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Decision 98-11-063 November 19, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Pacific Bell (U 1001 C), Complainant, vs. MCI Telecommunications Corporation (U 5002 C), Defendant.	Case 97-02-027 (Filed February 18, 1997)

L. Nelsonya Causby and Colleen O'Grady, Attorneys at Law, for Pacific Bell, complainant.
Le Boeuf, Lamb, Greene & MacRae, LLP, by Thomas E. McDonald, Attorney at Law, and Tony DiTirro, for MCI Telecommunications Corporation, defendant.
Wright & Talisman, by Michael Day, Michael J. Thompson, and Paul Flynn, Attorneys at Law, for San Diego Payphone Owners Association and Payphone Service Providers Group; Graham & James, by Martin A. Mattes and Douglas D. Orvis, Attorneys at Law, for California Payphone Association; intervenors.
S. Robert Weissman, for the Telecommunications Division.

Table of Contents

OPINION

I. Summary

This decision finds that MCI Telecommunications Corporation (MCI) failed to comply with Resolution T-15782[1] which required MCI to implement procedures to compensate payphone owners for the use of their equipment to originate non-coin intraLATA calls[2] carried by MCI. Accordingly, this decision orders MCI to comply with Resolution T-15782 by compensating the following parties for the use of their payphones to originate non-coin intraLATA calls carried by MCI: (a) Pacific Bell, (b) members of the California Payphone Association, (c) members of the Payphone Service Providers Group, and (d) members of the San Diego Payphone Owners Association. This decision also orders MCI to file an amended tariff that complies with Resolution T-15782. Finally, this decision finds that MCI's obligation to compensate payphone owners pursuant to Resolution T-15782 ended once MCI began to compensate them for non-coin calls in accordance with federal regulations.

II. Regulatory and Procedural Background

In Decision (D.) 90-06-018, the California Public Utilities Commission (CPUC or Commission) authorized Pacific Bell (Pacific)to bill and collect 25¢ from payphone customers for each non-coin intraLATA call and to remit the 25¢ to the owners of the payphones from which the non-coin calls were originated. The purpose of the 25¢, also known as the Pay Station Service Charge (PSSC), was to compensate payphone owners for the use of their equipment to make non-coin intraLATA calls initiated by one of the following methods:

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[1] Resolution T-15782 was issued on March 13, 1996.

[2] A non-coin call is a call from a payphone that is completed without depositing a coin. Non-coin calls are also known as "non-sent paid" calls.

- Dialing 0 (zero) plus the ten-digit phone number and a credit card number.
- Dialing an access code (1-800, 950-0XXX, or 10XXX, where the three-digit XXX denotes a particular interexchange carrier) plus 0 (zero), plus a ten-digit phone number and a credit card or PIN number.
- Placing the call through an operator (i.e., dialing 0- or 00-).

Pre-paid calling card calls and 1-800 calls to information providers (e.g., 1-800-AIRLINE or 1-800-GOPIZZA) were not subject to the PSSC.

In D.94-09-065, the Commission opened Pacific's intraLATA toll market to competition from interexchange carriers (IECs). With the start of intraLATA competition, the Commission determined it would be fair to require IECs carrying intraLATA traffic to bill, collect and remit the 25¢ PSSC to all payphone service providers (PSPs),[3] including Pacific Bell. Thus, D.94-09-065 required IECs to charge a 25¢ PSSC for each non-coin intraLATA call in addition to any other applicable rates and charges. To determine how IECs should comply with this requirement, D.94-09-065 directed Staff to convene a workshop and report back to the Commission.

On October 17, 1994, MCI filed a petition to modify D.94-09-065 to eliminate the requirement for MCI to bill, collect, and remit the 25¢ PSSC. In D.95-06-062, the Commission denied MCI's petition and made the following statements:

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[3] "PSP" refers to both Local Exchange Companies (LECs) and independent payphone providers (IPPs). IPPs are often referred to as Customer Owned Pay Telephone (COPT) providers.

"[D.94-09-065] clearly articulates the position that [PSPs] should, out of fairness, be compensated when customers use their telephones to make calls producing revenues that flow only to the IEC... (D.95-06-062, mimeo., p. 3.)

"In sum, we intended in our discussions of the PSSC in D.94-09-065 to endorse the commonly held principles that the owner of property should be fairly compensated for others' use of that property and that the treatment of competitors should be as fair as possible. As applied to this case, the first principle suggests that [PSPs] should receive fair compensation for use of [their] facilities for [non-coin] intraLATA calls carried by the IECs. The second principle leads to the conclusion that all those providing comparable services using [PSP] facilities should be comparably burdened for such compensation." (Ibid., p. 5.)

MCI next filed an application for rehearing of D.95-06-062. In D.95-09-126, the Commission denied MCI's application and stated as follows:

"D.95-06-062 correctly found that [D.94-09-065] is supported by the evidence, that [D.94-09-065] is necessary to afford compensation to payphone providers, that the PSSC does not violate Section 451 of the Public Utilities Code, and that the Commission has jurisdiction to impose the [PSSC] as a condition of entry to the intraLATA toll market." (D.95-09-126, mimeo., pp. 1, 2.)

As required by D.94-09-065, Commission Staff convened workshops to determine how IECs should comply with the Commission's requirement to bill, collect, and remit the 25¢ PSSC. On June 1, 1995, Staff issued its workshop report (the "PSSC Workshop Report") which contained the following recommendations: (1) The PSSC should be applicable to completed non-coin intraLATA calls that lead to revenues for the IEC; (2) All IECs carrying at least 3% of the non-coin intraLATA traffic (i.e., AT&T, MCI, and Sprint) should implement a procedure to bill, collect and remit the PSSC to PSPs within 30 days of the Commission order to do so; and (3) AT&T, MCI, and Sprint should each submit an advice letter to place the PSSC into their tariffs.

On March 13, 1996, the Commission issued Resolution T-15782 which adopted all the recommendations in Staff's PSSC Workshop Report.[4] The resolution also (1) authorized Pacific to file a tariff which required MCI to bill, collect, and remit the 25¢ PSSC to Pacific and other PSPs[5]; and (2) ordered MCI to file a tariff to bill, collect, and remit the PSSC in conformance with the provisions in Pacific's PSSC tariff.[6]

MCI filed an application for rehearing of Resolution T-15782. In D.96-10-079, the Commission denied MCI's application and stated:

> "After 18 months of litigation regarding our policy to compensate [PSPs] for the use of their equipment, we adopted Resolution T-15782 ... [which] required such IECs, including MCI...to file and make effective within 30 days tariffs for billing, collecting, and remitting the PSSC as necessary to implement Pacific's Advice Letter No. 17014, and adopted the recommendations of the PSSC workshop report. (D.96-10-079, mimeo., pp. 4, 5.)
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> "As the factual description laid out above indicates...MCI [has] been trying to avoid paying the PSSC ever since [D.94-09-065] was issued in 1994. The current applications for Rehearing and Motions to Stay are a continuation of a legal strategy to support <u>an obvious policy on the part of [MCI]...to just 'not pay' the PSSC</u>. Our Telecommunications Division reports that seven months after the Resolution was adopted by us, MCI...still [has] not begun reimbursing pay phone owners through a PSSC." (Ibid., p. 6, emphasis added.)

