

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Petition for Declaratory Ruling</b>	)	<b>CG Docket No. 03-84;</b>
<b>Concerning the Bundling of Local</b>	)	<b>DA 03-867</b>
<b>Telephone Service with Long Distance</b>	)	
<b>Service</b>	)	

**COMMENTS OF MCI WORLDCOM NETWORK SERVICES, INC.**

MCI WORLDCOM Network Services, Inc. (“MCI”), hereby submits comments in the above-referenced Petition for Declaratory Ruling Concerning the Bundling of Local Telephone Service with Long Distance Service (“Petition”) filed by Linda Thorpe (“Petitioner”) with the Federal Communications Commission (“FCC” or “Commission”) on March 19, 2003. The Petitioner is a named complainant in a class action suit in the District Court for the Middle District of Florida (the “Court”) against GTE Corp., GTE Florida Inc. (collectively “GTE”), AT&T Corp. (“AT&T”), Sprint Florida Inc. (“Sprint”) and MCI.<sup>1</sup> The Petition was filed pursuant to a court order referring the case to the FCC

---

<sup>1</sup> MCI notes that on July 21, 2002, WorldCom, Inc., and numerous subsidiaries filed Voluntary Petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The Petition filed on behalf of WorldCom, Inc. has been assigned Case No. 02-13533-ajg. The Bankruptcy Court granted motions to administer jointly all of the Petitions filed on behalf of WorldCom's subsidiaries under this case number. Pursuant to 11 U.S.C. § 362, such Petitions operate as a stay of claims arising before July 21, 2002 against MCI WORLDCOM Network Services, Inc. until the Bankruptcy Court grants relief from the stay, the case is closed, or the case is dismissed. Accordingly, to the extent that the claims in the above-referenced proceeding or the underlying civil action seek to adjudicate the lawfulness of the practices of MCI WORLDCOM Network Services, Inc. prior to

pursuant to the doctrine of primary jurisdiction. The referring Court concluded as follows:

The Court has examined the allegations of the Complainant. These allegations center around the fact that Plaintiff does not want long distance service on her second phone line, but Defendants contend Plaintiff must accept it under the national framework of the [Act], and pay the associated charges.<sup>2</sup>

On March 27, 2003, the FCC issued a Public Notice seeking comments on three specific questions: 1) whether the state claims set forth by Petitioner in the complaint are preempted by the Communications Act (the “Act”) thereby giving exclusive jurisdiction to the Commission; 2) whether local telephone service providers may provide local service only to their customers, or must, by virtue of their filed tariffs, bundle local service with long distance service, even where the customer has no need for long distance service; and 3) if long distance service is not required to be bundled with local service in all instances, if the practice of bundling these services is a violation of the Communications Act.

The questions presented in the Public Notice do not, however, actually track the issues raised in the underlying complaint and, as a result, it is not clear that the FCC needs to reach determinations on these questions.<sup>3</sup> Nevertheless, MCI submits the following comments in response to the questions as presented by the Petitioner in the FCC’s Public Notice.

---

July 21, 2002 as opposed to the reasonableness of industry-wide practices as a whole, or to adjudicate any damages against MCI WORLDCOM Network Services, Inc. arising before July 21, 2002, such claims are stayed. MCI files comments in this proceeding solely because any decisions reached in the context of a Petition for Declaratory Ruling may have an impact on the practices of carriers industry-wide.

<sup>2</sup> Notably, the Court dismissed Petitioner’s complaint as against MCI, as MCI had never provided *any* service or had *any* other contact with Petitioner. *See* Court Order (Petition, Exhibit B) at 6.

<sup>3</sup> *See* Court Order (Petition, Exhibit B) at 5 where the judge summarizes the issues in the complaint. Petitioner argues that the Act “does not mandate that local exchange carriers provide access to a long

## BACKGROUND

Petitioner brought the underlying civil action as a putative class action against five telecommunications providers. Petitioner alleged that her local exchange carrier (“LEC”), GTE, installed a phone line at Petitioner’s residence to be used exclusively for dial-up Internet access service.<sup>4</sup> Petitioner claims that GTE represented that she was required to have long distance service through a presubscribed primary interexchange carrier (“PIC”) assignment associated with her telephone line.<sup>5</sup> Petitioner also claims that she was wrongfully charged for long distance services on this line by defendants GTE and AT&T.<sup>6</sup> Notably, Petitioner does not state the nature of those charges nor does she identify specifically any fees related to a carrier’s provision of interstate services.<sup>7</sup> Based upon these allegations, Petitioner has asserted claims not only against GTE and AT&T, but also against MCI and Sprint alleging that all of the defendants: (i) engaged in deceptive and unfair trade practices pursuant to Florida statute so as to injure Petitioner and (ii) breached contractual and quasi-contractual obligations owed to Petitioner.<sup>8</sup>

## ISSUES RAISED BY PETITION

### I. Petitioner’s State Law Claims are Barred by the Filed Rate Doctrine; The FCC is the Appropriate Forum for Petitioner’s Dispute.

