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ORIGINAL

April 16, 1999

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

Re: Docket No. 980435-TI

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Telecommunications Corporation are the original and fifteen copies of its Petition for Reconsideration and Request for Official Recognition.

By copy of this letter, these documents are being furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson

AFA
APP 1 RDM/kcg
CAF Enclosures
CMU 1 cc: Parties of Record
CTR
EAG
LEG 1
MAS 3
OPC
RRR
SEC 1
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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: April 16, 1999

MCI's PETITION FOR RECONSIDERATION AND REQUEST FOR OFFICIAL RECOGNITION

MCI Telecommunications Corporation (MCI) hereby petitions the Florida Public Service Commission (Commission) to reconsider Order No. PSC-99-0613-FOF-TI, issued April 2, 1999 (Refund Order), in which the Commission ordered MCI to refund certain Federal Universal Service Fund (FUSF)and National Access Fee (NAF) charges which MCI had collected from interstate customers in Florida pursuant to MCI's federally filed tariff.

In support of this petition for reconsideration, MCI respectfully refers the Commission to the Federal Communications Commission's Memorandum Opinion and Order in File No. E-99-01 (released March 22, 1999) (FCC Order), in which the FCC considered a challenge by the Virginia State Corporation Commission to the same charges that are at issue in this docket. MCI asks the Commission to take official recognition of the FCC Order, a copy of which is attached as Exhibit A hereto, for purposes of ruling on MCI's petition for reconsideration.

In support of these requests, MCI states:

Background

1. This case involves an issue as to the legality of MCI's former method of collecting FUSF and NAF charges from its interstate customers, pursuant to a federal tariff, when those charges were calculated as a percentage of total billings to a customer for both interstate and intrastate services.

2. At the time this case was briefed and argued to the Commission, and the Commission discussed the issues and voted to enter a final order requiring MCI to refund a portion of its FUSF and NAF charges collected from Florida customers, the FCC had not yet ruled on a complaint by the Virginia State Corporation Commission (VSCC) involving the validity of MCI's method of imposing such charges.

3. The FCC's decision on the VSCC complaint was adopted on March 5, 1999, a mere two days after the Commission's vote in this docket.[1] The FCC Order was released in written form on March 22, 1999, prior to the issuance of the Commission's final order.

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[1] MCI had advised the Commission that the issuance of an FCC Order on the VSCC complaint was expected about the time scheduled for the final hearing in this docket, and had moved for a continuance so that the parties could brief and argue the effect of the upcoming federal decision. That request for continuance was denied by Order PSC-99-0399-PCO-TI, issued February 24, 1999.

Request for Official Recognition

4. On reconsideration, MCI urges the Commission to consider the effect of the FCC Order on the issues addressed in the PSC Refund Order. To that end, MCI requests that the Commission take official recognition of the FCC Order. Official recognition is particularly appropriate in this case, since any reviewing court will have the benefit of the FCC Order. Under the circumstances, the Commission should have the first opportunity to consider the impact of that order on the decisions reflected in the Refund Order.

Standard for Reconsideration

5. It is appropriate for the Commission to consider the effect of the FCC Order under the normal standards for reconsideration. As the Commission is well aware, the purpose of a motion for reconsideration is to bring to the attention of the Commission some point of fact or law which it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In this docket, the Commission failed to consider the FCC's ruling on the legal issues that were addressed in this docket. Since those issues involve the interplay between the jurisdiction of the FCC and that of the Commission, the Commission should have the opportunity to consider the effect of the FCC ruling which

addresses the very same issues.

Effect of FCC Order

6. MCI has maintained throughout this docket that its former method of collecting the FUSF and NAF based on the total revenues, both interstate and intrastate, from an interstate customer is permitted under the FCC's Universal Service Order.[2] The Universal Service Order did not specify a particular method for carriers to use in recovering the cost of their federal universal service contributions. As the FCC held in rejecting the VSCC's complaint that MCI's method of recovery violated the Universal Service Order:

> ...the [Federal Communications] Commission requires only that carriers obtain recovery of the cost of their universal service contributions "in an equitable and nondiscriminatory fashion" and "through rates for interstate services."
>
> (FCC Order, ¶19, footnotes omitted)

By holding that MCI's recovery methodology did not violate the Universal Service Order (FCC Order, ¶20), the FCC necessarily concluded that MCI's recovery method represented a "rate for interstate services." As such, the FCC, not the Commission, has

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[2] Federal State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (Universal Service Order), as corrected by Federal-State Joint Board on Universal Service, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), consolidated appeal pending sub nom Texas Office of Public Utility Counsel v. FCC and USA, No. 97-60421 (5th Cir. 1997).

exclusive jurisdiction to regulate such charges. In light of this FCC ruling, it is clear that the Refund Order, which would require a refund of "rates for interstate services" exceeds the Commission's jurisdiction over intrastate rates. The Refund Order should therefore be withdrawn, and a final order should be entered dismissing the underlying show cause proceeding.

7. Alternatively, even if the Commission continues to hold the view that MCI's recovery methodology resulted in the imposition of an intrastate charge (notwithstanding the FCC Order to the contrary), the FCC Order demonstrates at a minimum that the federal agency that issued the Universal Service Order and is charged with its interpretation believes that MCI did not act improperly in implementing its cost recovery mechanism. Because MCI acted reasonably, and collected no more in the aggregate than would have been collected under a different recovery mechanism, the Commission at a minimum should reconsider and vacate the portion of its order that requires refunds.