In response to Resolution T-15782, MCI filed Advice Letter No. 253 on April 12, 1996, containing its tariff to bill, collect, and remit the 25¢ PSSC. MCI's

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[4] Resolution T-15782, Ordering Paragraph (OP) 3.

[5] Ibid., OP 1.

[6] Ibid., OP 2.

advice letter was protested by the California Payphone Association (CPA) and Pacific, but the protests were never acted upon by the Commission.[7]

Pacific filed the instant complaint on February 18, 1997. In its complaint, Pacific alleged that MCI has failed to remit the PSSC as required by D.94-09-065, Resolution T-15782, and Pacific's tariff. MCI denied all of Pacific's allegations in its answer to Pacific's complaint filed on April 18, 1997.

On April 9, 1997, CPA[8] filed a petition to intervene. There was no opposition to CPA's intervention, and CPA's petition was granted by assigned Administrative Law Judge (ALJ) Kenney in a ruling issued on June 6, 1997. On July 1, 1997, a joint petition to intervene was filed by the Payphone Service Providers Group (PSPG) and the San Diego Payphone Owners Association (SDPOA).[9] There was no opposition to the intervention of PSPG and SDPOA (referred to collectively hereafter as PSPG), and their petition was granted in a ruling from the bench on July 3, 1997.[10]

A prehearing conference was held on July 3, 1997, followed by evidentiary hearings on September 23 through September 25, 1997. The case was submitted upon the receipt of PSPG's reply brief on November 3, 1997. On June 8, 1998, at the request of the assigned Commissioner, the ALJ's proposed decision was mailed to the parties for comment pursuant to Rule 77.1. Comments and reply comments on the ALJ's proposed decision were submitted by all the parties. On September 8, 1998, in response to a motion filed by MCI, an oral argument on the

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[7] Pacific's and CPA's protests contained essentially the same allegations as their testimony in this proceeding.

[8] CPA represents over 200 independent PSPs.

[9] PSPG represents 95 independent PSPs while SDPOA represents 68 PSPs.

[10] CPA, PSPG, and SDPOA are hereafter referred to collectively as "the Intervenors."

ALJ's proposed decision was held before Commissioners Bilas, Conlon, and Duque. All parties to this proceeding participated in the oral argument.

The Commission's authority to decide this complaint case stems from Public Utilities (PU) Code § 1702 which states, in pertinent part, as follows:

> Complaint may be made by...any corporation or person, chamber of commerce, board of trade, labor organization, or any...commercial...association or organization...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established of fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

III. Pacific's and Intervenors' Complaint

Pacific and the Intervenors (referred to collectively as "Complainants") allege that MCI has failed to remit the PSSC to the Complainants in violation of Resolution T-15782 and various Commission orders. In particular, Complainants allege that MCI's PSSC tariff is so unreasonable that no PSP would ever take service under the tariff, and thus MCI would never have to remit the PSSC as required by Commission orders. Pacific also alleges that MCI has violated Pacific's tariff which requires IECs to remit the PSSC to Pacific and other PSPs. Pacific further alleges that MCI has engaged in unfair competition by refusing to bill MCI customers for the 25¢ PSSC while Pacific has dutifully complied with Commission orders to charge its customers for the 25¢ PSSC. Finally, Pacific alleges that MCI has violated PU Code § 453(a) which prohibits public utilities from subjecting corporations to prejudice or disadvantage.[11]

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[11] Pacific also alleged that MCI violated PU Code § 451. Because Pacific's testimony and briefs do not mention of § 451 violations, we shall assume that Pacific has dropped this allegation.

The Complainants seek relief in the form of a Commission order requiring MCI to remit the PSSC for past and future years.[11] They also state that MCI should be ordered to file a new PSSC tariff expunged of the rates, terms and conditions in MCI's existing tariff which they consider to be unreasonable or illegal. In addition, Pacific asks that MCI be fined for its failure to comply with Commission orders to remit the PSSC.

MCI denies all of the Complainants' allegations. MCI states that it complied with the Commission's orders by filing a tariff to bill, collect and remit the PSSC, and that the Complainants refused to avail themselves of the tariff. MCI also asserts that PU Code § 532 obligates MCI to adhere to its filed tariff, effectively precluding the Commission from granting the Complainants' request for PSSC payments based on terms different from those found in MCI's tariff. MCI further states that it has no obligation under Pacific's tariff to bill, collect, and remit the PSSC. In addition, MCI believes that the relief sought by the Complainants constitutes "damages" which the Commission lacks jurisdiction to award. Finally, MCI claims the Commission lacks jurisdiction to adjudicate matters involving prospective relief because matters related to the PSSC have been preempted by federal regulations since late 1996.

IV. Federal Preemption of Commission Jurisdiction Over PSSC

A. Background

A threshold issue in this proceeding is whether the Federal Communications Commission (FCC) has preempted the Commission's authority to order MCI to remit the PSSC to the Complainants. The issue of FCC

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[11] The Intervenors claim that MCI owes the PSSC for non-coin calls made on or after January 1, 1995. Pacific claims that MCI owes the PSSC for non-coin calls made on or after the effective date of Resolution T-15782 (i.e., April 12, 1996); but Pacific also states that if the Intervenors receive the PSSC for non-coin calls made on or after January 1, 1995, then so should Pacific.

preemption stems from the following portion of the Telecommunications Act of 1996 (Telecom Act):

> "[T]he [FCC] shall take all actions necessary...to prescribe regulations that...establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. (47 U.S.C. § 276(b)(1), emphasis added.)
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> "To the extent that any State requirements are inconsistent with the [FCC's] regulations, the [FCC's] regulations on such matters shall preempt such State requirements." (47 U.S.C. § 276(c).)

As required by the Telecom Act, the FCC issued the following orders (the "Payphone Orders") which prescribed rules for compensating PSPs for interstate and intrastate calls made from their payphones[11]:

- *Report and Order In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, released on September 20, 1996 (FCC Order 96-388).
- *Order on Reconsideration In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, released on November 8, 1996 (FCC Order 96-439).
- *Second Report and Order In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, released on October 9, 1997 (FCC Order 97-371).
- *Memorandum Opinion and Order In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, released on March 9, 1998 (FCC Order 98-481).

