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FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

APRIL 16, 1998

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BEDELL, OTTINOT) *CB MCB AO*
DIVISION OF COMMUNICATIONS (MARSH) *AO*

RE: DOCKET NO. 980435-TI - INITIATION OF SHOW CAUSE
PROCEEDINGS AGAINST MCI TELECOMMUNICATIONS CORPORATION
FOR CHARGING FCC UNIVERSAL SERVICE ASSESSMENTS ON
INTRASTATE TOLL CALLS

AGENDA: 04/28/98 - REGULAR AGENDA - SHOW CAUSE - INTERESTED
PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE.

SPECIAL INSTRUCTIONS: I:\PSC\CMU\WP\980435TI.RCM

CASE BACKGROUND

During recent months, a number of complaints have been received regarding charges that IXCs have placed on their bills to recover federal universal service assessments. Upon investigation, the FPSC staff found that at least one company, MCI, has been charging interstate fees based on the total bill, including intrastate toll calls.

After both meetings with and phone calls to MCI, on February 24, 1998, staff sent a letter to MCI, advising it that the charges are being improperly assessed, and asking that it cease such practices immediately. We also asked that MCI issue refunds or bill credits to those Florida consumers who were improperly charged.

MCI responded on March 17, 1998, citing a number of reasons, as discussed in Issue 1, as to why it believes its charges are justified. In the same letter MCI informed us ~~that~~ based on its

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understanding [of the FCC's Order], MCI will continue its current billing practice." (Letter, p. 4)

On March 23, 1998, MCI met with staff to further discuss the matter. It was not resolved. Subsequently, staff opened this docket to recommend action to stop MCI from assessing the charges on intrastate calls.

The state of Virginia has taken similar action. On March 13, 1998, the staff of the Virginia State Corporation Commission filed a Motion for Rule to Show Cause (Motion) asking the Commission to enter an order directing MCI to show cause "why it should not be enjoined from continuing to bill customers illegally for its 'Federal Universal Service Fee' and 'National Access Fee' and why it should not be required to refund to customers all amounts collected in excess of its tariffed rates." (Motion, p. 6) That action is still pending.

In response to Virginia and to the FPSC staff, on April 3, 1998, MCI filed a Petition for Declaratory Ruling (Petition) with the FCC, asking that it find that carriers are not precluded by the Universal Service Order from imposing a charge on interstate customers that is based on customers' total billed revenues, including intrastate revenues, to recover federal universal service assessments. MCI points out that the facts in the case are not in dispute. MCI contends that the state commissions disagree as to the correct interpretation of the Universal Service Order regarding recovery of universal service fund contributions by an assessment on total customer bills, including intrastate charges, of interstate customers. MCI has asked that the FCC resolve the issue before July 1, 1998, when MCI intends to begin applying charges to residential customers' bills. The arguments MCI raises in its Petition are essentially the same as those provided in its letter to the FPSC staff. Those arguments are discussed in Issue 1.

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DISCUSSION OF ISSUES

ISSUE 1: Should MCI be ordered to show cause within 20 days why it should not cease to charge FCC universal service assessments on intrastate toll calls and make appropriate refunds to its customers?

RECOMMENDATION: Yes. Staff recommends that the Commission should order MCI to show cause, in writing, within 20 days why it should not cease to charge FCC universal service assessments on intrastate toll calls and make appropriate refunds, with interest, to its customers. Refunds should also include amounts collected before April 1, 1998, plus interest, for the intrastate revenue-based National Access Fee (NAF). MCI should also refrain from instituting these charges for its residential customers. No fine should be assessed at this time. (MARSH)

STAFF ANALYSIS: MCI is currently charging two new fees to recover assessments for the federal Universal Service fund and for access charge restructuring, which MCI calls the Federal Universal Service Fee (FUSF) and the NAF, respectively. The NAF is intended to recover the amount of primary interexchange carrier charges (PICCs) assessed by the incumbent local exchange carriers (ILECS). MCI states that these charges are included in its federal tariff. There are no corresponding charges in its Florida tariff. MCI argues that its fees are consistent with relevant FCC decisions.

