



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

RECEIVED FPSC

NOV-9 PM 4:10

RECORDS AND REPORTING

-M-E-M-O-R-A-N-D-U-M-

DATE: NOVEMBER 9, 1998

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

FROM: DIVISION OF LEGAL SERVICES (BEDELL) *CB MCB*
DIVISION OF COMMUNICATIONS (MARSH) *GO for AEM*

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: 11/17/98 - REGULAR AGENDA - SHOW CAUSE - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980435.RCM

CASE BACKGROUND

By Order No. PSC-98-0681-SC-TI, issued May 18, 1998, the Commission ordered MCI Telecommunications Company (MCI) to show cause why it should not cease to charge Federal Universal Service Fund assessments on intrastate toll calls and refund those assessments to customers. MCI timely responded on June 8, 1998, and this matter is now set for hearing. On June 15, 1998, the Federal District Court for the Eastern District of Virginia issued an Order and Memorandum Opinion ruling against the Virginia Commission in a similar proceeding. This decision forms the primary basis of MCI's Motion to Dismiss filed on July 21, 1998. This recommendation addresses the Motion to Dismiss.

DOCUMENT NUMBER-DATE

12593 NOV-98

FPSC-RECORDS/REPORTING

ISSUE 1: Should MCI's Motion to Dismiss be denied?

RECOMMENDATION: Yes, MCI's Motion to Dismiss should be denied.
(BEDELL)

STAFF ANALYSIS: As stated in the Case Background, MCI filed its Motion to Dismiss on July 21, 1998. The basis of this motion is the Commission's lack of jurisdiction to issue the Show Cause Order. Staff's analysis regarding the motion and our subject matter jurisdiction follows.

As grounds for dismissing the Order to Show Cause, MCI alleges the following: (1) MCI has tariffs on file at the FCC which set forth the NAF (National Access Fee) and FUSF (Federal Universal Service Fee); (2) these charges apply only to interstate customers; and (3) the Florida Commission is without authority to order MCI to charge outside its federally tariffed rates.

MCI misapprehends the basis of the Commission's Order to Show Cause. Staff does not dispute the validity, nor the application, of MCI's FCC tariffs to interstate customers and interstate calls. The Commission's concern is with the inclusion of **intrastate** toll calls in the calculation of the charges for FUSF. In its argument, MCI states that its tariffs apply to interstate customers. Staff would agree. However, to the extent that MCI applies its tariffs to calls that are wholly intrastate, that application is within the PSC's jurisdiction and beyond the authority of the FCC tariff. Staff does not believe that there is a conflict of laws here, nor does staff believe that this is an issue of preemption. Assessing interstate charges on intrastate revenues is neither required nor authorized by the FCC (FCC Order No. 97-157) and thus is clearly within the purview of the state commissions.

Florida has exclusive jurisdiction over MCI's intrastate interexchange rates, charges and service. It is undisputed that MCI does not and did not have a tariff in Florida authorizing the collection of the FUSF on the basis of a percentage of intrastate revenues. Further, the FCC has specifically not preempted the states in this regard. It should be noted that in the Telecommunications Act of 1996 (the Act), provisions for funding Universal Service are separated between interstate and intrastate services. Subsection (d) of Section 254, Universal Service, requires Universal Service contributions to the Universal Service Fund from telecommunications carriers providing interstate telecommunications services. Subsection (f) provides for the states' responsibilities with regard to contributions from

intrastate telecommunications carriers. Clearly, the Act did not contemplate that the FCC, by merely accepting the filing of a tariff, could preempt the states in the matter of collecting Federal Universal Service contributions from carriers for intrastate services. Further, in addressing the issue of recovery of Universal Service Fund contributions, the FCC stated:

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. (Order FCC 97-157, ¶ 825)

MCI's FCC tariff gave MCI the authority to collect a percentage of "services." [The tariff in question is appended as Attachment A.] The language of the tariff does not state that MCI has the authority to collect the FUSF based on intrastate and interstate services. Therefore, staff concludes that the FCC has no authority over intrastate services and has not preempted the states. Staff further believes that the tariff does not provide that MCI can collect Federal Universal Service contributions based on intrastate revenues because it does not include intrastate services in the language of the tariff. Based on these conclusions, staff does not believe that the Florida Commission would in any way be interfering with a federal tariff by ordering MCI to cease applying its tariff to intrastate services if that were to be the appropriate outcome of the show cause hearing.