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[11] Not all of the FCC orders discussed in this decision are part of the official record in this proceeding. Therefore, pursuant to Rule 73 of our Rules of Practice and Procedures (Rule), we hereby take official notice of all FCC orders and decisions referenced herein.

The FCC's Payphone Orders[14] require IECs to compensate PSPs for non-coin calls, including intraLATA access code calls, subscriber 800 calls, and operator 0+ calls.[15] The FCC's Payphone Orders thus require IECs to compensate PSPs for the same non-coin calls that are subject to the PSSC.

Under the FCC's Payphone Orders, PSPs are to receive the following compensation for inter- and intrastate non-coin calls:

- For the period of November 7, 1996, through October 6, 1997, the FCC "tentatively" concluded that IECs should compensate PSPs at a rate of $0.284 for each access code and subscriber 800 call. However, the FCC has yet to address how the total payment obligation for this period will be calculated and allocated among the IECs. (FCC 97-371, ¶¶ 4, 12.)

- For the period of October 7, 1997, through October 6, 1999, the FCC ordered all IECs to compensate PSPs at a rate of $0.284 per completed call. The $0.284 is a default rate that applies if a PSP and IEC cannot reach a negotiated agreement. Beginning on October 7, 1999, the default rate in the absence of a negotiated agreement will be the market-based local coin rate less $0.066. For coinless payphones, the $0.284 will continue to be the default rate in the absence of a negotiated agreement. (FCC 97-371, ¶¶ 1-3.)

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[14] FCC Orders 96-388 and 96-439 were affirmed in part and vacated in part by a decision of the U.S. District Court of Appeals for the District of Columbia Circuit in Illinois Public Telecommunications Association v. FCC, 117 F.3d 555. FCC Orders 97-371 and 98-481 revised the FCC's payphone regulations in response to Illinois Public Telecom.

[15] An access code call occurs when a caller dials a sequence of numbers that connect the caller to the operator service provider (OSP) associated with that sequence, as opposed to the OSP presubscribed to the originating line. Access codes include 800 numbers, 10XXX in equal access areas, and "950" Feature Group B dialing (950-0XXX or 950-1XXX) anywhere, where the three-digit XXX denotes a particular IEC. A subscriber 800 call occurs when a caller dials an 800 or 888 number assigned to a particular subscriber. Finally, an operator 0+ call occurs when the caller dials "0" plus the called number. Operator 0+ calls include credit card, collect, and third number billing calls. (FCC 97-371, Footnotes 2 and 12)

- PSPs may receive the above per-call compensation amounts for all other non-coin calls not otherwise compensated pursuant to contract, including operator 0+ calls. (FCC 96-388, ¶ 53; FCC 96-439, ¶¶ 2, 51; FCC 97-371, ¶¶ 2, 165)
- Each LEC, including Pacific, may receive the above per-call compensation amounts from IECs once the LEC has fulfilled various FCC conditions. (FCC 96-439, ¶¶ 7, 130-132; FCC 97-371, Footnote No. 9.)

Although the FCC's payphone compensation regulations apply to every completed intrastate call,[16] the FCC declined to say whether its regulations preempted all state payphone compensation plans. Instead, the FCC instructed the states to review their payphone compensation regulations to ensure that PSPs are not receiving double compensation for non-coin calls. After allowing for a reasonable period for the states to undertake such a review, the FCC stated that any party that believes a state's regulations conflicts with the FCC's rules could file with the FCC a petition for a declaratory ruling, and that the FCC would evaluate the state's payphone compensation regulations at that time.[17]

B. Position of the Parties

MCI believes the Telecom Act provides the FCC with preemptive authority to regulate all intrastate payphone compensation arrangements. According to MCI, the Act's preemptive measures became effective in November 1996 when the FCC implemented its payphone compensation regulations for all interstate and intrastate non-coin calls.

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[16] FCC 96-388, ¶ 1; FCC 96-439, ¶ 7.

[17] FCC 96-439, ¶¶ 49, 73.

MCI states that it has been paying compensation to the Intervenors for non-coin calls pursuant to the FCC's rules[18] since November 1996.[19] MCI acknowledges, however, that it has not yet paid any compensation to Pacific for non-coin calls under the FCC's rules, but MCI states that no compensation was owed to Pacific under the FCC's rules. This is because the FCC precluded LECs, including Pacific, from receiving payphone compensation from the IECs until the LECs removed payphone costs from their interstate tariffs.[20]

The Complainants present several arguments for why there has been no federal preemption of the state-mandated PSSC. First, the Complainants contend that FCC-mandated compensation for non-coin calls does not preempt the PSSC since each charge provides compensation for different services rendered. Pacific adds that because the state and federal charges are for different purposes, Pacific would need a new source of revenues if the PSSC is eliminated at the state level.

Second, the Complainants note that FCC 96-439 allowed parties to petition the FCC for a declaratory ruling on whether a state's payphone compensation rule is preempted by the FCC's rules. Since MCI has not sought such a declaratory ruling, the Complainants argue that MCI's assertion of FCC preemption lacks credibility.

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[18] The FCC initially established an "interim" compensation arrangement that was to apply from November 1996 through October 6, 1997. Under the interim arrangement, IECs with revenues in excess of $100 million per year were to collectively pay PSPs a flat rate of $45.85 per month for each payphone, with MCI's share being $8.826 per month for each payphone. After the FCC's interim arrangement was vacated by the court in Illinois Public Telecom, the FCC "tentatively" concluded that IECs should compensate PSPs at a rate of $0.284 for each non-coin call made from November 1996 through October 6, 1997. (FCC 97-371, ¶ 4.)

[19] 3 TR 395: 13-17.

[20] Prior to the Telecom Act, LECs recovered the portion of their payphone equipment costs allocated to the interstate jurisdiction through Carrier Common Line ("CCL") charges assessed on carriers that connected with the LECs. To implement Section 276(b)(1)(B) of the Telecom Act, the FCC ordered LECs to remove all payphone costs from their interstate CCL charges. (FCC 96-388, ¶¶ 128, 146, 181, and 183; FCC 96-439, ¶ 142-165.)

Third, the Complainants claim that the CPUC addressed the issue of federal preemption in D.96-10-079 which states that "setting a PSSC until the Act's preemptive measures come into play is clearly within our authority." (D.96-10-079, mimeo., p. 7.) The Complainants interpret this statement to mean there has been no federal preemption of the state-mandated PSSC.

