

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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: February 19, 1999

BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION STAFF

The Florida Public Service Commission Staff, pursuant to Order No. PSC-99-0273-PHO-TI, files this brief on the issues and states:

BACKGROUND

This Commission received complaints regarding charges that IXCs placed on bills to recover federal universal service assessments. Upon investigation, the Commission staff found that at least one company, MCI Telecommunications Corporation (MCI), had been charging interstate fees based on customers' total bills, including intrastate toll calls.

On February 24, 1998, after discussions with MCI, Commission staff advised MCI that the charges may be improper and asked that it cease such practices immediately. Staff also asked that MCI issue refunds or bill credits to those Florida consumers who were improperly charged.

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PSC-RECORDS/REPORTING

MCI responded on March 17, 1998, explaining why it believed its charges were justified. Subsequently, staff recommended action to stop MCI from assessing the charges on intrastate calls. It is undisputed that, thereafter, MCI ceased collecting National Access Fee (NAF) and Federal Universal Service Fee (FUSF) charges based on intrastate state services effective April 1, 1998, and August 1, 1998, respectively.

In response to show cause actions pending in Virginia and Florida, MCI filed a Petition for Declaratory Ruling with the Federal Communications Commission (FCC), asking that it find that carriers are not precluded by the Universal Service Order (FCC 97-157) from imposing a charge on interstate customers that is based on customers' total billed revenues, including intrastate revenues, to recover federal universal service assessments. Also, as a result of the Federal Court decision against the Virginia (discussed in more detail in Issue 3 below), the Commonwealth of Virginia filed a Complaint on the validity of the tariffs with the FCC on October 6, 1998. Both pending FCC matters are expected to be ruled on by March 5, 1999.

By Order No. PSC-98-0681-SC-TI, issued on May 18, 1998, this Commission ordered MCI to show cause in writing why it should not cease to collect NAF and FUSF charges on intrastate toll calls and make appropriate refunds, with interest, to its customers. On June 8, 1998, MCI filed its response to the show cause order requesting

a formal hearing. Because there are no disputed issues of fact, this matter has been set for an informal hearing, pursuant to Section 120.57(2), Florida Statutes.

SUMMARY OF ARGUMENT

MCI should be required to refund, with interest, NAF and FUSF assessments recovered from intrastate services in Florida between January 1, 1998, and August 1, 1998. Commission staff does not dispute the validity, nor the application, of MCI's FCC tariffs to interstate customers and interstate or international calls and the subsequent recovery of the charges from intrastate revenues. Our concern is with the inclusion of **intrastate** toll calls in the calculation of the charges for FUSF. To the extent that MCI applies its tariffs to calls that are wholly intrastate, that application is within the Commission's jurisdiction and beyond the authority of the FCC. Collecting interstate charges on intrastate revenues is neither required nor authorized by the FCC and thus is clearly within the purview of the state commissions. This Commission has not been preempted in this matter by the Telecommunications Act of 1996 (Act), the FCC, or the federal courts.

ISSUE 1: Did MCI bill customers for National Access Fee (NAF) and Federal Universal Service Fund (FUSF) based on intrastate charges in Florida?

POSITION: Yes.

MCI was charging two fees to recover assessments for the Federal Universal Service Fund and for access charge restructuring, which MCI calls the FUSF and NAF, respectively. The FUSF is an interstate charge that is designed to recover MCI's federal universal service fund contributions. MCI collected from small business customers 5 percent of their total MCI billed revenues, and large business customers were assessed 4.4 percent of their total MCI revenues.

The NAF is intended to recover the amount of primary interexchange carrier charges (PICCs) assessed by the incumbent local exchange carriers (ILECS). MCI imposed the NAF on its interstate customers on a per-line or per-account basis. Until April 1, 1998, small business customers were charged a percentage of their total MCI bill. Percentages ranged from 13 percent to 30 percent, depending on the amount of the total bill. Effective April 1, 1998, that was changed to a per-line charge of \$2.75. Until April 1, 1998, for NAF, and August 1, 1998, for FUSF, MCI assessed these charges on intrastate toll revenues for intrastate services. MCI asserts that these charges were included in its

federal tariff. There were no corresponding charges in its Florida tariff.

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

POSITION: MCI did not have Florida Commission approval to collect the NAF and FUSF based on intrastate charges in Florida. Therefore, MCI did not have authority to assess these fees.

MCI did not have any authority to collect NAF and FUSF from the Florida intrastate services portions of customers' bills. MCI cannot rely on the Act for authority because the Act does not preempt the states in matters concerning intrastate services and charges. In Section 254 of the Act, Congress assigned shared responsibility for Universal Service funding between the States and the FCC, specifically giving states responsibility for the collection of contributions on intrastate services and giving the FCC responsibility for interstate services. See, Subsections (d) and (f) of Section 254. Further, preemption cannot be deemed to have occurred through the mere act of letting a tariff go into effect. MCI relies on its FCC tariff and on the Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (released May 8, 1997) (Order) for authority to collect NAF and FUSF based on intrastate charges.

Paragraph 813 of the above-cited Order, contained in a portion of the Order entitled "General Jurisdiction over Universal Service Support Mechanisms," states as follows:

[W]e conclude that the [FCC] has jurisdiction to assess contributions for the universal service support mechanisms from intrastate as well as interstate revenues and to require carriers to seek state (and not federal) authority to recover a portion of the contribution in intrastate rates. Although we expressly decline to exercise the entirety of this jurisdiction, we believe it is important to set forth the contours of our authority in this Order. (Order, ¶ 813)

This entire discussion appears to be an exercise by the FCC to assert what the extent of its authority would be should it choose to exercise it. In fact, the FCC points out in several other places that it has not taken this approach in its Order. (See ¶¶ 813, 818, and 822) Nowhere in the discussion can staff find support for MCI's fees levied on intrastate revenues. Rather, the FCC clearly refers carriers to the intrastate jurisdiction for recovery of any portion of the contribution through intrastate rates. While the FCC has based a portion of the Universal Service Fund assessment on total revenues, it clearly states in its Order that "[C]arriers may recover these contributions solely through rates for interstate services...." (Order, ¶ 838) In another passage, it states:

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, ¶ 825)

Thus, MCI's reliance on the Order is misplaced. Further, MCI's federal tariffs, in and of themselves, cannot give authority beyond the Act and FCC's authority.

