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February 18, 1999

ORIGINAL

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 Memorandum of Law.

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

Very truly yours,

Richard D. Melson

RDM/kcg
Enclosures
cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re:	)	
	)	
Order to Show Cause Against	)	DOCKET NO. 980435-TI
MCI Telecommunications Corporation	)	
For Charging FCC Universal Service	)	FILED: February 19, 1999
Assessments on Intrastate Toll Calls	)	
	)	

MCI TELECOMMUNICATIONS CORPORATION
MEMORANDUM OF LAW

For seven months during 1998, MCI charged to its interstate business customers, pursuant to its federal tariff, a Federal Universal Service Fee ("FUSF") that was calculated as a percentage of its interstate customer's total monthly revenues. For three months during 1998, MCI charged to its interstate small business customers, again pursuant to its FCC tariff, a National Access Fee ("NAF") that was calculated as a percentage of its interstate customer's total monthly revenues.

The Staff of the Florida Public Service Commission ("Commission") has not challenged the reasonableness of the rate levels MCI charged relative to its universal service and access costs, and MCI has repeatedly emphasized that it has designed these elements to recover no more than MCI's cost. Rather, the Staff has alleged that, because the FUSF and NAF were based in part on interstate customers' intrastate revenues, MCI's collection of these fees violated Florida law because it tariffed them, not in Florida tariffs, but in tariffs filed at the Federal Communications Commission ("FCC").

Not only is MCI's practice lawful, but in the case of the FUSF it was specifically authorized by an FCC order. Moreover, the proper jurisdictional forum for this debate over MCI's compliance with federal rules is the FCC, which is currently considering this very question. The Florida Public Service Commission cannot adjudicate the lawfulness of MCI's FCC tariff or order MCI to violate that tariff.

Background

Federal Universal Service Subsidy Programs Reach Intrastate and Interstate Revenues.

On May 8, 1997, the FCC adopted an order that revised certain existing federal universal service subsidy programs and created new subsidy programs pursuant to the

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Telecommunications Act of 1996.[1] In compliance with this FCC order, MCI and all other telecommunications carriers that provide interstate telecommunications services must contribute to universal service support for eligible schools, libraries, and health care providers and for high cost and low-income programs. Following the recommendation of the Federal-State Joint Board on Universal Service, the FCC ordered that "universal support mechanisms for schools and libraries and rural health care providers be funded by assessing both the intrastate and interstate revenues of providers of interstate telecommunications services."[2]

The FCC concluded that its decision to base a carrier's contributions on intrastate revenue, as well as interstate revenue, did not violate Section 2(b) of the Communications Act establishing the parameters of its jurisdiction. Section 2(b) provides that "nothing in [the Communications Act] shall be construed to apply or give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications by wire or radio."[3] The FCC found that, with respect to its jurisdiction to assess intrastate and interstate revenues for universal service purposes, the FCC "merely is calculating a federal charge based on both interstate and intrastate revenues, which is distinct from regulating the rates and conditions of interstate service."[4] According to the FCC, even when it exercises jurisdiction to assess contributions for universal service support from intrastate revenues, "such an approach does not constitute rate regulation of those services or regulation of those services so as to violate section 2(b)."[5] The FCC further found that "[t]here is no indication that Congress's authorization in section 254(f) of a separate support mechanism covering intrastate carriers evidences an intent that the amount of a carrier's contributions to the respective support mechanisms similarly should be based on the type of communications service, interstate or intrastate, provided by the carrier."[6]

In addition to the FCC's statements on its jurisdiction to assess total revenues, the FCC also found that carriers can recover their contributions to federal universal service support through interstate rates. The FCC made this decision, in part, due to concerns expressed by some carriers that they would be unable to establish state rates to permit full recovery of the subsidies.[7] Further, the FCC stated that carriers are "permitted . . . to pass through their contributions to their interstate access and interexchange customers."[8]

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[1] Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, (rel. May 8, 1997).
[2] Id. at para. 806.
[3] 47 U.S.C. Section 152(b)
[4] Id. at para. 821.
[5] Id.
[6] Id. at para. 819.
[7] Id. at paras. 825-28.
[8] Id. at para. 829.