Fourth, the Complainants contend it is premature to decide whether there has been federal preemption of the PSSC. They note the Court in Illinois Public Telecom vacated the FCC's payphone compensation rates for the period of November 7, 1996 to October 6, 1997, and that the FCC has not set new rates for this period. Instead, the FCC has only adopted "tentative" conclusions on the amount of compensation IECs must pay PSPs for this period, and the FCC may yet change its "tentative" conclusions.

Finally, Pacific states that it has received no compensation from MCI under either the federal or state compensation schemes. Pacific believes this is good reason to find that the FCC regulations do not preempt the PSSC since, at least in the case of Pacific, MCI has made no payments under the federal scheme.

C. Discussion

We have repeatedly stated that the purpose of the PSSC is to compensate PSPs for the use of their payphones to make non-coin intraLATA calls.[21] Our examination of the FCC's Payphone Orders reveals that the FCC's regulations likewise require that PSPs be compensated for the use of their payphones to

[21] D.96-10-079, mimeo., pp. 2, 4; D.95-09-125, mimeo., pp. 2, 13; D.95-06-062, mimeo., pp. 3, 5, and Conclusion of Law No. 1.

make non-coin intraLATA calls.[22] Thus, requiring MCI to remit the state-mandated PSSC of $0.25 in addition to the FCC-mandated compensation of $0.284 for the same non-coin intraLATA call would result in MCI paying the Complainants twice for the same call.[23] Therefore, once MCI began compensating the Complainants under the FCC's rules, the Complainants suffered no ill effects related to MCI's alleged failure to remit the PSSC. Accordingly, to avoid double compensation, we will not require MCI to remit the PSSC to the Complainants once MCI began to compensate the Complainants for non-coin intraLATA calls under the FCC's rules.[24] For this reason, we are not required to decide whether the PSSC has been preempted by federal regulations in order to resolve the instant complaint in a way that is just and reasonable to all the parties.[25]

The Complainants are mistaken that the FCC's payphone regulations cannot be relied upon to provide them with compensation due to the actions of the Court in <u>Illinois Public Telecom</u>. While the Court required the FCC to reset

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[22] The plain language of the Telecom Act requires the FCC to prescribe regulations to fairly compensate PSPs for every completed intrastate non-coin call (47 U.S.C. §276(b)(1). The FCC complied by issuing its Payphone Orders (e.g., FCC 97-371, ¶¶ 6, 8, 9, 24-28, 41-63, 68, 99-108, 111, 117-122).

[23] For certain types of non-coin intraLATA calls, such as operator 0+ calls, the effect of the FCC's rules is to allow PSPs to choose between (1) negotiating with carriers for the amount of compensation they will receive for these calls or (2) receiving the per-call compensation amount mandated by the FCC (e.g., $0.284 per call from October 7, 1997 through October 6, 1999) from the carrier to whom each of these calls is routed. (FCC 96-388, ¶ 53; FCC 96-439, ¶¶ 7, 51; FCC 97-371, ¶¶ 2, 165)

[24] Since we find the FCC-mandated compensation of $0.284 per call serves the same purpose as the 25-cent PSSC, we do not need to address Pacific's contention that it would need a new source of revenues if the PSSC is eliminated.

[25] The Complainants are incorrect that we decided the issue of federal preemption in D.96-10-079. In that decision, we stated there was no federal preemption of the PSSC as of March 13, 1996, but we left open the possibility of federal preemption at a future date: "While it is clear that an FCC order based on [the Telecom Act]...has the possibility of being preemptive in some respect in the future, on March 13, 1996 states still had the authority to

Footnote continued on next page

the amount of compensation to be paid to PSPs, the Court left intact the FCC's requirement that IECs should compensate PSPs for every completed non-coin call. As required by the Court, the FCC in 97-371 reset the amount of compensation to be provided to PSPs starting on October 7, 1997.[26] As of the date of this decision, the FCC was in the process of re-determining the amount of compensation for the period of November 7, 1996 through October 6, 1997. In short, the FCC has established regulations under which all PSPs will be fairly compensated for non-coin intraLATA calls.

Further on in today's decision, we conclude that MCI was required by Resolution T-15782 to start remitting the PSSC to the Complainants beginning no later than April 12, 1996. Therefore, in order to ascertain the amount of PSSC owed by MCI to the Complainants, we need to determine when MCI's obligation to remit the PSSC to the Complainants ended, i.e., the date that MCI began to compensate the Complainants for non-coin intraLATA calls pursuant to the FCC's rules. In the case of the Intervenors, the FCC ordered MCI to provide compensation for non-coin calls effective as of November 7, 1996.[27] MCI also testified that it has been paying compensation to the Intervenors under the FCC's rules since the fourth quarter of 1996[28]; and CPA acknowledged that MCI has been paying compensation under the FCC's rules.[29] Therefore, since the record

set a PSSC for intrastate traffic...Setting a PSSC until the Act's preemptive measures come into play is clearly within our authority." (D.96-10-09, mimeo., pp. 6-7.)

[26] The FCC ordered IECs to compensate PSPs by April 1, 1998, for non-coin calls made during the period of October 1997 through December 31, 1997. (FCC 98-481, ¶ 4.)

[27] FCC 97-371, ¶ 4. Although the FCC has firmly established that MCI shall compensate the Intervenors for non-coin calls effective November 7, 1996, the amount of compensation has only tentatively been set by the FCC at $0.284 per call for the period of November 7, 1996 through October 6, 1997. The FCC may affirm or alter this amount in a subsequent order.

[28] 2 TR 268: 10-22; 3 TR 396: 6 - 397: 18.

[29] Exhibit 100, p. 9.

indicates that MCI effectively started compensating the Intervenors for non-coin intraLATA calls under the FCC's rules on November 7, 1996, we shall only consider in this proceeding the amount of PSSC that MCI owes to the Intervenors for the period of time prior to November 7, 1996.

The FCC did not set a firm date for when MCI would begin to compensate Pacific. Rather, the FCC required Pacific to first certify that it had completed various actions, including the following: (1) reclassified payphones assets from Pacific's regulated to nonregulated accounts; (2) removed payphone costs from Pacific's federal tariffs; and (3) implemented nonstructural safeguards related to Pacific's provision of unregulated payphone services.[30] The FCC, however, did not require Pacific to file such certification with the FCC. Instead, the FCC left it to Pacific and MCI to mutually agree upon when Pacific had met the FCC's certification requirements.[31]

Pacific sent a letter to MCI on June 10, 1997, in which Pacific certified that it had met all of the FCC's requirements to receive compensation from MCI.[32] Based on this information, we conclude that MCI has been compensating Pacific for non-coin calls under the FCC's rules since June 10, 1997. Accordingly, we shall only consider in this proceeding the amount of PSSC that MCI owes to Pacific for the period of time prior to June 10, 1997. If the actual date is other than June 10, 1997, Pacific and MCI should confer with one another for the purpose of reaching a joint stipulation on the date that MCI started paying compensation to

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[30] FCC 96-439, ¶¶ 131, 132.
[31] FCC 97-805, ¶ 22; FCC 98-481, ¶ 4.
[32] Exhibit 2, Attachment 1.