In conclusion, MCI's FCC tariff is not sufficient to establish MCI's authority to collect NAF and FUSF from intrastate charges in Florida. This Commission has not been preempted in this regard by the Act or the FCC. Thus, without a valid Florida tariff for the fees at issue, MCI was without authority to collect NAF and FUSF based on intrastate charges in Florida. It is undisputed that there is no corresponding Florida tariff.

ISSUE 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?

POSITION: The Florida Commission has exclusive jurisdiction over MCI's intrastate interexchange rates, charges and services. The FCC has not preempted the states in this regard.

This Commission has exclusive jurisdiction over MCI's intrastate interexchange rates, charges and services. 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 not preempted the states in this regard. It should be noted that in the Act provisions for funding universal service are separated between interstate and intrastate services. Subsection (d) of Section 254 of the Act requires universal service contributions to the Universal Service Fund from telecommunications carriers providing interstate telecommunications services. Subsection (f) of Section 254 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 Universal Service Fund 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. Further, the tariff does not provide that MCI can collect Universal Service Fund contributions based on intrastate revenues because it does not include intrastate services in the language of the tariff. Thus, the Florida Commission can not in any way be interfering with a federal tariff by ordering MCI to cease applying its tariff to intrastate services.

On March 13, 1998, the staff of the Virginia State Corporation Commission filed a Motion for Rule to Show Cause (Motion) asking the Commission to enter an order directing MCI to show cause "why it should not be enjoined from continuing to bill customers illegally for its 'Federal Universal Service Fee' and 'National Access Fee' and why it should not be required to refund to customers all amounts collected in excess of its tariffed rates."

On May 8, 1998, the State of Virginia issued an order on Rule to Show Cause enjoining MCI from billing customers for FUSF and NAF and requiring a refund. Thereafter, MCI appealed the Virginia Commission decision to the Federal Court and it is MCI Telecommunications Corp. v. Commonwealth of Virginia State Corp. Comm'n, Civil Action No. 3:98CV284 (E.D. Va. June 15, 1998), enjoining Virginia from enforcing its order based on federal preemption, that MCI relies on as a basis for the Commission's lack of jurisdiction.

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

Second, the Federal Court's Order states that the review and rejection by a state regulatory agency of a federal tariff is in direct conflict with the Act and is preempted. Order at p.9. Further, as basis for this conclusion, the Court states that the Virginia Commission's decision is preempted both because compliance with it and the federal law is impossible and because it stands as an obstacle to accomplishment of a regulatory scheme intended by Congress. 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 changed the manner in which it collects NAF and FUSF. Therefore, for the reasons outlined above, staff concludes 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.

In conclusion, staff believes that this Commission has exclusive authority over charges for intrastate services and that this exclusive authority has in no way been preempted by the Act, the FCC, or the federal courts.

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

POSITION: Yes. MCI has ceased collecting these charges on intrastate calls. The company should be prohibited from doing so in the future.

It is undisputed that MCI has ceased assessing NAF and FUSF based on intrastate charges. Therefore, staff agrees with MCI that no prospective prohibition should be required.

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

POSITION: Yes. MCI should be ordered to refund, with interest, all monies collected for the NAF and FUSF that were based on intrastate charges in Florida.

MCI should refund with interest the monies collected based on intrastate charges in Florida because it had no authority to do so. MCI has suggested that to require a refund would require MCI to charge outside its federal tariff. Commission staff does not agree with that argument. We are only seeking to have MCI appropriately apply charges to interstate and international services, excluding

intrastate services, under the federal tariff. Further, although the Commission brought this matter to MCI's attention in February, 1998, the second month of the FCC tariff was in effect, MCI took no action to change its assessment of the fees for several months. Also, to staff's knowledge, MCI was the only IXC charging fees on intrastate monies. MCI's "good faith" reliance on the FCC tariff in light of this Commission's proceedings was reliance on its own risk. We may not disagree with MCI that it did not in the aggregate collect a penny more than it was entitled to. However, it did collect more than it was entitled to from Florida customers who received intrastate services and who were assessed NAF and FUSF based on those services, and it is those monies which should be refunded.

CONCLUSION

The Commission has exclusive jurisdiction over the NAF and FUSF fees assessed based on intrastate charges to customers in Florida. This jurisdiction is not preempted by the Act, any federal orders, or FCC tariffs. MCI should be ordered to refund, with interest, all fees collected for NAF and FUSF based on intrastate charges.

Respectfully submitted,

A handwritten signature in cursive script, reading "Catherine Bebell", written over a horizontal line.

CATHERINE BEDELL
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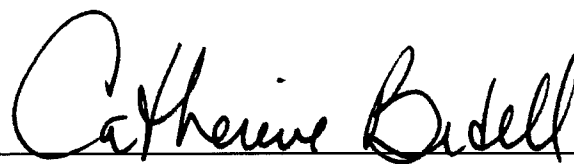
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Brief of Florida Public Service Commission Staff has been furnished by U.S. Mail, on the 19th day of February, 1999, to Richard Melson, Esquire, Hopping Law Firm, P.O. Box 6526, Tallahassee, FL 32314, on behalf of MCI Telecommunications Corporation.



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