FCC Access Reform Order Was Improperly Implemented

Also on May 7, 1997, the FCC adopted an order reforming its system of interstate access charges.[9] In that order, the FCC directed the largest incumbent local exchange carriers (ILECs) to remove from per minute rates certain costs for the interstate portion of local loops, and to create a new, flat "per line" charge – called a presubscribed interexchange carrier charge ("PICC") – to recover the costs. In addition, the FCC directed that PICC rate levels would vary by the type of customer and the number of lines that a customer has activated. With respect to MCI's practices at issue in the current proceeding, the ILECs' schedule of PICC charges is as follows:

Single line business customers: $0.53 for a single line
Multiline business customers: $2.75 per line

ILECs were ordered by the Commission to provide to interexchange carriers (IXCs) information concerning whether an IXC customer would be charged to the IXC as a single line or multiline customer. The FCC's access reform order recognized that IXCs would recover their PICC costs in some manner. However, it refrained from dictating the method of cost recovery, instead giving the IXCs complete flexibility.[10]

In the period of time leading up to the implementation of the new access structure, ILECs were dragging their feet in producing the basic data that would tell an IXC whether the IXCs customer was considered single or multiline by the ILEC. In an Order on Reconsideration adopted in October 1997, the FCC required ILECs to provide IXCs with customer-specific information about the number and types of PICCs the ILECs planned to assess for each of the IXCs presubscribed customers.[11] This information is critically important to the IXC, which has no way to determine whether a customer who appears to be a single line customer, is in fact a multiline customer with a line presubscribed to another IXC. Due to the disparate PICC rate levels that apply, making such a determination has significant consequences for the IXC's access charges and its cost recovery plans. However, the ILECs, including BellSouth, ignored the requirements of the FCC's October order and provided no information to MCI.

In fact, so confused was the implementation of the new PICCs, that MCI subsequently filed an Emergency Petition with the FCC, seeking prescription of a definition of primary lines and the immediate disgorgement by ILECs of information on MCI's customers.[12]

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[9] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers' Transport Rate Structure and Pricing; End User Common Line Charges, 12 FCC Rcd 15,982 (1997).
[10] Id. at paras. 88-105.
[11] Second Order on Reconsideration, 12 FCC Rcd 16,606 (1997) at para. 16.
[12] MCI Emergency Petition for Prescription, CC Docket No. 97-250 (1998).

MCI's FCC tariffs

Consistent with the flexibility afforded to IXCs under the Universal Service Reform decision and the Access Reform decision, MCI, on December 17, 1997, filed with the FCC interstate tariffs to establish the FUSF to recover its costs for universal service, and the NAF to recover its PICC costs. Specifically, effective January 1, 1998, MCI imposed on its business (but not its residential) customers the FUSF. The FUSF was generally calculated in a manner consistent with the approach used by the FCC to calculate carriers' contributions to the universal service funds. Because the FCC had calculated carriers' contributions as a percentage of their total revenues from intrastate, interstate, and international calls, MCI recouped its universal service obligations by charging interstate customers a percentage of their total billings.

Beginning August 1, 1998, MCI changed its tariff for business FUSF to recover its universal service costs from interstate customers based on interstate and international revenues only. In doing so, MCI did not and does not suggest, admit, or imply that its prior practice of charging based on total telecommunications revenues was unlawful. To the contrary, MCI filed a Petition for Declaratory Ruling with the FCC seeking to have the FCC declare that its prior practice of charging total revenues was permissible under the Universal Service Reform decision.[13] As a result of MCI's tariff changes, the only revenues at issue in the instant proceeding are the intrastate portion of its FUSF charges to business customers from January 1, 1998 through July 31, 1998.[14]

With respect to its small business NAF, MCI's tariff was designed to approximate an equivalent per line charge that could have been tariffed if MCI had received customer line information from the ILECs. The only information available to MCI at the time it designed the charge was customer revenue. MCI reasoned that, on average, small business customers with higher revenue were likely to have more lines, and hence would be larger "cost causers" under the new access structure. Effective January 1, 1998, MCI tariffed a formula for small business customers that applied to total revenue. The formula was designed to produce a charge that approximated MCI's PICC costs for that customer, using some reasonable assumptions about the number of lines, as follows:

$00.00	to	$25.00	x 30%
$25.00	to	$100	x 27%
$100.00	to	$250.00	x 20%
over $250.00			x 13%

Using this formula, for example, an MCI small business customer with a $10 monthly bill would be charged an NAF of $3.00.