Pacific under the FCC's rules.[33] Any such stipulation should be filed with our Docket Office. If no stipulation can be reached, Pacific and/or MCI may file a petition to modify this decision regarding the date that MCI effectively began compensating Pacific under the FCC's rules. If necessary, the assigned ALJ will hold an evidentiary hearing and prepare a decision on the issue of when MCI began compensating Pacific for non-coin calls under the FCC's rules.

V. Whether MCI's PSSC Tariff Complied with Commission Orders

The Complainants allege that MCI has not paid the PSSC as required by Commission orders. More specifically, they allege that MCI filed a tariff to bill, collect, and remit the PSSC that contained so many unreasonable terms and conditions, including provisions in direct violation of Commission orders, that it was effectively impossible for the Complainants to obtain PSSC payments from MCI. We examine the specific allegations below.

A. MCI's 18-Month Development Period

MCI's PSSC tariff states that MCI would not remit the PSSC until 18 months after MCI had received a request to develop a system to bill, collect, and remit the PSSC. The Complainants allege the 18-month waiting period violates Resolution T-15782 which ordered MCI to start remitting the PSSC within 30 days from the effective date of the resolution. MCI responds that it was not required by Resolution T-15782 to start remitting the PSSC within 30 days, but to merely file a PSSC tariff within 30 days. MCI adds that its estimated 18-month development time for a PSSC system was reasonable given the complexity of the task.

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[33] MCI concedes that it must compensate Pacific under the FCC's rules, but MCI is unsure when its obligation to compensate Pacific started. (3 TR 236: 3 - 237: 3) Our intent is for MCI to remit the PSSC to Pacific up to the moment when MCI began to compensate Pacific under the FCC's rules.

MCI is wrong that Resolution T-15782 did not require MCI to start remitting the PSSC within 30 days. In the resolution, we found that because MCI had already been apprised in D.94-09-065 of its obligation to remit the PSSC, it was "reasonable to require [MCI] to implement the PSSC within 30 days from the effective date of this resolution."[34] We then ordered MCI to file a tariff within 30 days "to implement Pacific Bell Advice Letter No. 17014."[35] Pacific's advice letter, in turn, required MCI to remit the PSSC to both Pacific and other PSPs, effective immediately. Further, Resolution T-15782 adopted the recommendations contained in Staff's PSSC Workshop Report,[36] including the recommendation that MCI should implement a procedure to remit the PSSC within 30 days of a Commission order to do so. When MCI sought rehearing of Resolution T-15782, we issued a decision in which we expressed our dismay that MCI had not yet begun to pay the PSSC:

> "MCI [has] been trying to avoid paying the PSSC ever since our IRD Decision was issued in 1994. The current Applications for Rehearing...are a continuation of...an obvious policy on the part of [MCI] to just "not pay" the PSSC. Our Telecommunications Division reports that seven months after the resolution was adopted by us, MCI...still [has] not begun reimbursing payphone owners through a PSSC." (D. 96-10-079, mimeo., p. 6, emphasis added.)

MCI's claim that it needed 18 months before it could start remitting the PSSC is false. The PSSC Workshop Report recognized that some IECs might need 18 months to develop systems to bill, collect, and remit the PSSC, and thus recommended that until IECs were able to develop such systems, they should

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[34] Resolution T-15782, mimeo., p. 8, emphasis added.
[35] Ibid., OP 2.
[36] Ibid., OP 3.

use, on an interim basis, one of the alternative procedures[37] identified in the PSSC Workshop Report.[38] The recommendations in the PSSC Workshop Report were then adopted by Resolution T-15782.[39] In short, Resolution T-15782 obviated the need for MCI to develop a PSSC system in order to start paying the PSSC. Therefore, because MCI filed a tariff that allowed MCI to forgo paying the PSSC for 18 months while it developed its PSSC system, MCI failed to comply with Resolution T-15782 which required MCI to use an alternate procedure to pay the PSSC pending the development of MCI's PSSC system.

B. MCI's 20.5¢ Fee to Bill, Collect, and Remit the PSSC

MCI's PSSC tariff contains a "processing fee" of 20.5¢ per call to bill, collect, and remit the 25¢ PSSC. The Complainants allege MCI's processing fee of 20.5¢ per call is unreasonable since it allows MCI to keep more than 80% of the 25¢ PSSC. They also state that MCI's 20.5¢ processing fee is unreasonable when compared with the processing fees charged by AT&T, GTE of California (GTE), and Pacific of only 3¢ to 4¢ per-call.[40]

MCI presents several reasons why its 20.5¢ processing fee is reasonable. First, MCI claims its 20.5¢ processing fee is a "market-based" rate. According to

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[37] The PSSC Workshop Report identified the following alternative procedures that IECs should use: (1) develop their own systems to bill and collect the PSSC, (2) use a billing company to bill and collect the PSSC, or (3) employ a revenue allocation procedure using updated data every three months. (Exhibit 300, Attachment A, pp. 15-16.) Under the revenue allocation procedure, an IEC that could not bill and collect the PSSC would still pay the PSSC to PSPs based on the IEC's proportionate share (i.e., "revenue allocation") of PSSC-eligible calls.

[38] Exhibit 300, Attachment A, pp. 4, 15, 16.

[39] Resolution T-15782, OP 3.

[40] AT&T has been paying the 25¢ PSSC for non-coin intraLATA calls since January 1, 1995. AT&T charges 4¢ to bill, collect, and remit the PSSC, GTE charges 3¢, and Pacific charges 3¢ to 4¢. (Exhibit 1, p. 10; Exhibit 100, pp. 5-6.)

MCI, it is reasonable to charge a market-based rate since Pacific charges both a market-based PSSC of 25¢ and a market-based PSSC processing fee of 3¢ to 4¢.

Second, MCI states its 20.5¢ processing fee is the sum of three components: (i) 10¢ to bill and collect the PSSC, (ii) 6¢ for "database dips," and (iii) 4.5¢ for uncollectibles. MCI explains that it must include 10¢ in its processing fee because MCI has to pay the LECs 10¢ per "casual call" in order to bill and collect the 25¢ PSSC associated with the casual call.[41] MCI also states that it is reasonable for its 20.5¢ processing fee to include 6¢ for database dips[42] and 4.5¢ for uncollectibles because this is what LECs charge for similar services.