WHEREFORE, MCI requests that the Commission:

a) take official notice of the FCC Order attached hereto as Exhibit A; and

b) reconsider its Order No. PSC-99-0613-FOF-TI; and

c) on reconsideration, withdraw the Refund Order and enter a new order dismissing the underlying show cause proceeding on the grounds that MCI's FUSF and NAF charges were charges for interstate services over which

the Commission has no jurisdiction; or

d) alternatively, on reconsideration, vacate the portion of the Refund Order which requires refunds on the grounds that in collecting the charges, MCI acted in reliance on a reasonable interpretation of the FCC's Universal Service Order.

RESPECTFULLY SUBMITTED this 16th day of April, 1999.

HOPPING GREEN SAMS & SMITH, P.A.

By: _____

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Telecommunications Corporation

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 16th day of April, 1999.

Catherine Bedell (*)
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Attorney

110776.1
COS/980435

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

COMMONWEALTH OF VIRGINIA STATE CORPORATION COMMISSION,	)	
Complainant,	)	
v.	)	File No. E-99-01
MCI TELECOMMUNICATIONS CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1999 **Released: March 22, 1999**

By the Commission: Commissioners Furchtgott-Roth and Tristani dissenting and issuing separate statements.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve a formal complaint brought by the Commonwealth of Virginia State Corporation Commission (VSCC) against MCI Telecommunications Corporation (MCI) pursuant to section 208 of the Communications Act of 1934, as amended (Act).[1] VSCC alleges that certain MCI charges to interexchange customers in Virginia during the first half of 1998 violate this Commission's *Universal Service Order*[2] and section 2(b) of the Act.[3] In particular, VSCC asserts that MCI's federally-tariffed Federal

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[1] 47 U.S.C. § 208; *Commonwealth of Virginia State Corporation Commission v. MCI Telecommunications Corp.*, File No. E-99-01 (filed on October 7, 1998).

[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (Universal Service Order), as corrected by *Federal-State Joint Board on Universal Service, Erratum*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *consolidated appeal pending sub nom Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997).

[3] 47 U.S.C. §§ 152(b).

Universal Service Fee (FUSF)[4] and federally-tariffed National Access Fee (NAF)[5] were unlawful, because MCI's calculation of those fees was based on a percentage of its customers' total usage charges, including intrastate usage charges.[6]

2. VSCC also alleges that, even assuming, *arguendo*, that MCI could lawfully base its FUSF and NAF, in part, on customers' intrastate usage charges, MCI's tariff language simply did not state that MCI was doing so.[7] VSCC asserts, therefore, that MCI violated section 203 of the Act[8] by failing to describe these charges sufficiently in its federal tariff.[9]

3. As discussed below, we deny VSCC's claims that MCI violated the *Universal Service Order* and section 2(b) of the Act. In addition, we sever VSCC's claim that MCI violated section 203 of the Act, and we will resolve that claim promptly in a separate, subsequent order.

II. BACKGROUND

4. VSCC regulates wholly intrastate telecommunications services and companies within the state of Virginia.[10] Consequently, VSCC qualifies as a "state commission" within the meaning of sections 3(41) and 208(a) of the Act.[11]

5. MCI is a corporation organized under the law of the State of Delaware, with its principal offices in Washington, D.C.[12] MCI provides, among other services and products,

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[4] The FUSF was imposed to recoup MCI's Commission-assessed federal Universal Service contributions. Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues (Joint Statement) at 2-3 (filed November 11, 1998); Brief of Complainant (VSCC Brief) at 4 (filed December 7, 1998); Initial Brief of MCI Telecommunications Corp. (MCI Brief) at 2 (filed December 7, 1998). *See also Universal Service Order* at 9198-99, paras. 825-29.

[5] The NAF was imposed to recoup MCI's Commission-authorized, federal presubscribed interexchange carrier charge (PICC), which is paid by interexchange carriers to local exchange carriers. Joint Statement at 2-3; VSCC Brief at 4; MCI Brief at 2. *See also Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Price, End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16004-5 (1997) (*Access Reform Order*).

[6] Complaint at paras. 4, 5, 8; VSCC Brief at 5-11.

[7] VSCC Brief at 12-14.

[8] 47 U.S.C. § 203.

[9] Complaint at paras. 5, 29-31; VSCC Brief at 14-17.

[10] Joint Statement at 2. *See generally* Joint Supplemental Statement Regarding Disputed Facts (Joint Supplemental Statement) (filed November 23, 1998).

[11] 47 U.S.C. §§ 153(41), 208(a).

[12] Joint Statement at 2.

interstate long distance telecommunications services to customers in the Commonwealth of Virginia and in every other state, pursuant to tariffs on file with this Commission.[13]

6. MCI Telecommunications Corporation of Virginia (MCI-Virginia) is a wholly owned corporate subsidiary of MCI organized under the laws of Virginia, with its principal offices in Washington, D.C.[14] MCI-Virginia provides intrastate long distance telecommunications services to customers in the Commonwealth of Virginia, pursuant to tariffs on file with the Virginia State Corporation Commission.[15] Virginia law requires that public service corporations offering intrastate service be separately incorporated relative to their interstate affiliate.[16]

7. The Commission determined in the *Universal Service Order* that, consistent with sections 2(b) and 254 of the Act,[17] it could assess interstate carriers on the basis of the carriers' total revenues, including intrastate revenues, to fund various Universal Service mechanisms.[18] In so holding, the Commission stated that its calculation of carriers' Universal Service contributions based, in part, on carriers' intrastate revenues does "not constitute rate regulation of those [intrastate] services."[19] The Commission did not require carriers to recover their contribution requirements from consumers. The Commission determined, however, that carriers who choose to recoup the amount of their universal service contributions from their customers may do so "through rates for interstate services only."[20] The Commission further decided that carriers may not shift more than an equitable share of contributions to any customer or group of customers.[21]

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[13] *Id.* at 2.

