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July 21, 1998

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RECORDS AND REPORTING

Ms. Blanca S. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: MCI Show Cause Proceedings -- Docket No. 980435-TI

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Telecommunications Corporation are the original and fifteen copies of MCI's Motion to Dismiss.

By copy of this letter, this document is being furnished to the parties on the attached service list.

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Very truly yours,

Richard D. Melson

RDM/kcg
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cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against MCI Telecommunications Corporation for charging FCC Universal service assessments on intrastate toll calls.	Docket No. 980435-TI Filed: July 21, 1998

MOTION TO DISMISS OF
MCI TELECOMMUNICATIONS CORPORATION

Pursuant to Rule 28.106.204, Florida Administrative Code, MCI Telecommunications Corporation ("MCI"), by its undersigned attorneys, respectfully submits this Motion to Dismiss the Order of May 18, 1998, issued by the Florida Public Service Commission (the "Commission") initiating show cause proceedings against MCI.

INTRODUCTION

On May 18, 1998, the Commission issued to MCI an Order to Show Cause (the "Order") why it should not be ordered to cease assessing its National Access Fee ("NAF") and Federal Universal Service Fee ("FUSF") against intrastate toll calls and to make refunds, with interest, to its customers for previous amounts of the NAF and FUSF collected that were based on intrastate toll charges. MCI has on file at the Federal Communications Commission (the "FCC") tariffs setting forth the NAF and FUSF, and these tariffs are fully effective. Pursuant to them, MCI is

charging customers of its interstate service in Florida -- and every other State -- the NAF and FUSF. These charges apply only to MCI's interstate customers.

The Commission lacks authority to order MCI to depart from its federally tariffed rates. If MCI complies with the remedies contemplated in the Order, it would violate its obligations under federal law -- only recently reaffirmed by the Supreme Court in American Tel. & Tel. Co. v. Central Office Tel., Inc., 118 S. Ct. 1956 (1998) -- to charge customers of its interstate service only the rates for that service set forth in its federal tariff and to charge all similarly situated customers in the country the same rate for that interstate service. 47 U.S.C. § 203. The legality of charges imposed on interstate customers pursuant to an interstate tariff is governed exclusively by federal law, administered by the FCC. Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the Commission cannot declare such interstate charges unlawful as a matter of state law, or usurp the FCC's exclusive authority to decide whether the charges comply with federal law. Rather, the only entity with authority to order MCI to change the charges set forth in MCI's interstate tariff is the FCC -- acting on a nationwide basis.

Last month, on precisely the same grounds asserted in this motion, a United States district court in Virginia permanently enjoined an order of the Virginia State Corporation

Commission that required MCI to cease assessing the NAF and FUSF based upon intrastate charges with respect to Virginia customers and to refund amounts previously collected. MCI Telecommunications Corp. v. Commonwealth of Va. State Corp. Comm'n, No. 3:98CV284 (E.D. Va. June 15, 1998) (attached as Exhibit 1). For the reasons set forth in that opinion and this motion, the Commission should dismiss the Order.

FACTS

A. The Federal Tariffing Scheme.

The Federal Communications Act of 1934 ("the Act"), 47 U.S.C. § 151, et seq., imposes a comprehensive federal regulatory scheme on rates and charges levied on interstate and international communications. Under the Act, common carriers such as MCI must "file with the [FCC] . . . schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). The FCC has promulgated extensive regulations governing the filing and review of such tariffs. See 47 C.F.R. § 61.1, et seq.; id. § 64.1, et seq. Federal law requires MCI to assess its customers the charges set forth in its federal tariff and specifically forbids any deviation -- upward or downward -- from those charges. 47 U.S.C. § 203(c). See Central Office Tel., 118 S. Ct. at 1962-63.

The Act provides two -- and only two -- methods by which the validity of tariffs filed with the FCC can be challenged: 47 U.S.C. § 204 permits the FCC to suspend a newly filed tariff while the FCC reviews the tariff (on its motion or that of any person), and 47 U.S.C. § 208 permits any person to bring a tariff challenge before the FCC, even after the tariff has gone into effect.