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[13] MCI Petition for Declaratory Ruling, CC Docket No. 96-45, filed April 3, 1998.

[14] MCI did not impose a residential FUSF until July 1, 1998, and at that time charged its interstate customers based on interstate and international revenues. As a result, these charges are not at issue in the instant case.

Effective April 1, 1998, MCI revised its small business NAF tariff by substituting a flat fee of $2.75 per line. As a result of this tariff change, the only charges at issue in the instant proceeding are the intrastate portion of small business NAF fees that were collected from January 1, 1998 through March 31, 1998.

Florida PSC Order to Show Cause

On May 18, 1998, the Commission issued an Order to Show Cause against MCI. The Commission stated that MCI has no authority for its assessment of the NAF and the FUSF on the intrastate portion of customer bills. The Commission stated that, with respect to MCI's FUSF, the FCC's order does not permit charges to customers based on total revenues, which include intrastate revenues. The Commission further stated that the FCC did not permit IXCs to pass through universal service costs. The order also expressed "concern" with MCI's small business NAF charge which was assessed based on total revenues, including intrastate revenues.

Argument

There are no factual disputes in this proceeding. MCI does not contest that its FUSF billed to business customers from January 1, 1998 through July 31, 1998 applied against the customer's total revenues, including intrastate revenues. MCI further does not contest that, for the first three months of 1998, its small business NAF applied to total revenues, including intrastate revenues.

In addition, the Commission's concerns, as expressed in its Order to Show Cause, that MCI take no further action to charge customers for universal service costs or PICCs based in part on intrastate revenues, have been honored. MCI's residential FUSF is based solely on a customer's interstate and international usage. Effective August 1, 1998, MCI's business FUSF is based solely on interstate and international usage. Further, since April 1, 1998, all NAF charges have been flat, per line charges. Moreover, at no time did MCI bill its business FUSF or small business NAF to intrastate-only customers. Consistent with these charges being tariffed in MCI's FCC tariff, only interstate customers – those with interstate usage – were billed FUSF or NAF.[15]

The issues at stake in this proceeding are legal ones, involving (1) whether MCI can, pursuant to federal law, recover universal service costs or interstate access costs via a federally-established tariff charge on a customer's total revenues, and (2) whether the Commission has jurisdiction to invalidate MCI's federal tariff or order MCI to violate that tariff. MCI's federal charges for the FUSF and NAF are lawful, permissible, and clearly within the limits of flexibility that the FCC provided in its relevant orders. While the Commission may be unhappy with the FCC's decisions in its universal service and access reform dockets that caused these charges to be created, the Commission's concerns are more appropriately addressed to the FCC directly, not to MCI. Furthermore,

[15] MCI is aware of no intrastate-only customer who was billed these federal charges. If such a customer were to have inappropriately received a bill for FUSF or NAF, MCI would credit that customer's account, consistent with our policy and tariff requirements.

if the Commission takes issue with MCI's implementation of the FCC's decisions, the proper jurisdiction to debate the implementation of FUSF and NAF is at the FCC itself, since it is the meaning of the FCC's orders that comprise the heart of the arguments at issue in this case. It is the FCC – not the state commissions – who must interpret its orders and review carrier implementation practices.

Should the Commission nevertheless rule adversely to MCI on the issues of whether its charges were lawful, and further declare that it has jurisdiction to decide the merits of this case, the Commission should not take further action to order refunds or credits in this case. The charges in question are now historical artifacts, and were imposed only during a limited period of time. The "total revenue" version of the NAF existed for only three months, and the "total revenue" version of the business FUSF existed for only seven months. In addition, the same set of customers – those who made interstate and international calls – paid the prior charges and the present charges and there is no reason to believe that, as a group, these customers were charged higher amounts (for a given amount of calls) under the prior charges. Finally, a refund or credit would also create windfalls for a substantial number of customers (those whose rates are higher using the present method), and would require MCI to raise current charges on interstate calls to recoup the amounts that would have be refunded or credited. In these circumstances, retroactively penalizing MCI by ordering a refund or crediting of its FUSF would be inequitable.