MCI argues that the Commission is requiring MCI to charge outside its tariff. We disagree. The Commission is requiring that MCI apply its FUSF charges to the appropriate interstate services. We are not challenging MCI's tariff nor are we usurping the authority of the FCC. MCI has no authority under its tariff, and the FCC has no authority under the Act or its regulations, to recover Federal Universal Service contributions through rates for intrastate services only.

As noted in the Case Background, MCI also relies on MCI Telecommunications Corp. v. Commonwealth of Virginia State Corp. Comm'n, Civil Action No. 3:98CV284 (E.D. Va. June 15, 1998), as a basis for its Motion to Dismiss. MCI contends that the Virginia case is directly on point with this proceeding. Staff disagrees.

MCI correctly states that the Virginia Commission entered a show cause order similar to the one entered in this docket. However, staff believes that MCI's reliance is misplaced and that the Virginia decision is in error.

First, it should be noted that the Virginia Commission's action was against the wrong MCI entity. The Virginia Commission issued its action against MCI Telecommunications Corporation of Virginia (MCIV), a wholly owned subsidiary of MCI. The funds which Virginia sought to prohibit the collection of and to have refunded by MCIV were collected by MCI, not the Virginia subsidiary. The Virginia Commission's ruling on its show cause directed MCIV to cease billing the FUSF and NAF against intrastate services and to refund the amounts collected. Clearly, Virginia could not order MCIV to take action regarding the collection of FUSF where MCI is the entity collecting the funds. June 15, 1998, Memorandum Order at p.8.

Second, the Federal Court's Order states that the review and rejection by a state regulatory agency of a federal tariff is in direct conflict with the Act and is preempted. Order at p.9. Further, as basis for this conclusion, the Court states that the Virginia Commission's decision is preempted both because compliance with it and the federal law is impossible and because it stands as an obstacle to accomplishment of a regulatory scheme intended by Congress. As stated earlier, staff believes that there is no preemption question and no interference with the purpose of the Act in the Florida proceeding for the following reasons: (1) In Section 254 of the Act, Congress separated Universal Service funding, giving states responsibility for the collection of contributions on intrastate services and giving the FCC responsibility for interstate services in Section 254 (Subsections(d) and (f)); (2) the FCC has stated that recovery of the Federal Universal Service contributions was to be through interstate services only (FCC Order 97-157); (3) preemption cannot be deemed to have occurred through the mere act of letting a tariff go into effect; and (4) the tariff itself does not give authority to collect for Federal Universal Service from intrastate services.

Third, it is not an "impossibility" for MCI to comply as MCI and the Federal Court have stated. MCI has already refiled its FCC FUSF tariff in a manner which does not collect on the basis of intrastate services. Therefore, for the reasons outlined above, staff concludes that the federal decision may be in error and should not control. In addition, staff reminds the Commission that the federal decision relied on by MCI is not controlling precedent. Based on the foregoing, staff recommends that the Commission had

DOCKET NO. 980435-TI
DATE: November 9, 1998

jurisdiction to enter Show Cause Order No. PSC-98-0681-SC-TI and has jurisdiction to proceed with the show cause hearing. Therefore, staff recommends that the Motion to Dismiss be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. (BEDELL)

STAFF ANALYSIS: If the Commission accepts staff's recommendation in Issue 1, this docket should remain open to proceed with the show cause hearing; however, if the Motion to Dismiss is granted, the docket should be closed.