[14] *Id.* at 1.

[15] *Id.* at 1.

[16] Virginia Constitution, Art. IX, § 5; VSCC Brief 3.

[17] 47 U.S.C. §§ 152(b), 254.

[18] For purposes of assessing contributions to the high cost and low income support mechanisms, the Commission determined that, although it has authority to assess based on intrastate revenues, it would assess based on interstate revenues only. *Universal Service Order*, 12 FCC Rcd at 9200, para. 831. For the schools and libraries and rural health care mechanisms, the Commission adopted the Joint Board's recommendation that contributions be assessed on both intrastate and interstate revenues. *Id.* at 9203, para. 837.

[19] *Id.* at 9196, para. 821.

[20] *Id.* at 9190-91, 9198, 9203-04, paras. 809, 825, 838. The Commission also stated that carriers can recoup their universal service contributions only from "interstate access and interexchange customers." *Id.* at 9199, para. 829.

[21] *Id.* at 9199, para. 829.

8. In 1997, after release of the *Universal Service Order*, MCI filed certain amendments to its Tariff F.C.C. No. 1 at issue here.[22] These amendments added two charges to be imposed on MCI's customers: (1) the Federal Universal Service Fee (FUSF) and (2) the National Access Fee (NAF).[23]

9. From January 1, 1998 through July 2, 1998, MCI charged the FUSF to all of its business customers who had interstate usage in a given month.[24] The purpose of the FUSF was to recover MCI's contributions to the various universal service support mechanisms.[25] MCI calculated the FUSF based on a percentage of its business customers' total invoices -- 5.0 % of small business customers' total invoices, and 4.4 % of large business customers' total invoices.[26] "Total" invoices included intrastate, interstate, and international usage charges.[27] Similarly, from January 1, 1998, to March 31, 1998, MCI charged the NAF to its small business customers to recover MCI's presubscribed interexchange carrier charge (PICC).[28] MCI calculated the NAF using a methodology comparable to that used for the FUSF.[29]

10. In February 1998, VSCC staff members asserted to MCI that MCI's federally tariffed FUSF and NAF improperly imposed *intra*state charges on MCI's *inter*state customers in Virginia.[30] In March 1998, MCI responded to VSCC staff that it believed the FUSF and NAF were interstate charges wholly consistent with relevant FCC orders.[31]

11. On April 3, 1998, MCI filed a Petition for Declaratory Ruling with this Commission seeking a declaratory ruling that carriers may impose charges on their interstate

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22 MCI FCC Tariff No. 1. §§ C-1.0611 through C-1.0613.

23 Joint Statement at 2-3.

24 *Id.* at 3-4.

25 *Id.* at 3-4.

26 VSCC Brief at 14. MCI did not impose the FUSF or any other universal service recoupment charge on residential customers during the relevant period. MCI Brief at 3.

27 VSCC Brief at 13-14.

28 MCI Brief at 3; *Access Reform Order* at 15004-5.

29 Joint Statement at 3-5.

30 VSCC Brief at 4-5.

31 *Id.*

customers that are calculated in the manner that MCI calculated the FUSF.[32] The VSCC filed an opposition to the *MCI Petition*.[33] The *MCI Petition* is currently pending before the Commission.

12. On May 8, 1998, the VSCC issued an Order on Rule to Show Cause prohibiting MCI from collecting the FUSF and the NAF from Virginia customers and requiring MCI to refund to Virginia customers all the challenged charges previously collected.[34] On May 11, 1998, MCI and MCI-Virginia jointly filed a complaint seeking injunctive and declaratory relief from the Show Cause Order in the United States District Court for the Eastern District of Virginia (District Court). The complaint contended that federal law preempts the VSCC's Show Cause Order.[35] On May 22, 1998 the District Court permanently enjoined the VSCC from implementing and enforcing the Show Cause Order.[36] The District Court held that (1) VSCC lacked authority to invalidate MCI's tariff, and (2) VSCC could challenge the validity of MCI's tariff before the FCC only.[37] In response, VSCC filed the instant formal complaint on October 7, 1998.[38]

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[32] *MCI Petition for Declaratory Ruling, Petition for Declaratory Ruling That Carriers May Assess Interstate Customers An Interstate Universal Service Charge Which is Based on Total Revenues*, CC Docket No. 96-45 (filed Apr. 3, 1998) (*MCI Petition*).

[33] *Petition for Declaratory Ruling That Carriers May Assess Interstate Customers an Interstate Universal Service Charge Which is Based on Total Revenues*, CC Docket No. 96-45, Opposition of the Staff of the Virginia State Corporation Commission (filed April 13, 1998).

[34] *See* Order on Rule to Show Cause, *State Corporation Commission v. MCI Telecommunications Corporation of Virginia*, Case No. PUC 980024 at 5 (Va. Corp. Comm'n May 8, 1998) (Show Cause Order) (attached to VSCC Brief at Ex. 3).

[35] *MCI Telecommunications Corporation and MCI Telecommunications Corporation of Virginia v. Commonwealth of Virginia State Corporation Commission and Hullihen Williams Moore, I. Clinton Miller, and Theodore V. Morrison, Jr., in their official capacities as Commissioners of the Commonwealth of Virginia State Corporation Commission*, Civil Action No. 98CV281, U.S. District Court for the Eastern District of Virginia.

[36] *See MCI Telecommunications Corp. v. Virginia State Corp. Comm'n*, 11 F. Supp. 2d 669, 675 (E.D. Va. 1998).

[37] *Id.* The District Court's decision is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit. *See MCI Telecommunications Corp. v. State Corp. Comm'n*, No. 98-2026 (4th Cir. filed July 10, 1998).

