



MCI Communications Corporation

1801 Pennsylvania Avenue, NW
Washington, DC 20006

December 23, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

**Re: In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services;
CC Docket 93-129**

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of MCI Telecommunications Corporation's Reply to Oppositions to Petition for Reconsideration regarding the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Reply to Oppositions to Petition for Reconsideration furnished for such purpose and remit same to the bearer.

Sincerely yours,

Alan Buzacott
Regulatory Analyst

Enclosure
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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:)
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800 Data Base Access Tariffs and the)
800 Service Management System Tariff and)
Provision of 800 Services)

CC Docket 93-129

MCI REPLY TO OPPOSITIONS TO PETITION
FOR RECONSIDERATION

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its reply to oppositions to the MCI petition for reconsideration in the above-captioned matter. In its petition for reconsideration, MCI requested that the Commission reconsider the Report and Order to the extent that it did not require the LECs to refund the unlawful portion of the 800 data base tariff changes introduced by the LECs in 1993. MCI noted that the Report and Order did not address the accounting order imposed by the Commission when it initiated its investigation of the LECs' tariffs.

In its petition for reconsideration, MCI demonstrated that the LECs' PCIs were inflated for three and a half years by the exogenous cost changes ultimately disallowed in the Report and Order. Failure to order a refund would harm the LECs' customers and would provide significant incentive for the LECs to propose unreasonable rates for future

new services.

In their replies, the LECs argue that the Commission should not order refunds. They also claim that, should the Commission decide to order refunds, the proper refund amount is less than that calculated by MCI. The Commission should reject these arguments and require the LECs to refund the full amount subject to the accounting order.

II. The Commission Should Require Refunds

In its petition for reconsideration, MCI noted that Section 204(a) of the Communications Act and the Commission's accounting order in this proceeding give it the authority to order refunds. The LECs, however, argue that the Section 204(a) authority is permissive and that the Commission is not obliged to order refunds.¹ To support their position, the LECs cite proceedings in which the Commission concluded that tariffs were unlawful but declined to order refunds. For example, several LECs cite the LEC Access Tariff Order,² in which the Commission declined to order refunds even after finding that Bell Atlantic had overearned. NYNEX also cites the Special Access Tariff Order,³ in which the Commission declined to order refunds of certain LECs'

¹ See, e.g., U S West at 2.

² In the Matter of Local Exchange Carrier Access Tariff Rate Levels Bell Atlantic Telephone Companies Tariff F.C.C. No. 1; GVNW Inc./Management Bourbeuse Telephone Company Tariff F.C.C. No. 1, Memorandum Opinion and Order, CC Docket No. 85-554, August 16, 1993 (LEC Access Tariff Order).

³ In the Matter of Special Access Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 5 FCC Rcd 1717 (1990) (Special Access Tariff Order).

special access rates despite finding that these LECs had overearned.

The investigations cited by the LECs involved unique circumstances that arose under rate of return regulation. For example, in the LEC Access Tariff Order, the Commission declined to order refunds because it determined that Bell Atlantic had not overearned for the monitoring period as a whole, but only for three months.⁴ Similarly, in the Special Access Tariff Order, the Commission found that the LECs had overearned for only a six-month period.⁵ In addition, the Commission noted that the overearnings were realized in the context of “unique circumstances” that existed during the six months in question.⁶

Because the tariff changes found unlawful in the Report and Order were in effect for over three years, not for a few months, the decisions cited by the LECs provide no support for their position that the Commission should not order refunds. Moreover, under price cap regulation, the length of time an unlawful tariff is in effect should be irrelevant to a determination of whether refunds are required. Under price cap regulation, rates are outside the “zone of reasonableness” whenever they exceed the properly-calculated PCI; the price cap rules do not permit above-cap rates in one time period to be offset by below-cap rates in other time periods. Accordingly, when the Commission found in the OPEB Investigation Order that the LECs’ PCIs were inflated, it ordered refunds even though the

⁴ LEC Access Tariff Order at ¶7.

⁵ Special Access Tariff Order, 5 FCC Rcd 1718-1719.

⁶ Id.

tariffs had been in effect for only three weeks.⁷

Even the LECs concede that the unlawful tariffs have caused significant harm to their customers. For example, even though U S West disputes the refund amount calculated by MCI, it still calculates its refund liability to be \$5.1 million.⁸ The Commission should use its Section 204(a) authority to ensure that full refunds are provided to the LECs' customers.