MCI TELECOMMUNICATIONS CORPORATION

4RD REVISED PAGE NO. 16.3
CANCELS 3RD REVISED PAGE NO. 16.3

CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

SECTION C - CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

1. GENERAL DESCRIPTION OF CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

.06 GENERAL CHARGES:

.001 Subscriber Charges:

Pursuant to Section B-5.16, customers, except as noted below, will be charged, subject to billing availability, the following in addition to standard tariffed usage charges and any applicable surcharges associated with MCI services. These charges will: (i) be calculated after the application of promotional and other discounts; (ii) not be eligible to receive promotional or any other discounts; (iii) not be included to determine satisfaction of usage volume requirements; and, (iv) not apply to calls using Telecommunications Relay Service or calls originated by customers with qualified hearing or speech impairments who are certified as described in Section C-3.02112.

- .0611 A monthly \$1.07 per account charge will be applied to invoices of customers of Metered Use Service Option A (ExecuNet) and Metered Use Service Option NN (homeMCI One).
- .0612 A charge equal to 5 percent of monthly MCI service usage charges will be applied to invoices of customers of Metered Use Service Option N (Prism Plus), Metered Use Service Option R (MCI Preferred), Metered Use Service Option U (Commercial Dial 1 Service), Metered Use Service Option EE (MCI Flat Rate), Metered Use Service Option JJ (Advanced Option I for Small Business), Metered Use Service Option KK (MCI Flat Rate Plus), and Metered Use Service Option OO (Advanced Option II for Small Business).
- .0613 A charge, based on monthly MCI service usage charges, as specified below, will be applied to invoices of customers of Metered Use Service Option N (Prism Plus), Metered Use Service Option R (MCI Preferred), Metered Use Service Option U (Commercial Dial 1 Service), Metered Use Service Option EE (MCI Flat Rate), Metered Use Service Option JJ (Advanced Option I for Small Business), Metered Use Service Option KK (MCI Flat Rate Plus), and Metered Use Service Option OO (Advanced Option II for Small Business). A charge equal to 30 percent of monthly MCI service usage charges will be applied to invoices of customers whose MCI service usage is between \$0.01 and \$24.99 per month. A charge equal to 27 percent of monthly MCI service usage charges will be applied to invoices of customers whose MCI service usage is between \$25.00 and \$99.99 per month. A charge equal to 20 percent of monthly MCI service usage charges will be applied to invoices of customers whose MCI service usage is between \$100.00 and \$249.99 per month. A charge equal to 13 percent of monthly MCI service usage charges will be applied to invoices of customers whose MCI service usage equals or exceeds \$250.00 per month.
- .0614 A monthly \$2.75 charge per ANI which is pre-subscribed to MCI service and which accesses MCI service via switched access will be applied to invoices of customers of Metered Use Service Option C (MCI WATS), Metered Use Service Option G (Vnet), Metered Use Service Option I (MCI Prism II), Metered Use Service Option J (University WATS), Metered Use Service Option Q (MCI Vision), Metered Use Service Option W (MCI MASTERS), Metered Use Service Option X (MCI HotelDirect), Metered Use Service Option BB, Metered Use Service Option CC (University Dial 1), Metered Use Service Option HH (hospitalityMCI), Metered Use Service Option MM (networkMCI One), and Metered Use Service Option PP (Masters97).
- .0615 A monthly \$13.75 charge per ANI which is pre-subscribed to MCI service and which accesses MCI service via Local Exchange Carrier-provided Binary Rate Interface (BRI) or Local Exchange Carrier-provided Primary Rate Interface (PRI) will be applied to invoices of customers of Metered Use Service Option C (MCI WATS), Metered Use Service Option G (Vnet), Metered Use Service Option H (MCI Prism II), Metered Use Service Option I (MCI Prism II), Metered Use Service Option J (University WATS), Metered Use Service Option Q (MCI Vision), Metered Use Service Option W (MCI MASTERS), Metered Use Service Option X (MCI HotelDirect), Metered Use Service Option CC (University Dial 1), Metered Use Service Option HH (hospitalityMCI), Metered Use Service Option MM (networkMCI One), and Metered Use Service Option PP (Masters97).