With respect to the small business NAF, the equitable balance tips even more strongly against refunds or credits. In the case of the NAF, MCI was at the mercy of an improper implementation of a new interstate access structure. MCI should not be blamed, much less required to pay a financial penalty for FCC and ILEC failures to properly implement FCC rules.

(1) Did MCI bill customers for its NAF and FUSF based on intrastate charges in Florida?

MCI stipulates that its federally tariffed NAF was billed based on total small business customer revenues from January 1, 1998 to March 31, 1998. MCI further stipulates that its federally tariffed FUSF for business customers was billed based on total customer revenues from January 1, 1998 to July 31, 1998.

(2) What authority did MCI have to collect NAF and FUSF based on intrastate charges in Florida?

MCI's authority to charge its FUSF and NAF are based on federal law. This memo first addresses MCI's authority to collect FUSF, and then addresses the NAF.

(a) MCI lawfully collected the FUSF from its business customers from January 1, 1998 through July 31, 1998, pursuant to its federal tariff and FCC orders

MCI's practice of calculating the FUSF on the basis of total usage of its interstate customers is fully consistent with, and authorized by, the FCC's Universal Service Order, and complies with all relevant sections of the federal Communications Act, as amended. The Universal Service Order permits carriers to "pass through their contribution requirements to all of their customers of interstate services."[16] The FCC specifically declined to mandate a particular method of recovery from interstate customers, instead "allow[ing] carriers the flexibility to decide how they should recover their contribution."[17] Thus, by its plain terms, the Order simply limits carriers to recovering contributions from "interstate access and interexchange customers." That is all MCI did here.

The Act requires all carriers that provide interstate telecommunications services to "contribute, on an equitable and nondiscriminatory basis," to the FCC's universal service mechanisms.[18] In the Universal Service Order, the Commission implemented the Act's requirement by assessing on all interstate carriers a *pro rata* contribution to the federal universal service fund based on revenues those carriers derive from end users.[19] For high cost and low income funds, the contribution is assessed on the basis of interstate end-user revenues. For the rural health care and schools and libraries funds, the contribution is assessed on the basis of both intrastate and interstate end user revenue.[20]

While the FCC did not require interexchange carriers to recover their contributions by assessing charges on total usage, neither did the order forbid it. In fact, it is clear from the FCC's own reasoning that the calculation of a surcharge based on an interstate customer's total usage does not render that surcharge a rate for intrastate services. In determining that the calculation of the universal service contribution for the rural health care and schools and libraries funds (the largest portion of the universal service contribution) would be based on both interstate and intrastate revenues, the FCC reasoned that "when assessing contributions based on intrastate and interstate revenues, the Commission merely is calculating a federal charge based on both interstate and intrastate revenues, which is distinct from regulating the rates and conditions of [intrastate] service."[21] According to the FCC, such an approach does not constitute rate regulation of intrastate services.[22]

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[16] Universal Service Order at para. 851. See also at para 829 ("carriers will be permitted . . . to pass through their contributions to their interstate access and interexchange customers.")

[17] Universal Service Order at paras. 851, 853.

[18] 47 U.S.C. Section 254(d).

[19] Universal Service Order at para. 844.

[20] Id. at 808, 837, 840.

[21] Id. at 821. See also paras. 808, 837, 840.

[22] Id. at 821.

Similarly, when assessing a universal service surcharge based on an interstate customer's total calls, a carrier is merely calculating a federal interstate charge, which is distinct from setting a rate for intrastate service. Just as the FCC is not regulating intrastate rates when it calculates carriers' contributions on the basis of their total intrastate and interstate revenues, a carrier is not setting an intrastate rate when it files a tariff imposing a charge that is calculated on the basis of total intrastate and interstate usage, but is imposed only on customers who make interstate calls. Thus, when MCI calculated the amount of each interstate customer's FUSF by taking into account the customer's interstate and intrastate calls, MCI was not violating the FCC's order, but was simply following the FCC's approach.