III. The Duration of the Investigation Does Not Limit the LECs' Refund Liability

Several LECs claim that the Commission should not order refunds because Section 204(a) of the Communications Act requires the Commission to terminate investigations within fifteen months.⁹ However, the only impact on the LECs of extending the investigation beyond fifteen months was to extend the period for which they were required to keep accurate account of the earnings, costs and returns associated with the rates subject to the investigation.¹⁰ The LECs' customers, on the other hand, have had to pay unreasonable rates for over three and a half years, from May 1, 1993 to

⁷ In the Matter of Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions"; Bell Atlantic Tariff F.C.C. No. 1; US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4; Pacific Bell Tariff F.C.C. No. 128, Memorandum Opinion and Order, 8 FCC Rcd 1024, 1037 (1993).

⁸ U S West Comments, Workpaper 3.

⁹ U S West Comments at 3; SWBT Comments at 2; Pacific Comments at 4.

¹⁰ In the Matter of the Bell Operating Companies' Tariff for the 800 Service Management System, Tariff F.C.C. No. 1 and 800 Data Base Access Tariffs, Order, 8 FCC Rcd 3242, 3245 (1993) (800 Data Base Suspension Order).

the present. There is no indication that the fifteen month period specified in Section 204(a) is intended to protect LECs that file unlawful tariff changes and limit the refunds provided to customers that have paid unreasonable rates.

Moreover, the LECs should not be rewarded for delaying the progress of the Commission's investigation. As the Commission noted in the Report and Order, the LECs' tariff changes were not accompanied by the cost support required by the Commission's rules.¹¹ Then, after the Commission ordered the LECs to file their cost models on the record, nine LECs filed petitions for waiver of this requirement.¹² The Commission denied these waiver requests in January, 1994, but, as a result of the LECs' attempt to avoid supplying required cost support, the Commission was not provided with complete direct cases until March, 1994, almost a year after the release of the 800 Data Base Suspension Order.¹³

IV. The Refund Liability Cannot Be Offset By Headroom In Other Baskets

Several LECs argue that the Commission should not order refunds because they had headroom in other baskets at various times in the past three and a half years, and would have increased rates in these baskets if the Commission had terminated its investigation and required the traffic sensitive PCI reduction within fifteen months of the

¹¹ Report and Order at ¶15.

¹² Id.

¹³ Id. at ¶16.

800 Data Base Suspension Order.¹⁴ U S West, for example, states that “the revenue that U S WEST would have foregone in the Traffic Sensitive basket as the result of an earlier resolution could have been recouped via rate element increases in the Interexchange and Trunking baskets.”¹⁵ Similarly, Southwestern Bell claims that “[h]ad the Order been issued sooner, SWBT could have made different business decisions which would have left total access costs to petitioners unchanged.”¹⁶

In effect, these LECs are arguing that above-cap pricing in one basket can be offset by below-cap pricing in other baskets. This would be contrary to the principles underlying the Commission’s price cap regime. The Commission chose to adopt four baskets, and not a single aggregate price cap, in order to deter cost shifting between service categories and to prevent discrimination among different classes of customers.¹⁷ The LECs’ proposal to offset unlawful rates with headroom from other baskets would defeat these objectives. For example, it would permit the LECs to discriminate in favor of their interexchange customers at the expense of their access customers.

In MCI v. FCC, the court concluded that earnings below the authorized level in one service category could not be used to offset unlawful rates in other service categories

¹⁴ U S West Comments at 3, Pacific Telesis Comments at 4, Southwestern Bell Comments at 2.

¹⁵ U S West Comments at 3.

¹⁶ SWBT Comments at 2.

¹⁷ In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6811 (1990).

when calculating refunds.¹⁸ The court based its decision in part on the potential for discrimination among customers purchasing services from different categories, stating that “the Commission’s approach to offsets is inconsistent with the statutory and regulatory goal of preventing discrimination in the pricing of access services.”¹⁹ While MCI v. FCC involved refunds under rate of return regulation, the statutory and regulatory goal of preventing discrimination is equally significant in the context of the price cap regime’s system of baskets.

V. The Refund Amount Must Be Based On the Disallowed Costs

In its petition for reconsideration, MCI showed that the Commission should require the refund to be effected through a one-time PCI adjustment reflecting the full amount of the excess exogenous costs included in LEC PCIs during the three and a half years the tariffs were subject to the accounting order.²⁰ Because the Commission has determined that the LECs’ traffic sensitive PCIs included \$34.1 million in exogenous costs, it should require the LECs to make a one-time exogenous cost change of \$119.4 million plus interest. After one year, the LECs may reverse the effect on the PCI in order to restore the status quo.

