated December 11, 1998, at Chart 1 (Sprint Written Response). The Sprint Written Response includes two charts: Chart 1 shows the volume of international traffic by day from January 1996 through February 1996; Chart 2 displays the typical traffic load on the New York gateway switch during the two weeks prior to the elimination of the nine countries from the promotion.

Although Sprint had expected the promotion to increase somewhat the amount of business calling on Fridays, it did not foresee the extreme shift in calling patterns that would lead to such high call volumes.<sup>47</sup> By late March, however, the extraordinarily high call volumes on Fridays threatened to bring down Sprint's New York international gateway switch (New York gateway switch),<sup>48</sup> which repeatedly reached over 100% of designed traffic capacity.<sup>49</sup> In addition, because of this international overload, the New York domestic switch (one of several switches that feed traffic to the New York gateway switch) also approached overload levels.<sup>50</sup> These system overloads prevented the completion of many international calls from all over the country,<sup>51</sup> and many Sprint customers had to dial the phone numbers of the parties they wished to reach several times before the call attempts succeeded.<sup>52</sup>

17. Prior to deleting countries from the Fridays Free promotion, Sprint took several steps to try to resolve the serious network problems being caused by the high international call attempt volume on Fridays. For example, in March 1996, Sprint installed a new processor, one that Sprint had not planned to purchase, to try to alleviate the high capacity problem at the New York gateway switch. In addition, to try to reduce overloading on the New York domestic switch, Sprint changed the routing of calls so that the domestic New York switch would receive less traffic.<sup>53</sup>

18. These ameliorative measures did not relieve the network overload problem.<sup>54</sup> Traffic loads continued to increase dangerously, and Sprint remained concerned that the gateway

---

<sup>47</sup> Apparently, prior promotions designed to shift calling patterns to certain days of the week had resulted in only a small percentage of businesses changing their calling patterns; moreover, Sprint believed that the ability to make international calls on Fridays would be limited because of time zone differences. Sprint Brief at 2-3. *See also In the Matter of RCA American Communications, Inc.*, 2 FCC Rcd 2363, 2366-67 (1987) (stating that events that were "clearly unforeseeable" when a tariff was issued provided substantial cause for a subsequent tariff revision).

<sup>48</sup> *Id.* at 1-2; Chart 2. A "gateway switch" connects two different networks and may be used, as it appears in this case, to send a call originating from the United States to an international overseas destination. *See Newton's Telecom Dictionary* 335 (14th ed. 1998).

<sup>49</sup> A switch can actually operate at over 100% of designed traffic capacity by automatically reconfiguring its processing priorities, but there is a serious risk that such an overloaded switch will crash. Sprint Written Response at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Sprint Brief at 17.

<sup>53</sup> Sprint Written Response at 2.

<sup>54</sup> *Id.*



switch would crash and automatically shut down.<sup>55</sup> Thus, Sprint filed tariff revisions that removed nine countries from the list of international destinations to which free calling was permitted on Fridays.<sup>56</sup>

19. On Friday, April 19, 1996, Sprint's tariff revision took effect, and calls to the deleted countries were no longer free.<sup>57</sup> The total number of calls to the deleted countries decreased from 3.69 million on Friday, April 12 to 1.43 million on Friday, April 19. As a result, the New York gateway switch reached no higher than 59% of designed traffic capacity.<sup>58</sup> Sprint states, therefore, that "[b]y removing these nine countries from the Fridays Free program, the very real danger that Sprint's New York switch would 'crash' because of calling on Fridays was substantially reduced, if not eliminated."<sup>59</sup>