Moreover, by imposing the disputed charges only on customers who used interstate or international service, MCI acted in a manner entirely consistent with the FCC's rationale. Indeed, the FCC made clear that its primary reason for declining to require that carriers recoup their contributions based on intrastate revenues was a fear that doing so would lead carriers to "increase[] rates for basic residential dialtone service, contrary to the affordability principle contained in section 254(b)(1)."[23] MCI's approach would not have done so, both because the assessment was on business customers only and because the charge was calculated as a percentage of intrastate interexchange service – not basic local service.

MCI's FUSF is also fully compliant with Section 2(b) and Section 203 of the Communications Act.[24] Section 2(b) provides that "nothing in this [Act] shall be construed to apply or give the [Federal Communications] Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio."[25] Section 203(a) of the Act requires carriers to file tariffs "showing all charges . . . for interstate and foreign wire or radio communication . . . ." The charges at issue here were in compliance with sections 2(b) and 203(a) because they were federal charges applied only to customers who used MCI's interstate or international service, and were imposed solely for the purpose of recouping contributions that the Commission had imposed on interexchange carriers (including MCI) pursuant to specific congressional grants of authority, as discussed above.

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[23] Id. at 838.

[24] 47 U.S.C. 152(b) and 47 U.S.C. 203. Section 2(b) divides telecommunications jurisdiction between federal and state regulators, while Section 203 establishes federal tariffing requirements.

[25] See Louisiana Pub. Service Comm'n v. FCC, 476 U.S. 355, 377 (1986); Illinois Pub. Telecomms. Ass'n v. FCC, 117 F.3rd 555, 561-63 (D.C. Cir. 1997), cert. Denied, 118 S.Ct. 1361 (1998).

(b) MCI lawfully collected its small business NAF from January 1, 1998 through March 31, 1998, pursuant to its federal tariff and FCC orders.

MCI also lawfully collected its small business NAF from January 1, 1998 through March 31, 1998, consistent with the relevant FCC orders, its tariff, and federal statute. Beginning January 1, 1998, MCI and other IXCs became responsible for paying to most ILECs various PICCs under the interstate access charge rules. While the actual amount of MCI's PICC bills from BellSouth, GTE and other large ILECs were – and are – a matter of controversy due to the FCC's failure to properly implement the new fees, there is no question that MCI is obligated to pay ILECs on a per presubscribed line basis for its small business customers. Furthermore, there is no dispute that in the federal regulatory system, MCI is regulated as a nondominant carrier that has virtually no regulation of its rate structure by the FCC. Consistent with the FCC's treatment of all IXCs as nondominant carriers, the FCC's Access Reform decision is silent on how IXCs can or should recover their costs under the new access structure – which includes PICCs.[26] MCI elected to flow through the PICC to its customers, consistent with its desire to respond to competitive conditions in the marketplace and to maintain as low a per minute rate structure as possible.

While the decision to charge the NAF is within the discretion of MCI, MCI's decision about how much to charge for its flow through of NAF is bound by the Communication Act's requirements that charges be "just and reasonable."[27] While MCI knew the amounts of the ILEC's tariffed PICCs, it had no way to know at the time how much MCI would be billed for PICCs based on MCI's customer base. Furthermore, as discussed above, the FCC-mandated data that ILECs were supposed to provide about MCI's customer base never materialized.

Confronting a new set of access charges and costs, with the absence of data that would allow it to recover those costs precisely from the "cost causers," MCI created a formula that it believed would produce a just and reasonable result for small business customers. One *component* of the formula is total revenues. MCI tariffed at the FCC the entire formula – and it is the result of the formula that appears on MCI interstate small business customer bills as a federal charge called the NAF.

As tariffed, the small business NAF formula creates four groupings of customers based on total spending levels. In the first grouping, customers spending between $0.01 and $25.00 are assessed a fee based on a formula that multiplies their total invoice charge times 0.30 (or 30%) to produce a flat NAF that is billed as an interstate line item. Applying this formula, a customer with total spending of $8.00 receives an NAF of $2.40. That level of NAF may, in fact, be different from the PICC that the ILEC is charging, since the ILEC will either bill MCI $0.53 if ILEC determines the customer is

[26] Indeed, it is informative that throughout the debate on this subject, neither the staff's recommended decision nor the Order to Show Cause cites any authority suggesting that the FCC precluded IXCs from flowing through PICC rate structures in the form of retail flat fees in the interexchange market.