B. The Relevant Federal Tariff Provisions.

Pursuant to these statutory and regulatory requirements, MCI has filed with the FCC its Tariff F.C.C. No. 1 (the "FCC Tariff"), which contains thousands of pages of tariff schedules listing rates and charges imposed on MCI's interstate and international customers. The two particular charges challenged by the Order -- the FUSF and the NAF -- were added to the FCC Tariff in response to certain regulatory actions taken by the FCC in 1997.

First, on May 8, 1997, the FCC released its "Universal Service Order," see Report and Order, In the Matter of Federal State Joint Board on Universal Service, CC Docket No. 96-45, 12 F.C.C.R. 8776 (1997) ("Universal Service Order"), which mandated an explicit subsidy mechanism to fund "universal service." Under this Order, MCI and all other telecommunications carriers that provide interstate telecommunications services must contribute to federally administered funds used to subsidize linking schools,

libraries and health care providers to the Internet, and to subsidize local service provided in high-cost (usually rural) areas and to low-income users, so that local rates remain within their reach. See id. ¶ 772. With regard to the schools and library component, the charge assessed by the FCC on MCI is proportional to MCI's total interstate and intrastate telecommunications revenues, including both its interstate and intrastate long distance revenues.

Second, on May 16, 1997, the FCC released its "Access Charge Reform Order." See First Report and Order, In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, 12 F.C.C.R. 15982 (1997) ("Access Charge Reform Order"). In this Order, the FCC restructured certain charges that long distance carriers must pay to local telephone exchange carriers for use of the local network to begin and end long distance calls. As part of this restructuring, the FCC authorized certain local exchange carriers to begin charging interexchange carriers like MCI a "presubscribed interexchange carrier charge" ("PICC").

Under these FCC Orders, MCI is entitled to recover from its customers the amount it must pay for the federal universal service funds and for the PICC charges. See Universal Service Order ¶ 829; Access Charge Reform Order ¶ 93. Thus, in 1997 and 1998, MCI amended its FCC Tariff to add as additional interstate

charges the FUSF (FCC Tariff § C-1.0612) and the NAF (FCC Tariff § C-1.0613). The FCC did not challenge, suspend, or investigate these amendments. These provisions of the FCC Tariff are, therefore, fully effective and binding on MCI and its customers. To date, no entity has asked the FCC to suspend and review those tariff provisions.

ARGUMENT

The Commission's Order is erroneously premised on the idea that it has authority to determine the validity of MCI's FCC Tariff and to order MCI to charge its interstate customers in Florida rates different from the uniform national rates prescribed in the Tariff. Moreover, the enforcement of the remedies contemplated in the Order -- which would mandate refunds to Florida customers and prohibit future collection of the FUSF and NAF from Florida customers as contemplated MCI's FCC Tariff -- would require MCI to violate federal law, which prohibits any variance from a publicly filed tariff. Review and rejection of a federal tariff by a state regulatory agency directly conflicts with both the Act and the entire scheme of FCC regulation, and is therefore preempted under the Supremacy Clause of the United States Constitution.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl.2. Even where

Congress has not expressly preempted state law, federal law nonetheless may preempt state law where there is an actual conflict between federal and state law, such that compliance with both state and federal law is impossible, or where state law stands as an obstacle to the accomplishment of Congress' purpose and objectives. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986); Lewis v. Brunswick Corp., 107 F.3d 1494, 1500 (11th Cir.), cert. granted on other grounds, 118 S. Ct. 439 (1997). Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. Louisiana Public Serv. Comm'n, 476 U.S. at 369. The remedies contemplated by the Order are clearly preempted under these principles.

I. The Remedies Contemplated by the Order Would Require MCI to Violate Federal Law and Would Frustrate the Objectives of Federal Law.