[38] *Commonwealth of Virginia State Corporation Commission v. MCI Telecommunications Corp.*, File No. E-99-01 (filed on October 7, 1998).

III. DISCUSSION

A. MCI's FUSF Did Not Violate the Universal Service Order.

1. Contentions of the Parties

13. VSCC contends that the *Universal Service Order* clearly limits the means by which a carrier may recover from its end-user customers its Commission-assessed, federal universal service contributions.[39] In VSCC's view, such limitation appears in the *Universal Service Order's* admonition that recovery must be through "rates for interstate services only."[40] According to VSCC, the phrase through "rates for interstate services only" in the *Universal Service Order* means that a carrier can recover its assessed interstate universal service obligations *only* by adjusting its interstate rates.[41] VSCC argues that MCI violated this limitation by including intrastate usage charges in its calculation of the FUSF.[42] In VSCC's view, such inclusion of intrastate usage charges impermissibly resulted in adjustments to MCI's intrastate rates.[43] In other words, for purposes of recovery, VSCC contends that an interstate surcharge that takes intrastate revenues into account is not an exclusively interstate rate adjustment and therefore is not *through rates for interstate services only.*[44]

14. VSCC also rejects MCI's claim that the FUSF was an interstate rate because it applied only to customers having interstate usage in a given period, *i.e.*, "interstate customers" in MCI's parlance. VSCC maintains that the phrase "interstate customer" does not apply to geographically fixed users in a single state. Rather, VSCC asserts that the proper focus of the *Universal Service Order* is on recovery in rates for "interstate *service*," as discussed above, and such service does not include purely intrastate usage.[45]

15. VSCC further rejects MCI's reliance on the fact that, according to the *Universal Service Order*, the Commission may, consistent with section 2(b) of the Act, base carriers'

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[39] VSCC Brief at 5-7.

[40] Complaint at para. 33; VSCC Brief at 5-7 (citing *Universal Service Order,* 12 FCC Rcd at 9190, 9203-04, paras. 809, 824-38); *see also id.* at 19-22 (citing *Joint Board Recommended Decision* at paras. *6,* 63, 64, 66).

[41] VSCC Brief at 8 (citing section 3(20), (21), (27), (46) and (48) of the Act, 47 U.S.C. § 153(20), (21), (27), (46), (48).

[42] *Id.* at 8-9.

[43] *Id.*

[44] Complaint at paras. 35-36; VSCC Brief at 8-9.

[45] VSCC Brief at 9; Reply Brief of the Virginia State Corporation Commission (VSCC Reply) at 3 (filed December 11, 1998).

contribution amounts on carriers' total revenues.[46] In VSCC's view, the validity of the Commission's *assessment* methodology is simply irrelevant to the validity of MCI's *recovery* methodology. VSCC declares that, regardless of whether the former affects intrastate rates, the latter definitely affects intrastate rates, and impermissibly so under the *Universal Service Order*.[47]

16. In response, MCI argues that basing its calculation of the FUSF on intrastate as well as interstate revenues was consistent with the requirements of the *Universal Service Order* that carriers' recovery of universal service contributions be (1) through "rates for interstate services only," and (2) charged to "all of their customers of interstate services."[48] MCI emphasizes that, within these broad parameters, the *Universal Service Order* did not "mandate a particular method of recovery from interstate customers" and allowed carriers "flexibility" in their recoupment decisions.[49]

17. MCI notes further that, in implementing section 254(d) of the Act,[50] which requires that carriers of interstate services contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis, the Commission's *Universal Service Order* assesses *pro rata* contributions on carriers' combined interstate and intrastate revenues for the schools, libraries, and rural health care support mechanisms.[51] In particular, MCI relies on the Commission's statement in the *Universal Service Order* that the assessment methodology adopted by the Commission for the schools, libraries and rural health care support mechanisms, which is based on total interstate and intrastate revenues, is merely a calculation of a federal charge, not a regulation of rates for intrastate service.[52] By analogous reasoning, MCI contends, calculation of the FUSF "based on an *inter*state customer's total usage does not render that charge a rate for *intra*state services."[53] Accordingly, MCI maintains, VSCC's central claim denying that the FUSF was an interstate rate applied only to interstate customers is unsupported.[54]

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46 VSCC Brief at 7-8; VSCC Reply at 1-2.

47 VSCC Brief at 7-8; VSCC Reply at 3-6.

48 MCI Brief at 7-8 (citing *Universal Service Order*, at 9199, 9209-10, paras. 829, 851);*see also* Reply Brief of MCI Telecommunications Corporation (MCI Reply) at 8-9 (filed December 11, 1998) (citing *Joint Board Recommended Decision* at para. 64).

49 MCI Brief at 8 (citing *Universal Service Order*, at 9209-10, paras. 851, 853).

50 47 U.S.C. § 254(d).

51 MCI Brief at 7-8.

52 *Id.* at 8 (citing *Universal Service Order*, at 9196, para. 821).

53 *Id.* (emphasis in original).