[27] See Sections 201 and 202 of the Communications Act, 47 U.S.C. Sections 201, 202.

single-line or $5.50 (2 x $2.75) if the ILEC determines the customer is multiline. Under this approach, almost half of our small business customers were billed an NAF of $5 or less each month for the duration of the time the formula remained in use.

MCI's small business NAF in its initial design, was merely an attempt to recover access costs. MCI made reasonable assumptions that, as small business revenue grew, it was likely that customers would have multiple lines. Had MCI had access to the customer data that ILECs have – and who ignored FCC orders to provide such data – the small business NAF formula would have been unnecessary. In no event was MCI seeking to profit from its NAF.

The formula MCI used to recover its PICC charges for small business customers for the three month period at issue here was properly tariffed in MCI's FCC tariff, resulted in an interstate flat charge, and was just and reasonable. Use of a customer's total revenues as a component in deriving a properly-tariffed federal charge does not convert that charge to an unlawful intrastate charge.

(3) What authority, if any, does the Commission have over MCI's collection of NAF and FUSF based on charges for intrastate calls in Florida?

MCI does not contest the jurisdiction of the Commission in matters of intrastate rates and regulation. But the Commission lacks the authority to order MCI to depart from its federally tariffed rates, including the FUSF and NAF. As stated in MCI's Motion to Dismiss, MCI has a federal statutory obligation 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.[28] MCI "is without the power to charge more or less than the charges set out in its federal tariff."[29] Moreover, once a tariff is filed with the FCC, it attains the status of binding federal law.[30] Thus, once MCI files its tariff with the FCC, the fees contained in that tariff become federal law, and MCI is bound to charge those fees.

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[28] American Tel. & Tel. Co. v. Central Office Tel., Inc., 118 S.Ct. 1956 (1998), citing 47 U.S.C. Section 203.

[29] MCI Telecommunications Corp. v. Virginia Corporation Commission, 11 F. Supp. 2d 669,674 (E.D. Va. 1998), citing MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 230 (1994); Coliseum Cartage Co. v. Rubbermaid Statesville, Inc., 975 F2d 1022, 1023 (4th Cir. 1992)("a carrier must collect in full the published rate.")

[30] 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."); Cahnmann v. Sprint Corp., 133 F3d 484, 488 (7th Cir. 1998)("A tariff filed with a federal agency is the equivalent of federal regulation."); Western Union Int'l, Inc. v. Data Dev., Inc., 41 F3d 1494, 1496 (11th Cir. 1995)("a tariff, required by law to be filed, constitutes the law and is not merely a contract")(quoting AT&T v. Florida-Texas Freight, Inc., 357 F. Supp. 977 (S.D. Fla. 1973), aff'd, 485 F.2d 1390 (5th Cir. 1973); MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 230 (1994); Keogh, 260 U.S. at 163 ("Unless and until suspended or set aside, [the tariff] rate is

The Commission has no authority to order MCI to charge less than the rates set forth its federal tariff or to refund amounts previously collected pursuant to that tariff. Any state order that requires MCI to charge a rate different from that in its federal tariff or to refund amounts collected pursuant to that tariff would create an "outright or actual conflict between federal and state law," and is therefore preempted.[31] Because the federal tariff is itself federal law, any state action that seeks to modify such tariff is effectively seeking to modify federal law. A state is not authorized to take such a step.[32] The legality of interstate charges 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 Florida 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. [33] Rather, the only entity with authority to order MCI to declare unlawful the charges set forth in MCI's interstate tariff is the FCC.

In addition, a state order prohibiting MCI from collecting federally tariffed fees and requiring a refund of previously collected fees would put MCI in the untenable position of not being able to comply with both state and federal law. Moreover, interfering in the federal rate-setting scheme would stand as an obstacle to fulfilling Congress' purpose to grant the FCC the exclusive authority to set rates for interstate and international telephone service and to ensure those rates are uniform and nondiscriminatory.[34]

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made, for all purposes, the legal rate . . . ."); Coliseum Cartage Co., Inc. v. Rubbermaid Statesville, Inc., 975 F.2d 1022, 1023 (4th Cir. 1992) ("a carrier must collect in full the published rate").