20. Contrary to Hi-Tech's contention that Sprint could have addressed its network problems through less restrictive measures,<sup>60</sup> we find that Sprint has acted in accordance with sound network management techniques and strategies. Although Hi-Tech contends that Sprint should have upgraded its facilities or used additional facilities to avoid curtailing the program,<sup>61</sup> Sprint did take such steps in its attempts to resolve its network capacity problems. Sprint's installation of a new processor and rerouting of calls, however, did not relieve the overload problem in the New York gateway switch.<sup>62</sup> We are persuaded by Sprint's explanation that it would not have been cost-effective to purchase even more facilities because such facilities would have been underutilized during the remaining six days of the week.<sup>63</sup> Sprint also explains that expansion of international capacity on a particular route involves delay and negotiation with the foreign carrier involved, and therefore, Sprint could not have implemented this solution in a timely manner to resolve its

---

<sup>55</sup> If the switch had crashed, it would have taken Sprint several hours to restart it and Sprint would not have been able to handle any international calls through the switch during the restarting process. *Id.* at 3.

<sup>56</sup> See April Tariff Revision, May Tariff Revision, *supra* ¶ 5.

<sup>57</sup> See April Tariff Revision.

<sup>58</sup> Sprint Written Response at 4.

<sup>59</sup> Sprint Brief at 7.

<sup>60</sup> Hi-Tech Brief at 12-13.

<sup>61</sup> *Id.* at iv, 16.

<sup>62</sup> Sprint Written Response at 3.

<sup>63</sup> Defendant Sprint's Answers to Complainant's First Set of Interrogatories at No. 2 (filed May 18, 1998) (Sprint's Answers to Interrogatories).

capacity crises.<sup>64</sup>

21. Hi-Tech also contends that Sprint could have resolved its network problems in a manner that would have permitted some continued free calling on Fridays or on other days of the week.<sup>65</sup> In response, Sprint states that this would have been impracticable in terms of marketing, sales, and billing, and that Hi-Tech has failed to provide any testimony from consultants or other evidence that would prove the contrary.<sup>66</sup> We agree. Although Hi-Tech has maintained from the inception of this proceeding that Sprint could have modified the Fridays Free program to preserve some free calling opportunities,<sup>67</sup> Hi-Tech has failed to provide any evidence to demonstrate the feasibility of implementing this alternative. Furthermore, Hi-Tech has failed to explain why the preservation of free calling on one day of the week is patently more reasonable than giving a 25% discount on calls on all seven days of the week.

22. The substantial cause standard also requires us to "take into account the position of the relying customer in evaluating the reasonableness of the change [to the tariff]."<sup>68</sup> We conclude that Sprint has also satisfied this part of the substantial cause test because Hi-Tech has not shown that it relied to its detriment on the original Fridays Free promotion. Hi-Tech has failed to demonstrate the extent, if any, to which it relied on the rates, terms, and conditions in the Fridays Free promotion. First, it appears that Hi-Tech did not rely substantially on the ability to make free calls on Fridays to the countries deleted by Sprint's tariff revisions. In fact, Hi-Tech's president, Mr. Kornfeld, admits that during the Fridays Free promotion in its original form, Hi-Tech made no calls to any of the deleted countries, except for three calls to Israel, which were made specifically "to take advantage of one last free call or fax to Israel prior to the termination of the free Fridays for Israel."<sup>69</sup> Second, Hi-Tech admits that it switched to Sprint's Business Sense service not only because of the Fridays Free promotion, but also because Sprint's "rate was attractive in itself. . . ."<sup>70</sup> Therefore, despite the deletion of nine countries from the Fridays Free list, Hi-Tech still continued to benefit from its enrollment in the Business Sense program.

---

<sup>64</sup> Sprint Brief at 17, n.17.

<sup>65</sup> Hi-Tech Brief at 12-13.

<sup>66</sup> Sprint Reply Brief at 7.

<sup>67</sup> See Complaint at 10.

<sup>68</sup> *RCA Americom 1981 Order*, 86 FCC 2d at 1201-02.

<sup>69</sup> Hi-Tech Brief at Exhibit A, Affidavit of Robert E. Kornfeld at 73-74 (Kornfeld Affidavit).