¹⁸ MCI Telecommunications Corporation, et al. v. Federal Communications Commission and United States of America, 59 F.3d 1407, 1418-1419 (1995) (MCI v. FCC).

¹⁹ Id. at 1419.

²⁰ MCI Petition at 2.

The LECs argue that the refund should be reduced by the amount by which they priced below cap during the time their tariffs were subject to the accounting order. However, any focus on the rates in effect would be inconsistent with the principles of the Commission's price cap regime. Under price cap regulation, the only relevant parameters are the price cap index and band limits; rates are presumed lawful as long as they are within the "no-suspension" zone. Consistent with the principle that the Commission does not regulate rates directly, the Report and Order did not find any particular rate to be unlawful. Instead, it found the LECs tariffs unlawful to the extent that the PCIs included excess exogenous costs. Price cap principles thus require that refunds be based on the excess costs in the LECs PCIs during the period the accounting order was in effect, not on the LECs' rates.

Further, the Commission has never permitted PCI reductions to be offset by headroom amounts from prior periods. For example, when PCIs are adjusted upwards as part of a low-end adjustment, the full amount of the PCI change must be reversed at the end of the tariff year.²¹ No credit is granted for the LEC's decision to price below cap. Similarly, when the LECs removed OPEB costs from their PCIs, the exogenous cost reduction equalled the original exogenous cost increase.²² No credit was granted for the LECs' decision to price below cap in the intervening years.

²¹ In the Matter of Commission Requirements for Cost Support Material to be Filed with 1993 Annual Access Tariffs, Order, 8 FCC Rcd 1936, 1938 (1993).

²² In the Matter of Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket 94-1, April 7, 1995, at ¶309.

If, however, the Commission permits the LECs to credit below-cap pricing in prior years toward the refund liability, it should ensure that the LECs' customers receive the full benefit of the residual refund amount. It should not treat the residual refund amount as a one-time exogenous cost reduction because the LECs would be able to use current headroom to further reduce the actual refund passed on to customers. It would be inconsistent for the Commission to focus on rate levels in calculating the refund amount, but to effect the refund using a PCI adjustment. Consequently, if the Commission permits the LECs to credit below-cap pricing in prior years toward the refund liability, it should require the refund to be provided through an API adjustment.

VI. Conclusion

For the reasons stated here, and in the MCI Petition for Reconsideration, the Commission should reconsider its Report and Order to the extent that it does not require the LECs to refund the full amounts subject to the accounting order instituted in the 800 Data Base Suspension Order.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION

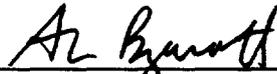


Alan Buzacott
Regulatory Analyst
1801 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 887-3204

December 23, 1996

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on December 23, 1996.



Alan Buzacott
1801 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 887- 3204

CERTIFICATE OF SERVICE

I, Stan Miller, do hereby certify that copies of the foregoing Petition for Reconsideration were sent via first class mail, postage paid, to the following on this 23rd day of December, 1996.

Regina Keeney**
Chief, Common Carrier Bureau
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20554

James Schlicting**
Chief, Competitive Pricing Division
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, D.C. 20554

Richard Welch**
Chief, Policy and Program Planning
Division
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

International Transcription Service**
1919 M Street, NW
Washington, DC 20554

Ava B. Kleinman
Mark C. Rosenblum
Seth S. Gross
AT&T Corporation
295 North Maple Avenue
Room 3245F3
Basking Ridge, NJ 07920

William J. Balcerski
NYNEX
1111 Westchester Avenue
White Plains, NY 10604

Gail L. Polivy GTE
1850 M Street, N.W.
Suite 1200
Washington, DC 20036

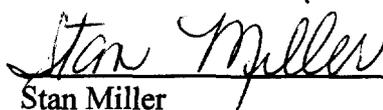
Richard A. Karre
U S West Communications, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Marlin D. Ard
Randall E. Cape
Pacific Bell and Nevada Bell
140 New Montgomery St., Rm. 517
San Francisco, CA 94105

Jay C. Keithley
Sprint Corporation
1850 M Street N.W.
Suite 1100
Washington, DC 20036-5807

Robert M. Lynch
Durward D. Dupre
Mary W. Marks
J. Paul Walters, Jr.
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101

Hand Delivered**


Stan Miller