[31] Louisiana PSC, 476 U.S. at 368. See, e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 580 (1981) (holding that a 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 the Supremacy Clause); Northern Natural Gas Co. v. State Corporation Commission, 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); Public Service Comm'n of West Virginia v. FPC, 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).

[32] See Appalachian Power Co. v. Public Service Comm'n of West Virginia, 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).

[33] MCI Telecommunications Corp. v. Virginia Corporation Commission, 11 F. Supp. 2d at 674-75.

[34] See, e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 582 (1981)(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"); Appalachian Power Co., 812 F.2d at 905 ("[l]odging exclusive authority in FERC to consider the merits of [cost allocation agreement] . . .

The federal filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."[35] The cornerstone of the filed rate doctrine is the principle that only the rate-setting agency – here, the FCC – may alter the filed rate.[36] Through this principle, the filed rate doctrine recognizes and protects Congress' interest in preventing discrimination among ratepayers by ensuring that the Congressional scheme of uniform rate regulation is not disturbed.[37] A state order setting aside a portion of MCI's charges would destroy the uniformity of federal charges among MCI's customers.[38] Those customers who use interstate long distance service and reside in Florida would pay a different federal rate 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 interstate charges. Such a result would destroy the uniformity that the federal law requires.

As a result, the Florida Commission's proposed action in this case is preempted by federal law. Federal law may preempt state law in at least three ways. First, state law is preempted where there is an actual conflict between federal and state law. Second, state law is preempted where compliance with both state and federal law is impossible. Third, state law is preempted where it stands as an obstacle to the accomplishment of Congress' purpose in enacting a federal statute or regulation.[39] Preemption may result not only from action taken by Congress itself, but also by a federal agency acting within the scope of its congressionally delegated authority.[40] Its action is preempted "both because compliance with it and federal law is impossible and because it stands as an obstacle to the accomplishment of a uniform regulatory scheme intended by Congress

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forecloses potential for differing state pronouncements regarding an agreement involving utilities regulated by various states"); Public Service Comm'n of West Virginia, 437 F.2d at 1239 ("If the acquisition of rights in an interstate transportation line were subject to the veto of every state regulatory agency along the line, a single agency could seriously impair interstate commerce and the interests protected by the [federal] Act . . . .").

[35] Arkansas Louisiana Gas, 453 U.S. at 577.

[36] See, e.g., Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co., 341 U.S. 246, 251 (1951); Marcus v. AT&T Corp., 96-9244, 96-9256, 1998 WL 91098, *12 (2d Cir. Feb. 28th 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).

[37] See, e.g., MCI Telecommunications Corp., 512 U.S. at 230; Maislin Industries, 497 U.S. at 126.

[38] 47 U.S.C. Section 254(g) (requiring FCC rules to ensure that interstate rates are available nationally on a geographically averaged basis). 47 U.S.C. Section 202 prohibits "unjust and unreasonable" discrimination.

[39] Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 368-69 (1986); Cox v. Shalala, 112 F.3rd 151, 154 (4th Cir. 1997).

[40] Louisiana PSC, 476 U.S. at 369.

through federal communications law."[41] As a consequence of the proposed action here, MCI's interstate customers who receive bills in Florida would receive a rate different from its federal tariff. This creates an impermissible conflict between federal and state law that cannot stand.

Under the scheme established by the Communications Act, there are only two methods to challenge the lawfulness of a federal tariff and both approaches rest exclusively with the FCC. First, under Sections 204 and 205 of the Communications Act (47 U.S.C. Section 204 and 205), the FCC, either upon petition or 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 investigation. An order determining the lawfulness of a tariff is reviewable in the federal Courts of Appeals pursuant to section 402 of the Communications Act. Anyone, including state commissions, may request that the FCC initiate a tariff review. Second, Section 208 of the Communications 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 Act. Thus, where a carrier's tariff is in effect, any individual or entity that believes the tariff is invalid may petition the FCC for relief.