The first question raised by the Petitioner is whether the state claims set forth in the underlying complaint are preempted by the Communications Act thereby giving exclusive jurisdiction to the FCC. The question, as presented, is somewhat confusing.

---

distance network on each residential line”. Petitioner also challenges a carrier’s recovery of costs for the local loop. *Id.* These issues are different than what is presented in the instant Petition.

<sup>4</sup> Petition at 2.

<sup>5</sup> Petition at 2-3.

<sup>6</sup> Petition at 3 .

<sup>7</sup> Compare Petition with Petitioner’s Complaint (Petition Exhibit A) at ¶ 13, identifying charges on a telephone bill as “Carrier Line” and “Universal Connectivity”.

The focus of this first inquiry really is whether the filed rate doctrine bars the state claims of Petitioner. The short answer is yes. As mandated by section 203 of the Act, every common carrier of communications services must file with the FCC a list of tariffs, which are “schedules showing all charges...and showing the classifications, practices, and regulations affecting such charges.”<sup>9</sup> Those tariffs govern the provision of long distance services – the services at issue in the Petitioner’s complaint.

Pursuant to the filed rate doctrine, the rates set forth in the tariff “bind both carriers and [customers] with the force of law”.<sup>10</sup> The filed rate doctrine bars not only state law claims that pertain directly to the price of telecommunications services but also bars state law claims that concern non-price aspects, such as “service, provisioning, and billing options.”<sup>11</sup> Challenges to the reasonableness or validity of those rates or terms must be made at the FCC no matter what the basis is for the suit.<sup>12</sup>

In the underlying action, Petitioner raises state law claims. Specifically, Petitioner seeks injunctive relief and damages against all defendants under Florida’s Deceptive and Unfair Trade Practices Act pursuant to Florida Statutes Section 501.204 *et seq.*<sup>13</sup> Petitioner also raises breach of contract or quasi-contract claims. It is not material that Petitioner’s action is one for common law fraud or breach of contract, as the filed

---

<sup>8</sup> Petition at 4-5. Obviously, MCI engaged in no such conduct with Petitioner. In the interests of preserving the proper application of telecommunications and policy, however, MCI responds to this Notice.

<sup>9</sup> *ICOM Holding, Inc. v. MCI WorldCom, Inc.*, 238 F.3d 219 at 221 (quoting 47 U.S.C. § 203(a)).

<sup>10</sup> *Id.* (quoting *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520).

<sup>11</sup> *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222-223 (1998).

<sup>12</sup> *See Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 251 (1951).

<sup>13</sup> *See* Petition, Exhibit A. MCI notes that in the civil case it argued that only persons aggrieved by a defendant’s actions, which actions amount to a deceptive act or practice in trade or commerce, have a claim for injunctive relief claim under the Florida Act. Fla. Stat. S. 501.211(1). *See Klinger v. Weekly World News, Inc.* 747 F. Supp. 1477, 1480 (S.D. Fla. 1990). Similarly, only consumers that suffer actual monetary loss or damage because of a defendant’s improper actions have a claim for damages under the [Fla] Act. *General Motors Acceptance Corp. v. Laesser*, 718 So.2d 276, 277 (Fla. 4<sup>th</sup> DCA 1998). Petitioner is simply not a person “aggrieved” by any actions attributable to MCI nor has she suffered any

rate doctrine cannot be avoided through artful pleading.<sup>14</sup> Courts have consistently held that the filed rate doctrine bars both federal and state claims that would affect the parties' rights and obligations pursuant to a filed tariff.<sup>15</sup> Specific to Petitioner's claims, recent court decisions have held that the filed rate doctrine bars state claims regarding unlawful conduct and unfair business practices<sup>16</sup> as well as state law claims seeking to enforce a contractual provision that differs from the filed rate.<sup>17</sup> Hence, these state claims are clearly preempted by federal law. Petitioner cannot avoid the fact that the filed rate doctrine bars the state law claims by styling her complaint to allege violations under Florida law.

With the state law claims barred as a matter of law, the FCC is the more appropriate forum to bring Petitioner's allegations regarding violations of the Act.<sup>18</sup> Petitioner challenges the reasonableness of the relevant tariffs and the practices regarding PIC assignment to a customer line as well as a customer's obligation to pay for access to long distance services. The courts are clear that exclusive jurisdiction over the reasonableness of all tariffed terms is entrusted to the FCC to ensure a uniform nationwide system of telecommunications rates. The filed rate doctrine thus forbids a

---

loss or damage because of MCI's actions. As such, Petitioner cannot support a claim against MCI pursuant to the Florida Unfair and Deceptive Practices Act.