Third, MCI states that GTE and Pacific can charge a much lower processing fee than MCI because they are the State's largest PSPs. As the largest PSPs, GTE and Pacific are paying the 25¢ PSSC to themselves, resulting in substantial revenues to offset their PSSC processing costs. Additionally, GTE's and Pacific's position as large PSPs means they are essentially billing themselves for most of their PSSC processing costs. MCI, in contrast, has to recover all of its PSSC processing costs from third parties, resulting in higher costs for MCI.

Fourth, MCI believes GTE and Pacific can charge a lower processing fee because they developed their PSSC billing systems in the early 1990s, which allowed them to recover their PSSC system development costs in a monopoly environment and over a longer period of time than MCI.

Fifth, MCI claims Pacific can charge a lower processing fee because its PSSC system does not have to perform as many functions as MCI's system.

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[41] Casual calling occurs when payphone users who are not customers of an IEC nonetheless use the IEC to place calls. Since casual callers are not the IEC's customers, the IEC may lack information to bill and collect the revenues generated by every casual call. Under such circumstances, the IEC may pay LECs to bill and collect the casual calling revenues.

[42] The term MCI uses for database dips is "payphone screening look-up."

According to MCI, Pacific admitted during the PSSC Workshop that it would cost $216 million for Pacific to develop a PSSC billing system similar to the one MCI would have to develop.

Finally, MCI believes that AT&T can charge a lower processing fee than MCI because AT&T made a decision to bill and collect payphone compensation on a nationwide basis in order to attract business from payphone owners. Therefore, AT&T's development costs could be amortized across a nationwide market, while MCI would have to recover its PSSC system development costs exclusively in California.

After reviewing the record, we conclude that MCI's 20.5¢ processing fee is unreasonable. The purpose of the PSSC is to compensate payphone owners for the use of their property to originate non-coin calls. MCI's 20.5¢ processing fee undermines this purpose by putting into MCI's pockets more than 80% of the 25¢ PSSC. Moreover, MCI failed to present a credible explanation for why it needs to charge a processing fee of 20.5¢. To begin with, MCI is simply wrong that it should be allowed to charge a market-based processing fee because Pacific charges both a market-based PSSC of 25¢ and a market-based processing fee of 3¢ to 4¢. The 25¢ PSSC paid to Pacific was not set by the market, but by the Commission in D.90-06-018 and D.94-06-065.[43] Pacific's processing fee of 3¢ to 4¢ was also set by the Commission in D.90-06-018.[44] Other LECs were likewise

[43] D.90-06-018 states that the PSSC is not a market-based rate, but instead represents an agreement among settling parties to: (1) compensate PSPs for the costs they incur when their payphones are used to make non-coin calls; and (2) compensate PSPs for reducing the amount they charge customers for local calls from 25¢ to 20¢. (D.90-06-018, mimeo., p. 12.) In D.94-09-065, the Commission required IECs to remit the 25¢ PSSC adopted in D.90-06-018.

[44] D.90-06-018, Appendix A, Article V, Section F.3.d(i) indicates that Pacific may charge a processing fee equal to the higher of 3¢ or its actual costs.

directed to establish cost-based PSSC processing fees, not market-based fees.[45] But even if we had intended the PSSC processing fee to be a market-based rate, MCI has ignored the relevant market, i.e., the PSSC processing fees charged by AT&T, GTE, and Pacific of between 3¢ and 4¢.[46] Given the existence of a "market" price for the PSSC processing fee of between 3¢ and 4¢, MCI's claim that its 20.5¢ processing fee is market-based lacks credibility.

We find little merit in MCI's explanation that it is reasonable for its 20.5¢ processing fee to include the LECs' charge of 10¢ per call to bill and collect for casual calling. Many of the PSSC-eligible calls carried by MCI are not casual calls, and it makes no sense for MCI to charge the LECs' rate to bill and collect for a casual call if a casual call did not occur in the first place. Further, MCI obtains a substantial benefit when it pays LECs to bill and collect for casual calls because this enables MCI to collect the revenues generated by such calls. Since MCI receives a substantial benefit by paying LECs to bill and collect for casual calls, it is unreasonable for MCI to force PSPs to pay the entire cost charged by LECs for this service. Finally, Pacific must often pay other LECs to bill and collect the PSSC on its behalf,[47] yet Pacific's processing fee is only a fraction of MCI's.[48]

There is no merit in MCI's explanation that its 20.5¢ processing fee should incorporate a charge of 6¢ for database dips and 4.5¢ for uncollectibles because

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[45] D.90-06-018, Appendix A, Article V, Section F.3.d states that the "billing service [for the PSSC] shall be priced at the LEC's fully allocated or direct embedded cost for setting up and operating this billing function."

[46] The "market" to bill and collect for the PSSC lacks one of the essential attributes of a well-functioning market, i.e., the existence of many buyers and sellers. Specifically, for any call subject to the PSSC, the only vendor for the service to bill and collect the PSSC for that call is the carrier that carries the call. Therefore, if the PSP wants to collect the PSSC, then the PSP has no choice but to pay whatever PSSC processing fee that is demanded by the carrier.

[47] Exhibit 300, Attachment A, p. 11.

[48] Pacific tariff Schedule Cal. P.U.C. A5.5.5.3.E.7 states that Pacific charges 3¢/call to bill for the PSSC when Pacific is doing the billing, and 4¢/call when another carrier is doing the billing.

this is what LECs charge for similar services. In order to bill, collect, and remit the PSSC, MCI does not pay LECs for either database dips or uncollectibles. Therefore, the LECs' charges for these services have no bearing on MCI's costs to bill, collect, and remit the PSSC. Further, the processing fees charged by AT&T, GTE, and Pacific of between 3¢ and 4¢ includes their costs for database dips and uncollectibles. Thus, MCI's claim that its charge of 6¢ for database dips and 4.5¢ for uncollectibles is comparable to what other carriers charge to bill, collect, and remit the PSSC is spurious.