<sup>70</sup> Hi-Tech Brief at 14.

23. Finally, we note that Mr. Kornfeld enrolled in the Fridays Free promotion by signing a standard order form<sup>71</sup> that clearly stated that the rates, terms, and conditions of Sprint's Business Sense service and Fridays Free promotion "are governed by the applicable Sprint tariffs, as they may be amended from time to time."<sup>72</sup> Thus, Hi-Tech had advance notice that the terms of the Fridays Free promotion could be revised by Sprint at any time. More importantly, the circumstances of this case do not implicate any of the fairness concerns that may be present when a carrier changes a contract in the middle of the term while binding the customer to all tariff provisions until its expiration.<sup>73</sup> Had Hi-Tech called to complain about the deletion of the nine countries from the Fridays Free promotion, Sprint would have provided it the option of terminating its subscription to the Business Sense program without penalty.<sup>74</sup> Because Sprint permitted its Business Sense subscribers to exit their contracts without penalty, such subscribers were no worse off than if they had never enrolled in Sprint's Fridays Free promotion.

24. Based on the record, we find that Hi-Tech has failed to prove that Sprint's tariff revisions were unjust and unreasonable in violation of section 201(b). Even assuming, *arguendo*, that the substantial cause standard is applicable in this case, Sprint has met such standard.<sup>75</sup> Sprint has provided evidence that the tariff revisions were necessary to protect the integrity of its network, and that such tariff revisions were limited. Sprint has shown that the Fridays Free promotion, in its original form, threatened its network with overload problems and the possible crashing of Sprint's New York gateway switch for routing international calls.<sup>76</sup> Also, the curtailment involved the deletion of only nine countries from a list of over 200 countries worldwide to which free Friday calling remained available.<sup>77</sup> Furthermore, Hi-Tech has failed to show that it relied to its detriment on the Fridays Free program. Finally, fairness concerns are minimal in this case because Sprint offered its Business Sense subscribers penalty-free termination if they expressed dissatisfaction with the tariff revisions. Thus, for the above reasons, we conclude that Hi-Tech has not met its burden of proving that Sprint's tariff revisions, intended to minimize severe network overload

---

<sup>71</sup> Kornfeld Affidavit at 13.

<sup>72</sup> See Sprint Brief at 3-4.

<sup>73</sup> See *RCA Americom 1983 Order*, 94 FCC 2d at 1339.

<sup>74</sup> Sprint Answer, Appendix A at 2, Findings of Fact and Conclusions of Law; Letter from Michael B. Fingerhut, counsel for Sprint, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Dec. 24, 1998.

<sup>75</sup> As stated above, in this *Order* we do not determine that the substantial cause standard is applicable in evaluating a revision to a generic, long-term service tariff filed by a non-dominant carrier. See *supra* ¶ 14.

<sup>76</sup> See Sprint Written Response at 2-4.

<sup>77</sup> Sprint Brief at iii.

difficulties, were unjust or unreasonable, or otherwise unlawful, under section 201(b). Accordingly, we deny Hi-Tech's claim under section 201(b).

**B. Sprint's Modification of the Fridays Free Promotion Did Not Violate Section 203 of the Act.**

25. Hi-Tech alleges that Sprint violated section 203(c) of the Act,<sup>78</sup> because "by altering the terms of the Fridays Free program, Sprint demanded charges for its service that were different than the charges then in effect."<sup>79</sup> Section 203 requires carriers who provide interstate and international communication services to file tariffs with the Commission, and to provide service to its customers strictly in accordance with the provisions of such tariffs.<sup>80</sup> As explained below, we find that Sprint did not violate section 203 of the Act, because Sprint did not charge rates different from those in its filed tariff and did not violate the terms of its tariff.

