

**MCI Telecommunications
Corporation**

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MCI

1801 Pennsylvania Avenue, NW
Washington, DC 20006

ORIGINAL

March 11, 1999

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street, S.W.
Washington, DC 20554

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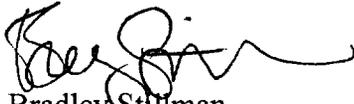
Re: Truth-in-Billing and Billing Format, CC Docket No. 98-170

Dear Ms. Salas:

On Thursday, March 11, 1999, the attached letter was sent to Dorothy Attwood, Chief, Enforcement Division, Common Carrier Bureau of the Federal Communications Commission and should be submitted to the record in the above referenced proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Very truly yours,



Bradley Sullman
Senior Policy Counsel
Strategic Advocacy

cc Dorothy Attwood

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**MCI Telecommunications
Corporation**



1801 Pennsylvania Avenue, NW
Washington, DC 20006

March 11, 1999

Dorothy Attwood
Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, NW
Washington, DC 20554

EX PARTE

Re: Truth-in-Billing and Billing Format, CC Docket No. 98-170

Dear Ms. Attwood:

Pursuant to our meeting on February 18, 1999, this letter provides the additional information that you requested to support the legal analysis contained in the MCI WorldCom Comments, filed in the above referenced proceeding on November 13, 1998.

Guidelines for Customer Billing and Rules for Carrier Billing: Legal Analysis

Commission does not have unfettered discretion to regulate customer billing

In asserting jurisdiction and regulating common carriers, the Commission is required to have (1) delegated authority from Congress to regulate an area; and (2) per the Administrative Procedure Act, a rational basis for its decision to regulate carriers. Congressional authority can be of two types -- a general statutory provision such as section 201, which renders unlawful any rates, charges, or practices that are unjust or unreasonable, or a specific statutory provision such as section 228, which sets forth Congressional requirements in the provision of pay-per-call services.

In this proceeding, the Commission is considering asserting regulatory requirements on customer billing practices, an area that, for nondominant carriers, it has never regulated. Its statutory basis for asserting regulatory controls is the general statutory authority of section 201. Case law suggests that when the Commission is employing general statutory authority to regulate, it must be cautious not to exceed its delegated authority.

For example, in Central Forwarding, Inc. v. Interstate Commerce Commission, 698 F.2d 1266 (5th Cir. 1983), the court stated that the Commission had overstepped its general statutory authority in adopting regulations for fuel cost reimbursements. The court reviewed three factors: (1) how broadly Congress had granted rulemaking authority to the agency; (2) how closely related to specific delegations of power was the regulation in question; (3) how dramatically the regulation would affect the private parties at which it was aimed.

In the case of customer billing of telecommunications services, there is no specific delegation of power to regulate billing, and the exercise of regulation will profoundly affect thousands of carriers whose billing systems have been developed in an environment of no federal requirements. In addition, in seeking to regulate customer billing practices, federal requirements could easily conflict with state requirements. This is a particular problem because, with few exceptions explicitly noted in the Telecommunications Act of 1996, the Commission's authority over intrastate communications is limited by section 152(b)(2). This suggests that there are legal limits to the Commission's ability to regulate customer billing.

Moreover, the APA imposes further limitations on the Commission's ability to regulate. As applied to the issues presented in this rulemaking, the Commission needs to identify a specific finding of market failure -- supported by evidence of such failure. For example, is the market failure widespread or restricted to a few bad actors? Second, there must be evidence that carrier bills -- as opposed to carrier charges or practices -- require an exercise of Commission authority. For example, a complaint that a carrier is imposing a new charge is not necessarily evidence that a bill is confusing or vague. In fact, the clarity of bill may have made it easier for a customer to review the new charge and raise a question. Additionally, the Commission must consider the costs and benefits of its proposed assertion of regulatory authority. This is particularly important since there are thousands of carriers whose billing systems have developed in an environment free from federal regulation, which is likely to result in substantial costs for complying with new federal mandates. Finally, any rules adopted must be sufficiently tailored to address the problem identified.

Commission is on strongest legal ground in adopting a policy statement and guidelines

Given the legal limitations on the Commission's ability to assert its regulatory power over customer billing, the Commission is on the strongest legal ground if it adopts a policy statement and guidelines to govern customer billing, as opposed to prescriptive rules and requirements.