<sup>14</sup> *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 490 (7<sup>th</sup> Cir. 1998). *See also Evans v. AT&T Corp et al.*, 229 F.3d 837, 841 (9<sup>th</sup> Cir. 2002); *Kline and Co. v. MCI Commun. Corp.*, 98 F.Supp.2d 69, 71-73 (D. Mass. 2002)

<sup>15</sup> *See e.g. Evanns*, 229 F.3d at 841.

<sup>16</sup> *See In Re California Wholesale Electricity Antitrust Litigation*, 244 F. Supp.2d 1072, 1078 (S.D. Cal. 2003).

<sup>17</sup> *See Cahnmann*, 133 F.3d at 489.

<sup>18</sup> Overall, Petitioner's dispute is based on the provision of interstate communications services. It is clear that claims that raise "questions concerning the duties, charges and liabilities of...telephone companies with respect to interstate communications services are to be governed solely by federal law and...the states are precluded from acting in this area." *MCI Communications Corp. v. O'Brien Marketing, Inc.*, 913 F.Supp. 1536, 1540 (S.D.Fla. 1995). The fact that this dispute is governed by federal law cannot be disputed.

court from entertaining a claim that would require it to assess the lawfulness of a carrier's tariff, or resolve a dispute over its meaning.<sup>19</sup>

Additionally, pursuant to the doctrine of primary jurisdiction, the FCC has primary jurisdiction over cases where the agency's expertise is necessary to make policy and technical determinations.<sup>20</sup> In this instance, Petitioner's claims are based on the FCC's rules and orders governing the provision of interstate communications services overall, as well as the practices regarding PIC assignment to a customer line, and the interpretation of tariff provisions. All of these complex issues require the FCC's policy and technical expertise to bring about resolution. The courts have specifically found that a determination of the reasonableness of tariffed rates is a decision left to the FCC's expert discretion.<sup>21</sup>

Further, the Courts have also held that the FCC has primary jurisdiction over claims of unjust and unreasonable practices in violation of § 201(b) of the Act.<sup>22</sup> Similarly, in this case, the Petitioner has specifically raised that GTE's practice regarding PIC assignments is unreasonable in violation of § 201(b) of the Act – a determination the FCC is best suited to make.

## II. Customers are Able to Select Local Only Service or Bundled Service Offerings

Petitioner also inquires whether local telephone service providers may provide local service only to their customers, or must they, by virtue of their filed tariff rates,

---

<sup>19</sup> See *Montana-Dakota Utils.*, 341 U.S. at 251-52.

<sup>20</sup> The Court in this instance already determined that the instant action should be referred to the FCC as the expert agency. Court Order (Petition, Exhibit B) at 5-6. Typically, Courts look at four factors in considering a referral motion, including whether the issue lies within the agency's discretion or requires its expertise. See e.g. *Phone-Tel Communications, Inc. v. AT&T Corp.*, 100 F.Supp.2d 313 (E.D.Pa. 2000) (held that the FCC's expertise was necessary to make technical and policy determinations regarding payphone collection).

<sup>21</sup> See *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996); *In re Long Distance Telecommunications Litig.*, 831 F.2d 627, 631 (6<sup>th</sup> Cir. 1987).

bundle local service with long distance service, even where the customer has no need for long distance service. MCI does not contend that a customer is prohibited from declining the random, default assignment of a presubscribed PIC to his or her telephone line. As MCI was not Petitioner's LEC, and was not involved in any sense in a PIC assignment to Petitioner's telephone line, MCI takes no position concerning a LEC's tariffed practices for doing so. MCI does contend that a carrier is entitled to recover fees associated with the provisioning of interstate services.<sup>23</sup>

MCI notes that the FCC has been clear that a customer is not required to have a presubscribed PIC assigned to his phone line. Specifically, the Commission has concluded that a customer may elect to have a "no PIC" option.<sup>24</sup> The FCC has acknowledged that some customers may not want to select a primary interexchange carrier, particularly if customers seldom make long distance calls or they use long distance service on a per call basis through access codes or dial-around products.<sup>25</sup>

### III. The Practice of Bundling Services is Not a Violation of the Communications Act

Petitioner also asks if long distance service is not required to be bundled with local service in all events, is the practice of bundling these services a violation of the Communications Act. The answer is simple - there is absolutely no support for the notion that the bundling of local and long distance services, as a general matter, violates the Act. To the contrary, the FCC has recognized that the industry trend is for carriers to bundle their service offerings to consumers to offer one-stop shopping, including the

---

<sup>22</sup> See *MCI Telecommunications Corp. v. Dominican Republican Corp.*, 984 F.Supp 185 (S.D.N.Y. 1997).

