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 ORDER NO. PSC-98-1652-PCO-TI ISSUED: December 8, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

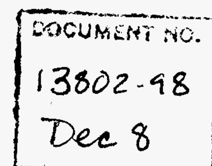
ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

By Order No. PSC-98-0681-SC-TI, issued May 18, 1998, this Commission ordered MCI to show cause why it should not cease to charge Federal Universal Service Fund assessments on intrastate toll calls and refund those assessments to customers. On July 21, 1998, MCI filed a Motion to Dismiss.

Standard of Review for Motion to Dismiss or Quash

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action or claim. See Augustine v. Southern Bell & Telegraph Co., 91 So.2d 320 (Fla. 1956). In determining the sufficiency of the petition, consideration is confined to the underlying petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So.2d 229 (1st DCA 1958). All material factual allegations of the petition are taken as true. See Varnes v. Dawkins, 625 So.2d 349, 350 (1st DCA 1993). The moving party must specify the grounds for the motion to dismiss. All material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews, 122 So.2d 571 (2nd DCA 1960).



MCI's Motion to Dismiss

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

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

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

> We have determined to continue our historical approach to recovery of universal service support mechanisms, that is, to permit carriers to recover contributions to universal service mechanisms through rates for interstate services only. In discussing recovery we are referring to the process by which carriers' recoup the amount of their contributions to universal service. (Order FCC 97-157, ¶ 825)

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

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

MCI also relies on MCI Telecommunications Corp. v. Commonwealth of Virginia State Corp. Comm'n, Civil Action No. 3:98CV284 (E.D. Va. June 15, 1998), as a basis for its Motion to Dismiss. MCI contends that the Virginia case is directly on point with this proceeding. We disagree. MCI correctly states that the Virginia Commission entered a show cause order similar to the one entered in this docket. However, MCI's reliance is misplaced and the Virginia decision is in error.

First, it should be noted that the Virginia Commission's action was against the wrong MCI entity. The Virginia Commission

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

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

Third, it is not an "impossibility" for MCI to comply as MCI and the Federal Court have stated. MCI has already refiled its FCC FUSF tariff in a manner which does not collect fees based on intrastate services. Therefore, for the reasons outlined above, we conclude that the federal decision may be in error and should not control. In addition, the federal decision relied on by MCI is not controlling precedent. Based on the foregoing, we believe it is appropriate to proceed with the show cause hearing. Therefore, the Motion to Dismiss is denied.

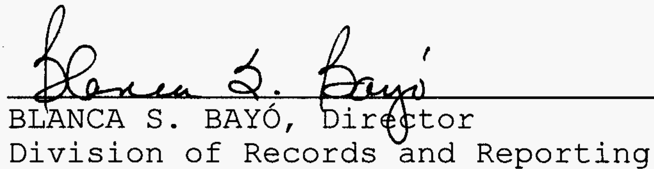
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that MCI

Telecommunications Corporation's Motion to Dismiss is denied. It is further

ORDERED that this docket shall remain open pending resolution of the show cause proceeding.

By ORDER of the Florida Public Service Commission this 8th day of December, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)
CB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.