It is significant in this case that the Commission is regulating customer billing for the first time. In the past, regulation of customer billing has been an area left to state regulation. For nondominant carriers, the Commission has never regulated customer billing and in fact, has

subjected nondominant carriers to substantially less regulation overall.¹ The proposal to regulate a business practice that up until now has been unregulated at the federal level raises issues that, upon examination, much more strongly support the adoption of guidelines instead of prescriptive rules.

First, there are substantial questions about how prescriptive federal requirements would interact with long-standing state requirements. For carriers such as MCI WorldCom, there is only one customer bill for both interstate and intrastate service. Conflicting or inconsistent federal and state requirements could not simultaneously be followed in a single bill. Federal guidelines -- which in the first instance are aspirational -- would not produce such a conflict.

Second, the Commission has little data or information to decide how prescriptive rules will impact the cost of customer billing for individual carriers or segments of the industry. In MCI WorldCom's view, the costs are likely to be substantial in that prescriptive rules would affect thousands of carriers with different and unique billing systems.² Many of those systems may not be immediately capable of complying with new federal requirements without extensive capital expenditures. Alternatively, some prescriptive rules may require the addition of pages to a bill, which adds considerably to the cost of producing a bill and therefore may create upward pressure on rates.

Moreover, as the Commission has consistently recognized over the years, competition can be relied upon to encourage "best practices" by carriers who are interested in long term relationships with customers. Customer billing is one essential element of providing telecommunications, and carriers in competitive markets compete on their ability to offer timely, accurate, and clear bills as much as on the price and convenience of telecommunications service.

Enforcement powers can be used to curb "bad actors" who are interested in producing confusing or vague bills to create short term gain. Problems with "bad actors" are not a reason to prescribe rules to govern business practices of thousands of legitimate carriers who want to attract and hold customers in the long term.

Guidelines have been used in other cases to deal with substantive areas where detailed Commission prescriptive rules would have been unworkable. In adopting private line guidelines for tariffing purposes, the Commission declined to adopt prescriptive rules governing tariffs as it

¹ One exception to this general rule is the Commission's decisions setting limits on a carrier's ability to "backbill" its customers. People's Network Incorporated v. AT&T, File No. E-92-99, 12 FCC Rcd 21081 (1997).

² As MCI WorldCom pointed out in Comments filed in this docket on November 13, 1998, we estimate that implementation of the Commission's proposals that were outlined in its Notice of Proposed Rulemaking could cost the industry over \$100 million. MCI WorldCom Comments at n 29.

had done in the case of switched access.³ Unlike the more standardized switched access offering which prescribes specific rate elements, the private line guidelines direct how tariffs should be structured so that customers can more easily compare one private line offering to another. For example, the private line guidelines call upon carriers to create one integrated rate structure for like services. Instead of having many different tariffs for voice grade private line service, the carrier should have one that displays the basic offering and all of its variations. Of course, the Commission could have prescribed rate structures for these voice grade offerings -- at least, for dominant carriers. But it decided that providing guidance in lieu of prescriptive rules was all that was necessary to create tariffs that were understandable and that were susceptible to Commission review for lawfulness.

As in the case of the private line tariff guidelines, the Commission can elect to adopt the guidelines as part of the Code of Federal Regulations.⁴ Or, the Commission can simply announce the guidelines in an order. Announcing the guidelines without adopting rules would be akin to the Commission's past practice of adopting a policy statement without codifying the policy statement in rules.⁵ In either event, the Commission would be announcing its policy preferences as to how carriers should bill customers.

Guidelines will inform carriers of "safe harbor"

In addition to the competitive pressures that already spur carriers to improve the clarity and accuracy of bills, Commission guidelines will create a "safe harbor" for carriers. A carrier can evaluate the Commission's policy preferences for billing in deciding how to manage customer billing going forward. Guidelines will assist carriers in making choices that will minimize the likelihood of future enforcement action.

In the Private Line Guidelines Order, the Commission found that guidelines would "help a carrier develop new offerings and change its rates with greater speed and certainty about the outcome of the Commission's review."⁶ In the instant case, billing guidelines will accomplish much the same result -- steering the carrier toward bills that comply with the Commission's

³ Private Line Guidelines Order, 97 F.C.C.2d 923 (1984).

⁴ Section 61.42 of the Commission's Rules.