<sup>23</sup> *In the Matter of Federal-State Joint Board on Universal Service et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45 (rel. Dec. 13, 2002) at ¶ 42. In the Petition, Petitioner does not squarely challenge the reasonableness of any specifically identified access fees.

<sup>24</sup> See *In the Matter of Investigation of Access and Divestiture Related Tariffs: Allocation Plan Waivers and Tariffs*, CC Docket No. 83-1145, Phase 1, 101 FCC2d 935, (rel. Aug. 19, 1985) at ¶ 38.

combination of long distance and local services.<sup>26</sup> Indeed, all of the major carriers in recent months have announced the launch of bundled products in an effort not only to match competitors' products, but also to meet customer demands, create customer loyalty, and increase market share and profit.<sup>27</sup> To date, the FCC has not found that any carrier providing such an offering violates the Act.

MCI notes that Petitioner's attempt to argue that the "forced" bundling of long distance and local service is a violation of § 201 (b) of the Act is based, in part, on some erroneous assumptions that require correction.<sup>28</sup> Petitioner argues that because she requested a new phone line and stated that she would only use the line for Internet or facsimile services, *access* to the long distance services was obviously not required.<sup>29</sup> Petitioner's intended use for her phone line, however, is irrelevant to her arguments.<sup>30</sup> In today's communications environment, it is technically possible for a customer to use a phone line in a home or business for a computer connection or fax machine in one

---

<sup>25</sup> See *In the Matter of Sprint Corp. Request for Declaratory Ruling Regarding Application of PICCs*, CCB/CPD Docket No. 98-2, 13 FCC Rcd 10220, (rel. May 19, 1998) at ¶¶ 2, 7.

<sup>26</sup> See *In the Matter of Federal-State Joint Board on Universal Service et al.*, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, (rel. Feb. 26, 2002) at ¶¶ 13-14, 133-134; see also *In the Matter of Federal-State Joint Board on Universal Service et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45 (rel. Dec. 13, 2002) Separate Statement of Chairman Michael K. Powell and Separate Statement of Commissioner Kathleen Q. Abernathy (discussing the need for the Commission to reassess the Universal Service contribution methodology because of the rise in bundled products including the combination of local and long distance services).

<sup>27</sup> See "Phone Companies See Their Future in Flat-Rate Plans", By Nicholas Thompson, NEW YORK TIMES, May 20, 2003; "Callers Jump at Chance to Gab, Gab, Gab; Bevy of Flat-Rate Phone Plans Gets Lots of Takers", By Michelle Kessler, USA TODAY, April 23, 2003; "Package Deals; Phone Companies Hope that Bundling Services Will Help Carry Them Back to Profitability", By Suzanne King, KANSAS CITY STAR, April 29, 2003.

<sup>28</sup> See Petition at 14-15.

<sup>29</sup> Petition at 2, 14. Petitioner claims that it was her intention to use her extra phone line "almost exclusively for an answering machine and not for making telephone calls". Petition at 2. The Petitioner further claims that at a later time she "acquired a computer system and elected to use the subject phone line as a 'dedicated line' to be used exclusively over her computer modem for locally accessible computer services". *Id.* It is not clear that those "intentions" and "elections" were communicated as an express desire to the carrier's representatives that she did not need a long distance PIC on her phone line.

<sup>30</sup> This is particularly true where Petitioner actually used her "second line" to make long distance calls. See Complaint (Petition Exhibit A) at 9 and Petition Exhibit D at 3.

instance and for basic voice services in the next. Further, sending a facsimile could require long distance service. The fact that Petitioner may have expressed the desire to use the line for limited purposes does not necessarily lead to the assumption that long distance service was unnecessary on that line.

Moreover, the fact that the customer line was “unused” for long distance services, at least for some period of time, is not significant to an analysis of a purported § 201(b) violation.<sup>31</sup> Equally likely, low volume customers may elect to have a long distance PIC on their phone lines and make few (if any) long distance calls during any given billing cycle. In short, these particular facts do not support a colorable § 201(b) violation.

### **CONCLUSION**

Since Petitioner’s questions, as presented, do not squarely track the underlying civil action, it is not clear that the FCC must make any determinations relevant to this proceeding. In the alternative, for the reasons described herein, MCI respectfully requests that the FCC find that the state law claims raised by the Petitioner are barred by the file rate doctrine and that the FCC is the appropriate forum for Petitioner’s claims. Further, the Commission should affirm that a customer may have a “no PIC” option on a phone line and that the practice of bundling local and long distance services, generally, does not violate the Communications Act.

---

<sup>31</sup> Petition at 14. Additionally, MCI notes that the Petitioner is actually not challenging the lawfulness of minimum monthly charges contained on her long distance bill.

Respectfully submitted,

MCI WORLDCOM Network Services, Inc.

/s/

---

Lisa R. Youngers  
1133 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
(202) 736-6325

Dated: June 5, 2003