54 MCI Brief at 8-9; MCI Reply at 2-3.

18. Similarly, MCI argues that charging the FUSF only to customers that had interstate usage in a given period means that the fee was charged only to "interstate customers." This is consistent, MCI reasons, with the Commission's finding that its own assessment of interstate universal service obligations, even if calculated in part based on intrastate revenues, is entirely interstate and distinct from regulation of rates for intrastate service.[55]

2. Analysis

19. The *Universal Service Order* generally permits, but does not require, carriers to recover the cost of their universal service contributions from their "customers of interstate services."[56] For carriers that elect to recover their federal universal service contribution costs from their customers of interstate services, the *Universal Service Order* does not specify a particular method for calculating such recovery.[57] Rather, the Commission requires only that carriers obtain recovery of the cost of their universal service contributions "in an equitable and nondiscriminatory fashion"[58] and "through rates for interstate services."[59]

20. Based on a review of the record before us, we cannot conclude that MCI's recovery methodology at issue here violates the *Universal Service Order*. In the *Universal Service Order*, the Commission declined to "mandate that carriers recover contributions in a particular manner;"[60] the Commission, instead, permitted "carriers the flexibility to decide how they should recover their contributions."[61] Under these circumstances, a carrier could reasonably have concluded that the methodology for recovering universal service contributions at issue here

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[55] MCI Brief at 7-9.

[56] *Universal Service Order*, at 9209, para. 851 ("Although we do not mandate that carriers recover contributions in a particular manner, we note that carriers are permitted to pass through their contribution requirements to all of their customers of interstate services in an equitable and nondiscriminatory fashion").

[57] *Id.* at 9211, para. 853 ("We agree with state members [of the Joint Board] and CPI that we should allow carriers the flexibility to decide how they should recover their contributions") (footnote omitted). In the Second Recommended Decision, released by the Federal-State Joint Board on Universal Service (Joint Board) on November 23, 1998, the Joint Board did not address the specific question of the appropriate manner of recovery of universal service contributions from consumers. *In the Matter of Federal-State Joint Board on Universal Service*, Second Recommended Decision, CC Docket No. 96-45, FCC 98J-7 (rel. Nov. 23, 1998) (*Second Recommended Decision*). The Joint Board recommended only that "the choice of whether to collect universal service assessments from end users via a line-item charge on their bills should remain with the carriers. . . ." *Id.* at para. 69.

[58] *Second Recommended Decision* at para. 69. *See also Universal Service Order* at 9199, para. 829 (carriers may not shift more than an equitable share of their contributions to any customer or group of customers). Whether MCI's recovery methodology was equitable and nondiscriminatory is not at issue in the present complaint.

[59] *Universal Service Order*, at 9190, para. 809.

[60] *Id.* at 9211, para. 853.

[61] *Id.*

fell within the directive of the *Universal Service Order*. Therefore, we cannot conclude that, in this instance, MCI's recovery methodology was an unreasonable interpretation of the *Universal Service Order*. We note that the appropriateness of particular recovery methodologies will be addressed fully by the Commission in a forthcoming order on reconsideration of the *Universal Service Order*.[62]

B. MCI's FUSF and NAF Did Not Violate Section 2(b) of the Act.

21. VSCC contends that MCI's inclusion of the FUSF and NAF in its federal tariff violated section 2(b) of the Act, because the FUSF and NAF allegedly constitute charges for intrastate communications services.[63] Section 2(b) of the Act provides, in pertinent part:

> [N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to [ ]charges, . . . [and] practices . . . for or in connection with intrastate communications service . . ..[64]

22. Prior to considering whether the FUSF and NAF are charges for intrastate communications service, as alleged by VSCC, we must resolve the threshold issue of whether section 2(b) even governs the actions of common carriers such as MCI. That is, assuming, *arguendo*, that MCI filed a federal tariff that included a rate for intrastate communications service, would such action by MCI violate section 2(b)?

23. By its plain language, section 2(b) of the Act serves as a limitation on the application of the Act and on the jurisdiction of the Commission. Section 2(b) is silent about the actions of common carriers. The first disjunctive clause of section 2(b), *i.e.* "nothing in this Act shall *apply to*" intrastate service, is a rule of construction for other provisions of the Act, and not a limitation on common carriers. We conclude, therefore, that section 2(b), in and of itself, does not establish a rule of conduct with which a common carrier such as MCI must comply. Accordingly, we deny VSCC's claim that MCI's inclusion of the FUSF and NAF in its federal tariff violated section 2(b) of the Act.

24. We emphasize that VSCC's claim that the Act itself precluded MCI from including the FUSF and NAF in its federal tariff is based solely on section 2(b) of the Act.[65] Thus, we hold

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[62] Our resolution of this claim here moots MCI's Petition for Declaratory Ruling. An appropriate order will be issued in that proceeding.

[63] Complaint at paras. 28, 37; VSCC Brief at 9-12, 24; VSCC Reply at 5.

[64] 47 U.S.C. § 152(b).

[65] Complaint at paras. 28, 37. Late in the five-month period for resolution of this matter under section 208(b)(1) of the Act, 47 U.S.C. § 208(b)(1), Commission staff asked the parties to submit briefs regarding, *inter alia*, whether section 201(b) or section 203 of the Act precludes a common carrier from including in its federal tariff a charge for intrastate communications service. Letter to J. Carl Wilson, Jr., Donald B. Verrilli, Jr., William

in this Order only that *section 2(b)* of the Act did not prohibit such inclusion. We do not address in this Order whether any other provision of the Act prohibits a common carrier from including in its federal tariff a charge similar to the FUSF and NAF.

C. MCI's Claim Under Section 203 of the Act Should Be Severed and Resolved in a Separate Subsequent Order.

25. As mentioned above, VSCC also asserts that, even assuming, *arguendo*, that the Act and the *Universal Service Order* permit a common carrier to base its universal service recoupment fees on its customers' intrastate and interstate usage charges, MCI violated section 203 of the Act by imposing and collecting such fees without describing them sufficiently in its federal tariff.[66] This claim is wholly independent of VSCC's claims under section 2(b) of the Act and the *Universal Service Order*. Moreover, this claim, unlike VSCC's claims under section 2(b) of the Act and the *Universal Service Order*, is not governed by the statutory deadline provided in section 208(b)(1) of the Act.[67] In addition, this claim presents challenging and potentially far-reaching issues that would benefit from further consideration by the Commission.