There is also no merit in MCI's argument that its has to charge a higher processing fee than other carriers because MCI has higher costs. MCI never developed a PSSC processing system, which casts doubt on MCI's claim that it would incur significantly higher costs to develop and operate its PSSC system than the actual costs incurred by AT&T, GTE, and Pacific. Moreover, each of MCI's reasons for why it should have higher costs than other carriers fails to withstand even cursory scrutiny. For example, MCI's claim that GTE and Pacific have lower costs because their costs are offset by their PSSC revenues is contradicted by D.90-06-018 which set GTE's and Pacific's processing fees equal to their total costs, and not costs less revenues as MCI would have us believe.[19]

Equally unpersuasive is MCI's claim that GTE and Pacific have lower PSSC processing costs because they can recover most of their costs internally. If MCI's reasoning had merit, then presumably AT&T would have to charge a PSSC processing fee similar to MCI's fee since AT&T, like MCI, must recover all of its

[19] D.90-06-018, Appendix A, Article V, Section F.3.d and Section F.3.d(i). GTE's and Pacific's PSSC processing fees could not reflect PSSC revenues because the two LECs received no such revenues at the time their PSSC processing fees were established.

PSSC-related costs from outside entities. However, AT&T's processing fee is only one-sixth of MCI's fee.

MCI is wrong that GTE and Pacific can charge a lower processing fee because they were able to recover their PSSC system development costs in a monopoly environment and over a longer period of time than MCI. Like MCI, both LECs have had to recover their PSSC costs exclusively from PSPs and not from a large body of ratepayers as suggested by MCI. The Commission also directed GTE and Pacific to amortize their PSSC development costs over three years,[50] giving them little more time than MCI would have had to amortize its development costs had MCI developed a PSSC system.[51] Furthermore, had MCI developed its PSSC system, it would have had about the same amount of time that AT&T has had to amortize its system development costs, yet MCI's tariff provides for a PSSC processing fee that is more than six times AT&T's fee.

MCI is in error when it asserts that Pacific can charge a lower PSSC processing fee because Pacific's PSSC system does not have to perform the same functions as MCI's PSSC system, and that Pacific admitted it would cost $216 million to build a system similar to MCI's. MCI and Pacific must both bill, collect, and remit the PSSC, nothing more or less. Since there is no difference in the functions that must be performed by MCI and Pacific, there is no justification for MCI to charge vastly more than Pacific. Furthermore, Pacific never admitted that it would cost $216 million to build a system similar to MCI's. Rather, Pacific

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[50] D.90-06-018, Appendix A, Article V, Section F.3.d and Section F.3.d.

[51] Since GTE and Pacific amortized their PSSC system development costs over a three-year period starting in the early 1990s, the two LECs have by now fully amortized their development costs, which means their current PSSC processing fees may be above their actual costs for this service. The possibility that the LECs' processing fees may exceed their current costs makes MCI's processing fee, which is five to six times higher than the LECs' fees, appear even more unreasonable by comparison.

said it would cost $216 million to install over 140,000 new payphones if the Commission placed the burden on PSPs to bill and collect the PSSC.[52] The Commission never adopted this method for billing and collecting the PSSC. MCI's argument also fails because there is no dispute that AT&T's PSSC system performs the same functions as MCI's system, yet AT&T charges a PSSC processing fee that is one-sixth of MCI's processing fee.

We find little merit to MCI's argument that AT&T has lower costs than MCI because AT&T chose to develop a nationwide system for payphone compensation. A nationwide system would likely cost more to develop than a California-specific system, thus offsetting much of the cost advantage that MCI alleges AT&T realized from the development of its nationwide system. Furthermore, there is substantial evidence that a state-specific system would not be unduly costly to develop. For example, Pacific stated that it cost only $300,000 to develop its California-specific system.[53] GTE's system evidently cost a similar amount to develop since GTE's cost-based PSSC processing fee is similar to Pacific's cost-based processing fee.

C. MCI's $10,000 Account Set-Up Fee

MCI's PSSC tariff requires PSPs to pay an "account set-up fee" (set-up fee) of $10,000. The purpose of the fee was twofold. First, MCI would not develop a system to bill, collect, and remit the PSSC until MCI had received a "bona fide" request, evidenced by the payment of the $10,000 set-up fee, to develop its PSSC system. Second, the $10,000 set-up fee would help defray MCI's PSSC system development costs. The Complainants allege the $10,000 set-up fee is

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[52] Exhibit 300, Attachment A, pp. 12, 13.

[53] Exhibit 2, p. 13; Exhibit 300, Attachment A, p. 15.

unreasonable because the fee made it uneconomic for most PSPs to seek the 25¢ PSSC from MCI; and because no other carriers charged such a fee.

MCI states there are several reasons why its $10,000 set-up fee is reasonable. First, MCI was concerned the FCC might impose regulations that would render obsolete a PSSC system developed solely for California. The $10,000 set-up fee assured that PSPs would bear at least some of the costs imposed on MCI to develop a California-specific PSSC system.

Second, the $10,000 set-up fee represented only a fraction of MCI's cost to develop a PSSC system. The fee constituted earnest money, rather than an effort by MCI to recover all of its PSSC system development costs. Moreover, MCI stated during hearings that groups of PSPs could band together to submit the set-up fee, thus making the set-up fee reasonable for each PSP.[54]

Third, MCI states it reasonably estimated that it would cost $2 million to develop its PSSC system. The $2 million cost estimate took into account the complexity of MCI's many different billing systems, all of which would have to be modified to enable MCI to bill, collect, and remit the PSSC.

Finally, MCI states its estimated development costs are not comparable to the costs incurred by Pacific to develop its PSSC system. According to MCI, Pacific's system cannot track non-coin intraLATA calls dialed via 1-800 or "950" access codes, thus making a comparison of MCI's estimated development costs with Pacific's actual development costs misleading. MCI believes a better comparison is the $2 million in development costs estimated by Sprint in the PSSC Workshop.

We find MCI's $10,000 set-up fee to be unreasonable for several reasons. To begin with, MCI was ordered by Resolution T-15782 to bill, collect, and remit

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[54] 3 TR 394: 25-28.

the PSSC, so no PSP should have had to pay $10,000 to induce MCI to develop its PSSC system. Furthermore, MCI's $10,000 set-up fee made it impossible for many PSPs to profitably collect the PSSC from MCI. For example, a typical PSP with 100 payphones, each generating 174 PSSC-eligible calls per year[55] and receiving net PSSC compensation from MCI of 4.5¢ per call (i.e., the PSSC of 25¢ less MCI's processing fee of 20.5¢), would need almost 13 years to pay off the $10,000 set-up fee. MCI's testimony during hearings that multiple PSPs could band together to collectively pay the $10,000 lacks credibility since MCI's tariff contains no such provision, and because allowing multiple PSPs to band together would defeat one of the primary reasons that MCI gives for its $10,000 fee, namely, to recover some of its costs to develop a PSSC system.