⁵ See, e.g., Policy Statement on International Accounting Rates, 11 FCC Rcd 3147 (1996). 47 CFR 0.445 (d) states that "formal policy statements. . . are published in the Federal Register, the FCC Record, FCC Reports, or Pike and Fischer." 47 CFR 0.445 (e) states that the policy statements which are "published in the Federal Register, the FCC record, FCC Reports, or Pike and Fischer Radio Regulation, they may be relied upon, used or cited as precedent by the Commission or private parties in any manner."

⁶ Private Line Guidelines Order, 97 F.C.C.2d at 1925.

policy preferences. However, carriers that need to vary their practice from the guidelines are not prohibited from doing so. “[G]uidelines do not preclude a carrier, in a given case when a private line tariff does not comply with these guidelines, from justifying its departure from the guidelines and showing that its tariff is just, reasonable, and nondiscriminatory.”⁷ Similarly, in a Commission complaint or other enforcement action, departures from billing guidelines might be justified by the carrier.

Guidelines will inform Commission decision-making about customer billing

Guidelines will also assist the Commission in future disputes about carrier billing by providing a statement of policy preferences for customer billing. Since the Commission has not regulated in this area before, there is little precedent upon which the Commission can draw when resolving an issue concerning a customer bill. A statement of guidelines will inform future decisions by providing guidance about the format and content of customer billing. This will help foster consistent decision-making across industry segments, and help contribute to a neutral application of rules.

In contrast, structural “nondiscrimination” rule for carrier billing is necessary and lawful

As part of the Truth in Billing proceeding, the Commission should also adopt a non-discrimination rule that prevents incumbent local exchange carriers (ILECs), when billing on behalf of other carriers, from engaging in discrimination. As discussed in the pleadings in this rulemaking, and in the pleadings filed in response to MCI WorldCom’s Petition for Rulemaking,⁸ ILEC billing on behalf of long distance carriers raises a specific case of market failure that requires Commission remedy. Failure to create that remedy -- a nondiscrimination rule -- will lead to the inability of long distance carriers to offer products using carrier identification codes, also known as “10-10” calling. Not only will this create an entry barrier for new entrants in the long distance market, it will disrupt large and successful 10-10 products in the market that consumers use and value. The nondiscrimination rule will ensure that ILECs will treat unaffiliated carriers the same as they treat their own affiliates in creating billing and collection contractual agreements.

The Commission can -- and should -- create a nondiscrimination rule and codify it in the Code of Federal Regulations. However, it could choose to simply announce the requirement in an order without codifying the rule. In either event, the Commission has created an enforceable requirement that long distance carriers can utilize in the event they believe an ILEC is

⁷ *Id.*

⁸ MCI WorldCom Comments at 18-20; Petition for Rulemaking, Billing and Collection Services Provided By Local Exchange Carriers for Non-Subscribed Interexchange Services, RM-9108, May 19, 1997.

discriminating against them in the provision of billing and collection. The rule could be promulgated pursuant to the Commission's Title I powers -- there is no need to "re-regulate" billing and collections as a common carrier service subject to Title II.⁹ With respect to Bell Operating Companies, there is further statutory authority for promulgating the rule -- section 272 (c)(1) of the Act, which requires nondiscriminatory treatment by the Bells of unrelated carriers and Bell affiliates.

Unlike the case of customer billing -- where the Commission has never regulated -- the issue of a dominant carrier billing on behalf of another carrier has been the subject of Commission regulation. The Commission, in 1986, determined that carrier billing should be removed from ILEC tariffs and regulated pursuant to Title I. At the time, the Commission anticipated that a competitive market for billing and collections would emerge, giving long distance carriers choices in billing services. As is readily apparent from the record compiled in response to MCI WorldCom's petition, that market has not emerged, and the ILECs remain the only vehicle by which many calls can be billed. And, due to the new paradigm created by the Telecommunications Act of 1996, there is less reason to believe the thesis -- and more evidence to support -- that ILECs will discriminate against unaffiliated providers.

If you have any further questions or concerns, I can be reached at 202-887-3340.

Sincerely



Bradley Stillman
Senior Policy Counsel
Strategic Advocacy

⁹ Title I provisions include section 1, authorizing the Commission to create communications services ". . . at reasonable charges," and section 4(I), authorizing the Commission to perform ". . . any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."