26. Prior to the tariff revision that curtailed free calling benefits to the deleted countries, Sprint's Fridays Free tariff provided that "[t]his promotion is available through" a specified date, "unless sooner changed or cancelled by Sprint."<sup>81</sup> The first such specified date was February 15, 1996, and the tariff revision that deleted countries from the Fridays Free promotion specified a date of April 16, 1996.<sup>82</sup> Hi-Tech claims that these provisions "specifically limited Sprint's ability to change or cancel the availability of the program for customers who subscribed on or before the specified dates."<sup>83</sup> Hi-Tech contends, therefore, that Sprint violated section 203(c) when it revised the tariff to curtail the free calling benefits, because the language of the tariff itself barred Sprint from revising the tariff's terms with respect to customers who subscribed before the specified

---

<sup>78</sup> 47 U.S.C. § 203(c).

<sup>79</sup> Complaint at 8. *See* Hi-Tech Brief at 16-17. In its complaint, Hi-Tech also alleges that, "by altering the terms of the Fridays Free program, Sprint demanded charges for its service which were different than the charges then in effect, in violation of § 203(c) of the Communications Act." Complaint at 8, *citing* 47 U.S.C. § 203(c). Hi-Tech has abandoned this allegation, because Hi-Tech's Brief and Reply Brief fail to present any arguments to support the allegation that Sprint demanded charges different from the rates published in its filed tariff. *See* 47 C.F.R. § 1.732(b) (stating that claims and defenses previously made but not reflected in the briefs will be deemed abandoned).

<sup>80</sup> *See* 47 U.S.C. § 203(a), 203(c) (stating that "no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect").

<sup>81</sup> *See, e.g.*, Sprint Answer, Exhibit 1 at 5, Sprint Tariff F.C.C. No. 11, §10.21, 8th Revised Page 421.10, Jan. 31, 1995 (January Tariff Revision).

<sup>82</sup> Fridays Free Tariff; April Tariff Revision.

<sup>83</sup> Hi-Tech Brief at 17.

dates.<sup>84</sup> Hi-Tech alternatively contends that Sprint's tariff revision was unreasonable because it was not clear and explicit.<sup>85</sup>

27. Sprint contends, in response, that nothing in section 203(c), or in any other provision of the Act, prevents a carrier from amending its tariffs from time to time, provided that such amendments comply with sections 201(b) and 202(a) of the Act.<sup>86</sup> With regard to its tariff language at issue here, Sprint contends that such language does not circumscribe Sprint's ability to modify or eliminate the Fridays Free promotion in the future; instead, the language "simply informs subscribers of the date by which they can subscribe to the promotion. Thus, it states that the Fridays Free offering would be available until a certain date unless that date was sooner changed by Sprint."<sup>87</sup> Sprint also denies that its tariff language was ambiguous.<sup>88</sup>

28. We agree with Sprint that the language at issue in the tariff did not limit Sprint's ability to change its tariff; the language merely sets forth the expiration date for subscription to the Fridays Free promotion. For example, the April Tariff Revision states that "[t]his promotion is available through April 16, 1996, unless sooner changed or cancelled by Sprint."<sup>89</sup> Because the first part of that sentence deals with the period of availability for the Fridays Free program, the clause "unless sooner changed or cancelled by Sprint" must refer only to modifications of that availability period. Thus, the sentence merely means that, unless Sprint changed the cut-off date, the Fridays Free program would remain available for subscription through April 16, 1996. Accordingly, we cannot reasonably interpret the tariff, as Hi-Tech argues, to mean that Sprint could not revise the material terms of the Fridays Free promotion for existing customers.

29. Hi-Tech also contends that, by its own terms, the April Tariff Revision deleting nine countries from the Fridays Free program applied only to those who subscribed after February 15, 1996.<sup>90</sup> The first sentence of the April Tariff Revision states: "[b]eginning February 15, 1996, new

---

<sup>84</sup> Hi-Tech Brief at 17.

<sup>85</sup> *Id.* at 17-18.