The FUSF is an interstate charge that is designed to recover MCI's federal universal service fund contributions. MCI assesses small business customers 5 percent of their total MCI billed revenues, and large business customers are assessed 4.4 percent of their total MCI revenues. In its March 5, 1998, response to a data request from staff, MCI stated that it "does not currently assess residential customers the federally mandated universal service fee (FUSF)."

MCI currently imposes the NAF on its interstate customers on a per-line or per-account basis. Until April 1, 1998, small business customers were charged a percentage of their total MCI bill. Percentages ranged from 13 percent to 30 percent, depending on the amount of the total bill. Effective April 1, 1998, that was changed to a per-line charge of \$2.75. MCI contends that the NAF is a federal charge which appears as a separate line item on the customer's bill. As such, MCI claims that this does not constitute the establishment of a state rate via the federal tariff.

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Staff's concern is with the small business NAF that was charged until April 1, 1998, and with the FUSF. Both of these interstate charges are being assessed on intrastate toll revenues. We disagree with MCI that its application of these charges is supported by the FCC's Order.

MCI's Position

MCI points out that the Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (released May 8, 1997) (Order) permits carriers to recover their contributions for federal universal service support only through rates on interstate services. MCI further quotes the Order as saying carriers are "permitted . . . to pass through their contributions to their interstate access and interexchange customers." (Order, ¶ 829) MCI claims that the FCC did not specifically address the issue of whether carriers could recover their universal service contributions through their federal tariffs based on customers' combined intrastate, interstate, and international revenues. MCI believes that such an application would be a logical result of the FCC's decisions and is consistent with the FCC's rationale for determining the contribution base for federal universal service support. MCI also argues that a large portion of the federal universal service fund is assessed based on total revenues. Thus, MCI believes that its recovery mechanism matches costs with cost causation.

MCI states that the FCC responded to arguments that it does not have jurisdiction to assess intrastate revenues of interstate carriers, saying that it "merely is calculating a federal charge based on both interstate and intrastate revenues, which is distinct from regulating the rates and conditions of interstate service." (Order, ¶821) Later, MCI quotes ¶819 where it is stated that

[t]here is no indication that Congress's authorization in section 254(f) of a separate support mechanism covering intrastate carriers evidences an intent that the amount of a carrier's contributions to the respective support mechanisms similarly should be based on the type of communications service, interstate or intrastate, provided by the carrier. (Order, ¶819)

Staff's Discussion of MCI's Position

Staff notes that ¶819 and ¶821 are part of a lengthy discussion in the FCC's Order titled "General Jurisdiction Over

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Universal Service Support Mechanisms." In the opening paragraph of that discussion, the FCC stated

[W]e conclude that the [FCC] has jurisdiction to assess contributions for the universal service support mechanisms from intrastate as well as interstate revenues and to require carriers to seek state (and not federal) authority to recover a portion of the contribution in intrastate rates. Although we expressly decline to exercise the entirety of this jurisdiction, we believe it is important to set forth the contours of our authority in this Order. (Order, ¶813)

The entire discussion appears to be an exercise by the FCC to assert what the extent of its authority would be should it choose to exercise it. In fact, the FCC points out in several places that it has not taken this approach in its Order. (See ¶813, ¶818, ¶822) Nowhere in the discussion can staff find support for MCI's fees levied on intrastate revenues. Rather, the FCC clearly refers carriers to the intrastate jurisdiction for recovery of any portion of the contribution through intrastate rates. While the FCC has based a portion of the Universal Service Fund assessment on total revenues, it clearly states in its Order that "[C]arriers may recover these contributions solely through rates for interstate services...." (Order, ¶ 838) In another passage, it states:

We have determined to continue our historical approach to recovery of universal service support mechanisms, that is, to permit carriers to recover contributions to universal service mechanisms through rates for interstate services only. In discussing recovery we are referring to the process by which carriers' recoup the amount of their contributions to universal service. (¶ 825)

Although the FCC has concluded in its Order that it has jurisdictional authority to require carriers to seek state approval to recover a portion of their contribution from intrastate revenues, Florida and other states have previously taken the position that the FCC has no such authority. In the state petitioners' brief in the 5th Circuit appeal, which opposed certain provisions of the Order, state petitioners argued the provisions of the Order that intrude on state authority over intrastate telecommunications should be annulled because there is no grant of such authority to the FCC. Accordingly, we believe that the FCC has no authority to permit MCI to recover its contributions from intrastate revenues, or to require it to seek approval from the state to do so.