26. Given the foregoing, we believe that the public interest dictates that we sever VSCC's claim under section 203 of the Act from VSCC's claims under section 2(b) of the Act and the *Universal Service Order*. Accordingly, pursuant to our broad authority under sections 4(i)

H. Chambliss, and Alison L. Held from Deena M. Shetler, Attorney, Common Carrier Bureau, Enforcement Division, Formal Complaints and Investigations Branch (dated January 25, 1999). In its responsive brief, MCI stated, *inter alia*, that it would be prejudicial, unfair, and improper for the Commission to essentially amend VSCC's complaint to allege a claim that MCI violated either section 201(b) or section 203 because the NAF and FUSF were allegedly intrastate charges. Second Supplemental Brief of MCI Telecommunications Corporation at 4 (filed January 29, 1999). In the particular circumstances of this case, we agree with MCI. In neither its Complaint nor its initial briefs did VSCC allege or state a claim that MCI violated section 201(b) or section 203 because the NAF and FUSF were allegedly intrastate charges. Moreover, such allegations or claims, had VSCC made them, would have raised difficult and important issues warranting extensive analysis by the parties and the Commission. Finally, given the statutory deadline, the Commission cannot accord either itself or the parties, particularly MCI, a full and fair opportunity to engage in such analysis. Thus, notwithstanding the Commission staff's *sua sponte* inquiry regarding sections 201(b) and 203, we decline to "amend" VSCC's complaint to state a claim under section 201(b) or section 203, as described above. *See* 47 C.F.R. § 1.727(h) ("[a]mendments or supplements to complaints to add new claims or requests for relief are prohibited"); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, CC Docket No. 96-238, 12 FCC Rcd 22497, 22597-98 (1997) (*Formal Complaint Order*) (explaining that permitting amendments to complaints would unduly undermine the fair resolution of complaints subject to a statutory deadline), *appeal pending, U S West v. FCC*, No. 98-9501 (10th Cir. filed Jan. 20, 1998), *recon. pending*; *GE Capital Communications Services Corp. v. AT&T Corp.*, 13 FCC Rcd 13138, 13149, para. 24 (Com. Car. Bur. 1998) (declining to address a claim raised for the first time in the complainant's brief).

[66] Complaint at paras. 29-31; VSCC Brief at 14-17.

[67] 47 U.S.C. § 208(b)(1). *See Formal Complaints Order*, at 22511-14, paras. 32-37.

and 4(j) of the Act to structure our own proceedings to best serve the public interest,[68] we hereby sever VSCC's claim under section 203 of the Act, and we will promptly resolve that claim in a subsequent order in a separately docketed proceeding.[69]

27. As described above, this Order fully and finally resolves VSCC's entirely separate and independent claims under section 2(b) of the Act and the *Universal Service Order*. Consequently, with respect to those claims, this Order constitutes a final order under applicable law.[70]

IV. CONCLUSION

28. For the reasons discussed above, we deny VSCC's claims that MCI violated the *Universal Service Order* and section 2(b) of the Act. In addition, we sever VSCC's claim that MCI violated section 203 of the Act, and we will resolve that claim promptly in a separate, subsequent order.

V. ORDERING CLAUSES

29. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 2(b), 4(i), 4(j), 208, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(b), 154(i), 154(j), 208, 254, that the claims filed by Virginia State Corporation Commission against MCI Telecommunications Corporation in the above-captioned complaint alleging that MCI Telecommunications Corporation's conduct described herein violated section 2(b) of the Act, 47 U.S.C. § 152(b), and the *Universal Service Order* ARE DENIED.

30. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 4(j), 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 203, 208, that the claim filed by Virginia State Corporation Commission against MCI Telecommunications Corporation in the above-captioned complaint alleging that MCI Telecommunications Corporation's conduct described herein violated section 203 of the Act, 47 U.S.C. § 203, IS SEVERED from this proceeding and, consequently, this claim is hereby assigned the new file

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[68] 47 U.S.C. §§ 154(i),(j).

[69] *Id. See also* F.R.C.P. Rule 21. In order to effectuate the severance, a new file number has been established for the severed claim. Accordingly, all pleadings, correspondence, and any other filings concerning the severed claim made after the release date of this order shall be identified by file number E-99-01A.

[70] 47 U.S.C. § 402(a); 28 U.S.C. § 2342(a). We note that the District Court's decision regarding MCI's challenge to VSCC's Show Cause Order does not appear to relate to VSCC's claim here under section 203 of the Act. See *MCI Telecommunications Corp. v. Virginia State Corp. Comm'n, supra.* In communications with Commission staff attorneys, MCI orally agreed not to request any delay of the resolution of VSCC's appeal of the District Court's decision based on the Commission's severance of the section 203 claim here. *See MCI Telecommunications Corp. v. State Corp. Comm'n*, No. 98-2026 (4th Cir. filed July 10, 1998). In light of this agreement, VSCC and MCI orally consented to severance of VSCC's section 203 claim, if the Commission deemed it appropriate to do so.

number E-99-01A. Accordingly, all pleadings, correspondence, and other filings concerning this claim made after the release date of this order shall be identified with file number E-99-01A.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Commonwealth of Virginia State Corporation Commission v. MCI Telecommunications Corporation (File No. E-99-01).