ISSUED: January 26, 1998

ISSUED BY: James E. Kerr
Manager, Federal Tariffs
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

EFFECTIVE: January 27, 1998

MCI TELECOMMUNICATIONS CORPORATION

3RD REVISED PAGE NO. 16.4
CANCEL 2ND REVISED PAGE NO. 16.4

CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

SECTION C - CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

1. GENERAL DESCRIPTION OF CUSTOMIZED BUSINESS COMMUNICATIONS SERVICE

.08 GENERAL CHARGES (Cont.)

.081 Subscriber Charges (Cont.)

- .0818** A monthly \$0.31 charge per ANI which is pre-subscribed to MCI service and which accesses MCI service via Local Exchange Carrier-provided Centrex will be applied to invoices of customers of Metered Use Service Option C (MCI WATS), Metered Use Service Option G (Vnet), Metered Use Service Option H (MCI Private II), Metered Use Service Option I (MCI Private II), Metered Use Service Option J (University WATS), Metered Use Service Option Q (MCI Vision), Metered Use Service Option W (MCI MASTERS), Metered Use Service Option X (MCI HotelDirect), Metered Use Service Option BB, Metered Use Service Option CC (University Dial 1), Metered Use Service Option HH (HospitalityMCI), Metered Use Service Option MM (networkMCI One), and Metered Use Service Option PP (Masters87).
- .0817** A charge equal to 4.4 percent of monthly MCI service usage charges will be applied to invoices of customers of Dedicated Leased Line Service, Metered Use Service Option C (MCI WATS), Metered Use Service Option F (MCI 800 Service), Metered Use Service Option G (Vnet), Metered Use Service Option H (MCI Private II), Metered Use Service Option I (MCI Private II), Metered Use Service Option J (University WATS), Metered Use Service Option P (MCI Forum Conference Calling), Metered Use Service Option Q (MCI Vision), Metered Use Service Option S (Virtual Private Data Services), Metered Use Service Option W (MCI MASTERS), Metered Use Service Option X (MCI HotelDirect), Metered Use Service Option BB, Metered Use Service Option CC (University Dial 1), Metered Use Service Option FF (CFRS), Metered Use Service Option GG (MCI HyperStream Frame Relay), Metered Use Service Option HH (HospitalityMCI), Metered Use Service Option II (MCI Hemispheres International Calling Card), Metered Use Service Option LL (directlineMCI), Metered Use Service Option MM (networkMCI One), Metered Use Service Option PP (Masters87), Metered Use Service Option QH (audioconferencing from networkMCI Conferencing), CCSA Service, Generation Point Service, Multiple Access Data Collection Service, Program Channel Service, and Wideband Service.
- .0818** A charge equal to 4.4 percent of invoice charges for MCI service will be applied to invoices of customers of Metered Use Service Option Y (MCI PrePaid), Metered Use Service Option Z (Exchange Card), and Metered Use Service Option DD (Third Party Debit Instrument Service).

A customer will not be required to pay the charges set forth in Sections C-1.0812, C-1.0817 and C-1.0818 if it demonstrates to MCI's reasonable satisfaction that it is acquiring MCI's services for resale, i.e., not for its own internal use, and that it has qualified as an entity not subject to these charges by virtue of its having submitted information required by the Federal Communications Commission and its appointed Universal Service Administrator.

ALL MATERIAL ON THIS PAGE IS NEW

ISSUED: December 18, 1997

ISSUED BY: James E. Kerr
Manager, Federal Tariffs
1881 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

EFFECTIVE: January 1, 1998

TOTAL P. 82