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We also disagree with MCI's use of ¶829 of the Order to support its case. In saying that carriers are "permitted . . . to pass through their contributions to their interstate access and interexchange customers," MCI fails to consider the footnote to that sentence, which says, "[t]he details of the recovery mechanism for price cap LECs are explained in [the FCC's] companion Access Charge Reform Order, section VI.D.2.b." A review of the referenced section shows that it deals solely with recovery of universal service contributions for incumbent price cap LECs from interstate mechanisms. Thus, the reference to interexchange customers that MCI relies on refers to the customers of LECs, not IXCs.

Finally, staff objects to MCI's characterization of its charges as "federally mandated." The FCC addressed such characterization in its order, stating

To the extent that carriers seek to pass all or part of their contributions on to their customers in customer bills, we wish to ensure that carriers include complete and truthful information regarding the contribution amount. We do not assume that contributions will provide false or misleading statements, but we are concerned that consumers receive complete information regarding the nature of the universal service contribution. Unlike the SLC, the universal service contribution is not a federally mandated direct end-user surcharge. (Order, ¶855)

While staff has not seen any misleading statements in MCI's bills, we are concerned because MCI has called this a federally mandated charge in correspondence with staff. Based on our reading of the Order, it is not federally mandated. Carriers have wide discretion as to how to recover the charges.

Conclusion

Staff believes that, based on our discussion above, MCI has no basis for its assessment of the NAF and the FUSF on the intrastate portion of customer bills. Accordingly, MCI should cease billing customers in this manner. All charges levied to date on intrastate bills should be refunded to customers, with interest. We also note that MCI has indicated it plans to institute charges on intrastate calls for its residential customers. MCI should refrain from doing so.

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While staff disagrees with MCI as to the interpretation of the FCC's Order, we do agree that this issue arises from a difference of opinion. It is not a violation of an established rule. The new carrier assessments for the federal universal service fund became effective January 1, 1998. Carriers are still trying to work out the details as to how to recover these costs. It is inevitable that when new programs become effective, some provisions associated with them will be subject to interpretation, and differences of opinion will arise. Accordingly, staff does not believe the assessment of a fine is warranted at this time. However, should MCI continue its current practice of assessing interstate charges on intrastate revenues, the FPSC may wish to consider imposing a fine at a later date.

Staff recommends that the Commission should order MCI to show cause, in writing, within 20 days why it should not cease to charge FCC universal service assessments on intrastate toll calls and make appropriate refunds, with interest, to its customers. Refunds should also include amounts collected before April 1, 1998, plus interest, for the intrastate revenue-based NAF. MCI should also refrain from instituting these charges for its residential customers. No fine should be assessed at this time.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: If MCI responds to the show cause order by ceasing to charge FCC universal service assessments on intrastate toll calls and making appropriate refunds, with interest, to its customers, this docket should be closed administratively. MCI must also refrain from instituting such charges for its residential customers. If MCI does not respond to the show cause order with the appropriate action, or if MCI requests a hearing, this docket should remain open for final disposition. (BEDELL, OTTINOT)

STAFF ANALYSIS: If the Commission approves Issue 1, MCI will have 20 days to respond to the Order, or to begin making appropriate refunds. If MCI responds to the show cause order by ceasing to charge FCC universal service assessments on intrastate toll calls and makes appropriate refunds, with interest, to its customers, this docket should be closed administratively. MCI must also refrain from instituting such charges for its residential customers. If MCI does not respond to the show cause order with the appropriate action, or if MCI requests a hearing, this docket should remain open for final disposition.