I respectfully dissent from today's decision to allow carriers to recover federal schools and libraries charges based on an end-user's *intrastate* calls.[71] I believe that basing a percentage surcharge on customers' intrastate calls cannot be considered recovery "through rates for interstate services only," as required by the Commission itself.[72] Today's decision from which I dissent, however, finds that under current FCC orders it is appropriate and reasonable for a carrier to charge a federal percentage surcharge based on a customer's intrastate calling, and that such a practice does not impact the "charges" for intrastate calls that are properly under state commission jurisdiction. In contrast, I believe that such a practice does impact intrastate calls, and therefore is properly within a state's jurisdiction. Moreover, since the Commission noticeably fails to rely explicitly on the fact that MCI did not impose a surcharge on customers who made no interstate calls in a given month, the Commission signals its openness to the possibility that this "federal" surcharge could even be placed on customers where no interstate usage at all is involved.

Let me illustrate. Under the logic of today's decision, an MCI customer who lives in Richmond and makes $100 worth of calls to Norfolk can be assessed a federal schools and libraries tax -- or, euphemistically, a "fee" -- based on this intrastate revenue, regardless of the fact that he places only one 1 minute call across state lines at the dime-a-minute rate of $.10. Assuming a 5% contribution rate, that customer would owe a "federal" charge of $5.01: 5% x $100 intrastate and 5% x $.10 interstate. In effect, the Commission allows for a "federal" interstate charge and a "federal" *intrastate* charge. In fact the majority's analysis would not change at all if MCI's surcharge had been explicitly broken into two components: a Federal Interstate Universal Service Charge, and a Federal Intrastate Universal Service Charge. I cannot support a decision that determines, under these facts, (i) that a carrier is not recovering universal service charges through intrastate services, and (ii) that the Commission is not impacting intrastate "charges" in violation of Section 2(b).

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[71] The majority opinion describes the assessment on intrastate revenue as supporting "various Universal Service mechanisms." Memorandum Opinion and Order, at par. 7. For purposes of assessing contributions to the high cost and low income support mechanisms, however, the Commission assesses based on interstate revenue only. Universal Service Order, 12 FCC Rcd 8776, 9200. Moreover, currently the Commission does not assess any revenue to support the rural health care program. *See* Second Quarter 1999 Universal Service Contribution Factor Public Notice (rel. March 4, 1999). Thus, contrary to the majority's description, the only program that is supported through assessments on *intrastate* revenue *is* the *schools and libraries program*.

[72] Universal Service Order, 12 FCC Rcd 8776, 9190-91, 9198, 9203-04 (1997).

Today's decision demonstrates the fallacy of the Commission's argument that its assessment for the schools and libraries program based on intrastate revenues does not violate Section 2(b). As I have described on several occasions, the legality of this approach to calculating contributions is highly questionable.[73] As I read the Communications Act, it does not permit the Commission to assess contributions for universal service support mechanisms based on intrastate revenues, and I have repeatedly objected to this approach. I believe, rather, that the Act makes clear that the power to collect charges based on such revenues rests within the exclusive province of the States. Section 2(b) of the Communications Act creates a system of dual federal-state regulation for telecommunications. In essence, the Act establishes federal authority over interstate communications services while protecting state jurisdiction over intrastate services. I believe that the Commission's decision to look to *intrastate* revenues to determine federal universal service support for the schools and libraries program impermissibly encroaches on states' rights and violates the Act's federal-state dichotomy. Indeed, as I have discussed on numerous occasions, the Commission's actions in this regard -- and in many other ways as well -- violate the clear directives of the Telecommunications Act and are illegal.[74]

Perhaps most importantly, however, today's decision undermines several of the arguments advanced by the Commission in defense of its universal service rules before the U.S. Court of Appeals for the Fifth Circuit. First, in that litigation, the Commission argued that its actions did not violate Section 2(b) because it did not "regulate" intrastate telecommunications services.[75] But Section 2(b) actually bars the Commission from any jurisdiction with respect to "*charges*, classifications, practices, services, facilities *or regulations* for or in connection with intrastate communication service . . . "[76] I find it unfathomable that the Commission can uphold a federal

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[73] Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998; Separate Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998.

[74] *See, e.g.,* Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998. *See also,* Testimony of Commissioner Harold Furchtgott-Roth Regarding Universal Service before the Ways and Means Committee of the House of Representatives; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration,* 12 FCC Rcd 22801 (1997); Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Clarification of "Services" Eligible for Discounts to Schools and Libraries, rel. June 11, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Third Quarter 1998 Universal Service Contribution Factors, rel. June 12, 1998.

[75] FCC Brief in Texas Office of Public Utility Counsel v. FCC, at 184.

[76] 47 U.S.C. Section 152(b). *See also Louisiana PSC v. FCC,* 476 U.S. 355, 359 (1986) ("[T]he Act grants to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication' while expressly

charge based on *intrastate* calling as it does today, but still claim that it is not asserting jurisdiction over "charges, classifications, [or] practices . . . for or in connection with intrastate communication service."[77] The fact that this charge is filed in the form of a federal tariff does not convert what is essentially a charge "for or in connection with intrastate communication service" into an interstate charge. Indeed, in this Order, it is striking that the Commission fails even to explain *why* MCI "could reasonable have concluded that the methodolgy for recovering universal service contributions at issue here fell within the directive of the Universal Service Order."[78]

Second, the Commission argued to the Fifth Circuit that it has not violated Section 2(b) because, "[a]s the FCC has made *clear*, contributing carriers under this system must recover their contributions solely through interstate rates."[79] In the decision today, however, the Commission determines that this very same language is not quite so clear. Indeed, it determines that the language is ambiguous enough for a carrier to base the level of its federal schools and libraries charge to end users on the level of intrastate communications.[80] In other words, what is now "clear" is that by "interstate rates," the Commission meant that a carrier could charge an "interstate" rate based on the number and quantity of "intrastate calls." Indeed, the Commission does not even remove the possibility that such an "interstate rate" could include a charge placed on a consumer who makes no interstate calls whatsoever. Now that the Commission is really being "clear" about what can and cannot be done, I do not understand how it can continue to assert that it is not impacting intrastate communication services or intrastate rates that are outside of its jurisdiction.