The Commission's attempt to force MCI to deviate from its FCC Tariff, and to refund charges collected pursuant to the FCC Tariff, directly conflicts with federal law. Under Section 203 of the Act, common carriers must "file with the [FCC] and print and keep open for public inspection schedules [tariffs] showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Critically, a carrier cannot "charge, demand, collect or receive a greater or less or different compensation for . . .

communication, or for any service in connection therewith . . . than the charges specified in the [tariff] then in effect." Id. § 203(c). See Central Office Tel., 118 S. Ct. at 1962-63; MCI Telecommunications Corp. v. American Tel. & Tel. Co, 512 U.S. 218, 230 (1994). Once a tariff is filed with the FCC, it attains the status of binding federal law, and MCI is required to charge the fees contained in that tariff. See, e.g., Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520 (1939) ("Until changed, tariffs bind both carriers and [customers] with the force of law."); Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 163 (1922)("Unless and until suspended or set aside, [the tariff] rate is made, for all purposes, the legal rate . . . ."); Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998) ("A tariff filed with a federal agency is the equivalent of a federal regulation."), cert. denied, 66 U.S.L.W. 3814, 3815 (U.S. June 26, 1998); Western Union Int'l, Inc. v. Data Dev., Inc., 41 F.3d 1494, 1496 (11th Cir. 1995) ("a tariff, required by law to be filed, constitutes the law and is not merely a contract") (quoting American Tel. & Tel. Co. v. Florida-Texas Freight, Inc., 357 F. Supp. 977 (S.D. Fla.), aff'd, 485 F.2d 1390 (5th Cir. 1973)). See also Central Office Tel., 118 S. Ct. at 1962-63; In re Olympia Holding Corp., 88 F.3d 952, 956-57 (11th Cir. 1996).

By requiring MCI to charge its interstate customers in Florida rates different from those in its FCC Tariff, the remedies contemplated in the Order would create an "outright or

actual conflict between federal and state law," Louisiana Public Serv. Comm'n, 476 U.S. at 368, and the Order is therefore preempted. See, e.g., Arkansas Louisiana Gas Co. v. Hall ("Arkla") 453 U.S. 571, 572 (1981) (holding that state court that awarded damages based on its determination of reasonableness of rates "usurped a function that Congress has assigned to a federal regulatory body" and therefore violated Supremacy Clause); Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91-92 (1963) (holding that state commission orders directed at interstate wholesale gas purchasers invaded exclusive domain of federal agency and were therefore preempted); Appalachian Power Co. v. Public Serv. Comm'n of W. Va., 812 F.2d 898, 905 (4th Cir. 1987) (holding that state public service commission's assertion of authority to change agreements filed with or established by FERC was fundamentally at odds with Federal Power Act and therefore violative of Supremacy Clause); Public Serv. Comm'n of W. Va. v. Federal Power Comm'n, 437 F.2d 1234, 1239 (4th Cir. 1971) (holding that state public service commission's purported authority to disapprove certificate of public convenience and necessity granted by FPC was preempted by Natural Gas Act).[1]

[1]Because of the similarities between the Interstate Commerce Act, the Communications Act, the Natural Gas Act and the Federal Power Act, it is common practice for courts to cite to decisions under all four acts interchangeably. See, e.g., Central Office Tel., 118 S. Ct. at 1962; MCI Telecommunications Corp., 512 U.S. at 229-30; Arkla, 453 U.S. at 577 n.7; MCI Telecommunications Corp. v. Graham, 7 F.3d 477, 479-80 (6th Cir. 1993); MCI Telecommunications Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387 (8th Cir. 1992); Las Cruces TV Cable v. FCC, 645 F.2d 1041, 1047 (D.C. Cir. 1981).

Indeed, in light of MCI's federal obligation to charge the FUSF and NAF pursuant to the FCC Tariff, the remedies contemplated by the Order present the clearest possible case for preemption: compliance with both the FCC Tariff and the Order literally would be "a physical impossibility." Boggs v. Boggs, 117 S. Ct. 1754, 1762 (1997).