<sup>86</sup> Sprint Brief at 10. Section 201(b) requires, in part, that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communications service, shall be just and reasonable." 47 U.S.C. § 201(b). Section 202(a) provides, in part, that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service...." 47 U.S.C. § 202(a).

<sup>87</sup> Sprint Brief at 11.

<sup>88</sup> *Id.* at 13.

<sup>89</sup> April Tariff Revision.

<sup>90</sup> Hi-Tech Brief at 18.

and existing Business Sense subscribers can receive free usage (outbound international only) on one day a week . . . for 12 months. . ."<sup>91</sup> The tariff language then describes program terms, including, for the first time, the elimination of certain countries.<sup>92</sup> Hi-Tech argues that such language meant that subscribers who enrolled prior to February 15, 1996 were not affected by the tariff revision and program curtailment.<sup>93</sup> Alternatively, Hi-Tech argues that such language was ambiguous.<sup>94</sup>

30. In response, Sprint states that the terms of the April Tariff Revision clearly apply to all new and existing customers and not just to those subscribers who enrolled after February 15, 1996.<sup>95</sup> Sprint states that under established tariff procedures, a carrier that extends the availability of an offering will cancel the previous page on which the offering appears. The new page on which the extended offering is set forth will then be applicable to new and existing customers.<sup>96</sup> Sprint then argues that acceptance of Hi-Tech's argument would mean that the Fridays Free program would be altogether inapplicable to subscribers who enrolled prior to February 15, 1996.<sup>97</sup> In other words, if Hi-Tech argues that the curtailment portion of the April Tariff Revision was inapplicable to subscribers who enrolled prior to February 15, 1996, then the entire April Tariff Revision (*i.e.*, the Fridays Free promotion itself) would be inapplicable to those subscribers, as well.

31. We find that the April Tariff Revision applied to all new and existing subscribers. The original expiration date for subscription to the promotion was February 15, 1996, but Sprint subsequently extended the date. Therefore, the phrase "[b]eginning February 15, 1996" clearly refers only to the prior expiration date and did not limit the applicability of the April Tariff Revision to those subscribers who enrolled after February 15, 1996. We agree with Sprint that Hi-Tech's interpretation of the April Tariff Revision is incorrect, because such interpretation would render the Fridays Free promotion itself inapplicable to those customers who subscribed prior to February 15, 1996. Sprint clearly intended the April Tariff Revision to revise the Fridays Free promotion for all new and existing subscribers.

---

<sup>91</sup> April Tariff Revision.

<sup>92</sup> *Id.*

<sup>93</sup> Hi-Tech Brief at 18. We note that Hi-Tech did not become a Business Sense subscriber until after February 15, 1996, so prevailing on this claim would not afford Hi-Tech any relief. *See id.* at 1.

<sup>94</sup> *Id.* at 18.

<sup>95</sup> Sprint Reply Brief (filed Dec. 23, 1998) at 10 (Sprint Reply Brief).

<sup>96</sup> *Id.* at 10.

<sup>97</sup> *Id.*

#### IV. CONCLUSION

32. Based on the record, the foregoing analysis, and our determination of the applicable requirements of the Act and our rules and orders, we conclude that Sprint's actions were lawful under the Act. We find that Sprint's modifications to its tariffed Fridays Free promotion were just and reasonable, in accordance with section 201(b) of the Act.<sup>98</sup> We also find that Sprint did not violate section 203(c) of the Act, because its tariff revisions were in accordance with the terms of its filed tariff.<sup>99</sup>

#### V. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 201(b), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 203(c), and 208, that the formal complaint in this proceeding IS DENIED and this proceeding IS TERMINATED.

34. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, shall forward a copy of this decision to the United States District Court for the Western District of Missouri, Western Division, promptly upon release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

---

<sup>98</sup> 47 U.S.C. § 201(b).

<sup>99</sup> 47 U.S.C. § 203(c).