Third, the Commission argued that the

> [P]etitioners do[] not explain how the assessment of federal charges can constitute regulation of intrastate services when those charges can only be recovered through interstate rates. Since [petitioners] ha[ve] failed to demonstrate how the challenged contribution system 'regulates' intrastate service, the court should reject the company's claim that the system violates section 2(b).[81]

Certainly, with today's order, the *Commission itself* demonstrates how its scheme regulates intrastate services since the "***interstate*** rates" of which the Commission speaks are actually rates

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denying that agency 'jurisdiction with respect to . . . intrastate communications service.") (internal citations omitted).

77 47 U.S.C. Section 152(b).

78 Memorandum Opinion and Order, at par. 20.

79 FCC Brief in Texas Office of Public Utility Counsel v. FCC, at 185.

80 Memorandum Opinion and Order, at par. 20.

81 FCC Brief in Texas Office of Public Utility Counsel v. FCC, at 186.

that are based on ***intrastate*** service usage. In fact, the Commission determines that such a recovery scheme was fully "within the directive of the Universal Service Order."[82]

To demonstrate the absurdity of the Commission's position, I take it out of the federal versus state framework. Suppose that a power or gas company, regulated by FERC and the relevant state authorities, entered the telecommunications market. The Commission's position would be analogous to claiming that it could base universal service contributions on that company's total revenue, including both its telecommunications and power or gas revenues. Under today's decision, moreover, the telecommunications subsidiary of the power company could also place a universal service surcharge on its end users based not only on that customers telecommunications revenues, but also based as a percentage of that customers power or gas usage. It seems absurd that the Commission could argue that such an action would not constitute either a charge or regulation of gas or power. Yet, the Commission seems to be arguing that it has the authority to enact such a scheme under the Telecommunications Act, claiming jurisdiction over power revenues merely because a power company's customer also availed themselves of that company's telecommunications service offering. I do not believe that Congress intended to provide such broad jurisdictional authority to the FCC.

In addition, I would note the Commission has scrupulously avoided relying too closely on MCI's practice of not charging customers who have no intrastate calls in finding no violation here.[83] The Commission has not wanted to rely too heavily on this fact because many carriers are recovering from customers through end-user charges regardless of whether any interstate calls are made. By failing to explicitly rely on this fact, however, the Commission has opened the door to upholding a "federal" universal service charge on customers who have no interstate calls whatsoever.

In conclusion, I note that some might ask why is it so important for the Commission to be able to assess based on intrastate revenues for the schools and libraries program? Why is it necessary to continue these legal gymnastics and absurdities just to preserve the ability to assess a carrier's intrastate revenues as well as its interstate revenues? The answer is that the contribution base more than doubles when intrastate revenues are included.[84] And it is much easier to place a new tax on a broader base because the effects that will be felt are much smaller. Thus, the inclusion of intrastate revenues makes new charges harder for consumers to find and easier for consumers to swallow. I fear that some here at the Commission may view intrastate revenue as a yet untapped source of revenue for the funding of their new and additional programs.

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[82] Memorandum Opinion and Order, at par. 20.

[83] Memorandum Opinion and Order, at par. 19-20.

[84] Second Quarter 1999 Universal Service Contribution Factor Public Notice (rel. March 4, 1999) (interstate only contribution base is $18.305 billion, while interstate and intrastate contribution base is $48.843 billion).

Dissenting Statement of Commissioner Gloria Tristani

Re: Commonwealth of Virginia State Corporation Commission v. MCI Telecommunications Corporation, Memorandum Opinion and Order

In the Universal Service Order, the Commission required carriers to contribute to the universal service programs identified in section 254 of the Telecommunications Act. The Commission said that carriers that elect to recover their contributions from subscribers may do so "through rates for interstate services only."[85] Because it appears to me that MCI's recovery methodology effectively raised the price of intrastate toll calls in Virginia, I must respectfully dissent from the majority's determination that MCI did not violate our "interstate-only" limitation.

During the period in question, MCI recovered its universal service contributions by charging its customers a percentage fee based on customers' total usage charges, including interstate and intrastate usage charges. For example, suppose there were two MCI subscribers located in Virginia, customers A and B. In a given month, Customer A used 10 minutes of MCI's interstate service plus 90 minutes of MCI's intrastate toll service. Customer B only used 10 minutes of MCI's interstate service. Under MCI's calculation of its federal universal service charge, customer A will pay a universal service charge that is ten times what customer B pays. Although the entirety of MCI's charge is labeled a "federal" charge, it seems inescapable that MCI's method of recovering its federal contributions effectively increased the cost of customer A's intrastate calls. In my view, that violates our requirement that universal service contributions be collected from subscribers only through rates for interstate service.

Part of the reason the Commission prohibited carriers from recovering federal contribution amounts through intrastate rates was to "promote[] comity between federal and state governments."[86] *Needless to say, I fully support that sentiment and believe it exceedingly important as we continue to work closely with state commissions to implement a new system of high cost support.*

I am pleased that the issue of recovery methodologies will be addressed in a forthcoming reconsideration order. I expect that order will allow us to address acceptable carrier recovery methods in a more comprehensive fashion. At that time, I hope to be able to support rules that fully reflect state jurisdiction over intrastate matters and that permit carriers to recover universal service contributions in flexible and non-discriminatory ways.

85 *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9198 (1997).

86 *Federal-State Joint Board on Universal Service*, 12 FCC Rcd at 9198.