MCI notes that, with respect to its FUSF charges, it has filed a petition for declaratory ruling at the FCC, seeking a determination that the language of the Universal Service Order permits a retail fee that is based on a customer's total revenue. Comments and reply comments on this petition have been received by the FCC, and a decision is pending. Moreover, the Virginia State Corporation Commission has filed an FCC complaint against MCI under Section 208 on the precise question at issue in this proceeding. That is the proper mechanism for resolution of the legal issue raised in the Commission's show-cause order.

(4) If the Commission has authority, should it prohibit MCI from collecting NAF and FUSF based on charges for intrastate calls in Florida?

As previously stated, the Commission does not have the jurisdiction to order MCI to charge less than the rates specified in its FCC tariff or to refund amounts previously collected pursuant to that tariff. If the Commission disagrees with MCI's approach, it must take its concerns to the FCC in the form of a complaint or other action. Further, since MCI is no longer collecting NAF and FUSF based in any way on intrastate revenues, this issue would be moot even if the Commission did have jurisdiction.

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[41] Id.

(5) If the Commission has the authority, should it order MCI to refund with interest all the monies collected for NAF and FUSF attributable to charges for intrastate calls in Florida?

Refunds or credits are inequitable here for the fundamental reason that the Commission does not find – nor could it – that MCI overcharged its customers. As discussed above, MCI is entitled to recover from its customers the amount it must pay for the federal universal service fund and for the PICC charges. There is no allegation in this case that MCI's prior practices resulted in MCI collecting a penny more than it was entitled to collect under federal law. To the contrary, this is entirely a jurisdictional dispute over whether MCI's federal tariffs may include a federally-established charge on total revenues.

By assessing the FUSF on the basis of total revenues, MCI was able to charge a smaller overall percentage in order to recover its contributions. When MCI changed its methodology and assessed charges based solely on interstate and international billings, that change necessitated an increase in the percentage rate used to calculate the charge. The prior method and the present method share the same objective: recouping MCI's obligations to the universal service funds. Likewise, the same set of customers paid the prior charges and the present charges: those who made interstate and international calls. To be sure, some individual customers (those whose long distance calls are predominantly intrastate) may pay less under the current approach of charging on a flat fee basis. But others will pay more. Overall, MCI will not collect more revenue. It will just collect the same amount of revenue in a different way. A refund or credit would also create windfalls for a substantial number of customers (those whose rates are higher using the present method), and would require MCI to raise current charges on interstate calls to recoup the amounts that would have be refunded or credited. In these circumstances, retroactively penalizing MCI by ordering a refund or crediting of its FUSF would be inequitable.

With respect to the small business NAF, the equitable balance tips even more strongly against refunds or credits. In the case of the NAF, MCI was at the mercy of an improper implementation of a new interstate access structure. Not only did the FCC fail to complete its work prior to the time the new structure became effective on January 1, 1998, but the major ILECs failed to provide customer information that was critical to MCI's ability to pass through ILEC PICC charges in its NAF. MCI simply did not know on a customer by customer and line by line basis, how the ILECs would charge for PICC.[42] MCI should not be blamed, much less required to pay a financial penalty for FCC and ILEC failures.

The charges that the Commission questions were in place for only a short period of time and did not result in any windfall or overcollection of universal service

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[42] For larger business accounts, MCI reasonably assumed it would be assessed a multiline fee of $2.75. For residential customers, MCI and other IXCs adopted a practice of charging an averaged "per account" fee that averaged our estimate of the number of single line and second line PICCs we would be billed.

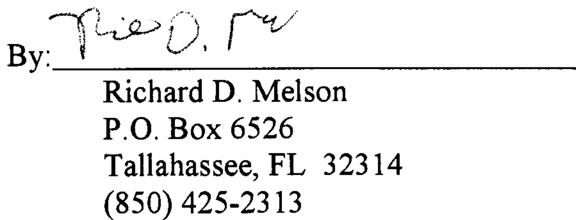
contributions or access costs by MCI. There is no reason to proceed with the burdensome and inequitable process of a refund or credit, a process that would enlarge the burden this Commission has already borne in this case.

Conclusion

For the reasons stated above, the Commission should enter an order terminating this show cause proceeding and closing this docket.

RESPECTFULLY SUBMITTED this 19th day of February, 1999.

HOPPING GREEN SAMS & SMITH, P.A.



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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 19th day of February, 1999.

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