Moreover, allowing the Commission to interfere in the federal rate-setting scheme would stand as an obstacle to fulfillment of Congress' purposes underlying the filed rate doctrine. See, e.g., Central Office Tel. Co., 118 S. Ct. at 1962-63; Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990); Arkla, 453 U.S. at 582; Keogh, 260 U.S. at 163; Armour Packing Co. v. United States, 209 U.S. 56, 80-81 (1908); Texas & P. Ry. Co. v. Mugg & Dryden, 202 U.S. 242, 245 (1906). The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." Arkla, 453 U.S. at 577. The doctrine advances two corresponding federal interests. First, it protects Congress' interest in preventing discrimination among ratepayers by ensuring that the congressional scheme of uniform rate regulation is not disturbed. See, e.g., Central Office Tel., 118 S. Ct. at 1963; MCI Telecommunications Corp., 512 U.S. at 230; Maislin Indus., 497 U.S. at 126. Second, it prevents usurpation of the rate-setting authority of the federal regulatory agency. See, e.g., Montana-

Dakota Utils. Co. v. Northwestern Public Serv. Co., 341 U.S. 246, 251-52 (1951); Keogh, 260 U.S. at 164. Thus, the cornerstone of the filed rate doctrine is the principle that only the federal rate-setting agency -- in this case, the FCC -- may alter the filed rate. See, e.g., Montana-Dakota Utils. Co., 341 U.S. at 251; Marcus v. AT&T Corp., 138 F.3d 46, 61 (2d Cir. 1998) ("[The filed] tariff is by definition reasonable unless and until the FCC, as the legislatively appointed regulatory body with institutional competence, says otherwise.") (internal quotation marks omitted).

The Commission's challenge to MCI's FCC Tariff frustrates both of these congressional interests. First, the Order, by setting aside a portion of MCI's charges, would destroy the uniformity of federal charges among MCI's customers. Those customers who use interstate long distance service and reside in Florida would pay a different federal charge than those customers in other states who use interstate long distance service. This discrimination would be just the beginning; if state commissions were able to override the federal tariff, MCI customers in each of the fifty states could conceivably pay fifty different charges. Such a result would destroy the uniformity that federal law requires. See Central Office Tel., 118 S. Ct. at 1963 ("the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services").

Second, the remedies contemplated by the Order would usurp the authority of the FCC, a result prohibited by both the filed rate doctrine and the Supremacy Clause. See Arkla, 453 U.S. at 581-82; Cahnmann, 133 F.3d at 488-89. In order to protect the authority and rate-setting expertise of the FCC, the filed rate doctrine prohibits courts or state agencies from changing the filed rate. See, e.g., Central Office Tel., 118 S. Ct. at 1963-65; Arkla, 453 U.S. at 582 (permitting variation of rates filed with FERC "would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate"); Montana-Dakota Utils. Co., 341 U.S. at 251; Marcus, 138 F.3d at 61 (order excusing plaintiffs from paying tariffed rate would "subvert the authority of the FCC and undermine the regulatory regime") (internal quotation marks omitted); Appalachian Power Co., 812 F.2d at 904 ("[a]llowing the states to [determine the reasonableness of rates approved by the Federal Energy Regulatory Commission]. . . would impede accomplishment of the purposes of the [Federal Power Act]").

The precise issue addressed by this motion was recently decided by a United States District Court in Virginia in MCI Telecommunications Corp. v. Commonwealth of Virginia State Corp. Comm'n, supra. In that case, the Virginia State Corporation Commission ("SCC") had (after entering an order to show cause similar to the Commission's) prohibited MCI from assessing the

NAF and FUSF with respect to Virginia customers based on intrastate charges and ordered MCI to refund amounts previously collected. After full briefing on the merits, the district court permanently enjoined the SCC from enforcing its order on the grounds that the SCC's order was preempted by the Act. Slip. Op. at 9. The court concluded both that "compliance with [the SCC's order] and federal law is impossible" and that the order "stands as an obstacle to the accomplishment of a uniform regulatory scheme intended by Congress through federal communications law." Id. Specifically, the court noted that the SCC's order "requires MCI to charge interstate customers a rate different from its federal tariff," and it concluded that "[t]his [the SCC] cannot do." Id. The Virginia SCC case is directly on point and demonstrates that the remedies contemplated by the Order are preempted by federal law. See also Appalachian Power Co., 812 F.2d at 904-05 (holding that state public service commission order requiring utilities to submit federally authorized rates to state commission for approval and preventing utilities from collecting amount authorized under federal law was preempted by Federal Power Act).

II. The Commission Has No Authority to Invade the FCC's Jurisdiction to Review Federally Filed Tariffs.

The Order must be dismissed for the additional reason that -- even if the charges are improper as the Commission asserts (and MCI maintains that they are not) -- the Commission

lacks the authority to undertake any review of MCI's FCC Tariff. The power to review and invalidate that Tariff rests solely with the FCC, with judicial review in the United States Courts of Appeals. State agencies simply have no role in this process.

The process for challenging a federal tariff is well-established. There are two -- and only two -- methods to challenge a tariff, and both are before the FCC.[2] First, under Section 204 of the Act, 47 U.S.C. § 204, the FCC, either upon complaint or on its own initiative, may commence a proceeding to determine the lawfulness of any new or revised tariff and may suspend the effectiveness of a tariff pending the investigation. An order determining the lawfulness of a tariff pursuant to Section 204 is reviewable in the federal Courts of Appeals pursuant to Section 402. 47 U.S.C. §§ 204(a)(2)(C), 402. Second, Section 208 of the Act allows "any person" to complain to the FCC about "anything done or omitted to be done by any common carrier subject to" the tariffing requirements of the Communications Act. 47 U.S.C. § 208(a). Thus, where -- as here -- the FCC has approved a carrier's tariff and allowed it to go

[2]Although Section 207 of the Communications Act allows "any person claiming to be damaged by any common carrier subject to the provisions of this chapter" to bring a suit for damages in federal district court, 47 U.S.C. § 207, under the doctrine of primary jurisdiction, even courts adjudicating Section 207 cases must defer to the FCC on questions of tariff validity. See, e.g., United States v. Western Pac. R.R. Co., 352 U.S. 59, 63 (1956) (explaining operation of and basis for primary jurisdiction doctrine); Allnet Communications Serv., Inc. v. NECA, 965 F.2d 1118, 1120 (D.C. Cir. 1992).

into effect without suspension, any individual or entity that believes the tariff is invalid may petition the FCC for relief.

The federal district court in MCI Telecommunications Corp. v. Commonwealth of Virginia State Corp. Comm'n, supra, relied in Sections 204 and 208 to conclude that a state public utility commision "is not the appropriate forum" to review a federal tariff. Slip op. at 10. While a commission can challenge a federal tariff through Section 208, the court noted, it cannot challenge or rule on the validity of a federal tariff in a state commission proceeding. Id.

CONCLUSION

For the foregoing reasons, the Order violates the Supremacy Clause of the United States Constitution.[3] Therefore, MCI respectfully requests that the Commission dismiss the Order.

[3]The Order also violates the Commerce Clause. See U.S. Const. art. I, § 8, cl. 2. The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates. See 47 U.S.C. §§ 151, 152(a); Crockett Tel. Co. v. FCC, 963 F.2d 1564, 1565 (D.C. Cir. 1992). The Commission's attempt to override MCI's federal tariff is therefore an impermissible regulation of interstate commerce in violation of the Commerce Clause. See New England Legal Foundation v. Massachusetts Port Auth., 883 F.2d 157, 174 (1st Cir. 1989); Appalachian Power Co. v. Public Serv. Comm'n of W. Va., 630 F. Supp. 656, 664 (S.D.W. Va. 1986).

RESPECTFULLY SUBMITTED this 21st day of July, 1998.

HOPPING GREEN SAMS & SMITH, P.A.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by U.S. Mail or Hand Delivery (*) this 21st day of July, 1998.

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Division of Legal Services
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Attorney

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