We are not persuaded that MCI's $10,000 set-up fee is justified on the basis that it would cost an estimated $2 million for MCI to develop its PSSC system. We previously expressed skepticism regarding MCI's claimed $2 million in development costs in D.96-10-079 wherein we stated:

> "MCI [has] been trying to avoid paying the PSSC ever since our IRD Decision was issued in 1994...The major complaint raised by MCI...is that implementation of the PSSC will cost them too much money. It is interesting to note that AT&T-C implemented the PSSC for $200,000 and Pacific did it for $300,000. MCI and Sprint, who have fought the PSSC from its inception, claim it will cost them over $2,000,000 to implement." (D.96-10-079, mimeo., p. 6, citations omitted.)

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[55] PSPG and SDPOA represent 163 PSPs who, on average, have fewer than 100 payphones each. (1 TR 160: 2-11.) CPA estimated that the amount of PSSC owed by MCI to its members in 1996 was $43.20 per payphone, which translates into 174 PSSC-eligible calls carried by MCI per year, per payphone. MCI claims that CPA's figure of 174 calls per year is too high. If MCI is correct, then it would take even longer for PSPs to recover MCI's $10,000 set-up fee.

MCI produced little support for its estimated $2 million in development cost.[56] Due to this lack of support, we conclude that the actual costs incurred by AT&T and Pacific to develop their PSSC systems of $200,000 and $300,000, respectively,[57] to be a more reliable gauge of the cost MCI would have incurred had it developed a PSSC system than MCI's estimated costs.

There is no merit to MCI's argument that its estimated PSSC development costs cannot be compared to Pacific's actual development costs because Pacific's system cannot track non-coin calls dialed via 1-800 and 950. Pacific was required by D.90-06-018 to remit the PSSC for 1-800 and 950 calls, and MCI presented no evidence that Pacific is not remitting the PSSC for these types of calls. Therefore, we have no reason to conclude that Pacific's PSSC system development costs cannot serve as a benchmark for MCI's PSSC system development costs.

Finally, MCI's $10,000 set-up fee is unreasonable because there was no need for MCI to spend $2 million to build a PSSC system in order to start paying the PSSC. The PSSC Workshop Report recognized that some IECs would initially not have a PSSC system in place, and thus recommended that "[u]ntil IECs have developed procedures to bill, collect, and remit the PSSC to pay telephone providers, IECs may use, on an interim basis, an alternative procedure such as a revenue allocation procedure that uses updated data every three months."[58] Resolution T-15782 expressly permitted IECs to use the alternate procedures described and recommended in the PSSC Workshop Report.[59] The appropriate

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[56] 3 TR 329-340.

[57] Exhibit 2, pp. 8, 13; Exhibit 300, Attachment A, p. 15.

[58] Exhibit 300, Attachment A, p. 4.

[59] Resolution T-15782, OP 3.

time for MCI to have assessed a $10,000 set-up fee, if ever, was after its PSSC system had been developed and its development costs were known.[60]

D. MCI's 3% Carriage Rule

MCI's tariff requires each PSP to "demonstrate to MCI's satisfaction that MCI carries at least 3% (three percent) of the non-coin intraLATA" traffic originated by the PSP.[61] The Complainants allege this tariff provision violates Resolution T-15782 which did not require PSPs to demonstrate they originate a threshold amount of MCI traffic in order to receive the PSSC from MCI. MCI responds that nothing in Resolution T-15782 prevents MCI from requiring PSPs to demonstrate they generate a threshold amount of MCI traffic in order to receive the PSSC. MCI also claims its 3% carriage requirement is reasonable since MCI is obligated to its customers to determine whether calls are subject to the PSSC before adding the PSSC to customers' bills.

In Resolution T-15782, the Commission required every IEC carrying more than three percent of the State's non-coin intraLATA traffic (i.e., AT&T, MCI, and Sprint) to bill, collect, and remit the PSSC.[62] In other words, Resolution T-15782 required MCI to remit the PSSC to all PSPs regardless of the amount of PSSC-eligible traffic that MCI carried for individual PSPs. Therefore, MCI made up out of whole cloth the requirement for PSPs to prove that at least 3% of their PSSC-eligible calls are carried by MCI. Since PSPs are largely incapable of making the

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[60] MCI's argument that possible FCC preemption of the PSSC made it unwise for MCI to develop a PSSC system does not excuse MCI's failure to use one of the alternative procedures for paying the PSSC adopted in Resolution T-15782 while MCI waited for FCC preemption.

[61] Exhibit 300, Attachment C, Original Sheet No. 9.

[62] Resolution T-15782, mimeo., p. 8 and OP 2.

showing demanded by MCI,[43] this tariff provision seems designed more to keep MCI from paying the PSSC than protecting MCI's customers.[44] But even if it were possible for PSPs to make such a showing, it is simply unreasonable to require them to do so since we ordered MCI to remit the PSSC for every PSSC-eligible call it carried.

E. Other MCI Tariff Provisions

The Complainants allege that MCI's PSSC tariff contains many more unreasonable provisions. For example, MCI's tariff does not provide for payment of the PSSC for non-coin calls dialed via "950" access codes. MCI's tariff also excludes certain "screening digits" from coverage, effectively preventing the payment of the PSSC for all of Pacific's payphones. In addition, MCI's tariff requires each PSP to provide a list of its ANIs[45] to MCI, despite the fact that MCI regularly receives a free list of ANIs from Pacific. Finally, MCI's tariff requires PSPs to provide MCI with free access to LEC's Line Information Databases (LIDB) and 411 databases as a prerequisite to PSSC compensation. MCI expressed a willingness to revise its PSSC tariff to assuage the Complainants' concerns.

We agree with the Complainants that the aforementioned tariff provisions are unreasonable. Although MCI is willing to revise its tariff to alleviate the Complainants' concerns, the fact that the unreasonable provisions were in MCI's tariff in the first place lends weight to the Complainants' allegation that MCI's

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[43] Exhibit 300, Attachment A, p. 13; Exhibit 200, p. 9, lines 11-19; 3 TR 348-350.

[44] There is nothing in the record to indicate why MCI's 3% carriage rule would have any bearing on MCI's ability to determine whether calls are subject to the PSSC.

[45] ANI is an acronym for "automatic number identification" which is a 10-digit number associated with each subscriber line. "Screening digits" are two additional digits passed along with the 10-digit ANI (e.g., as of April 15, 1997, all of Pacific's coin line payphones are identified with the screening digits of "27" (Exhibit 1, pp. 7-8)).

PSSC tariff was deliberately crammed with unreasonable terms and conditions in an effort to avoid having to pay the PSSC.

F. Violation of PU Code § 453(a)

Pacific alleges that MCI paid what MCI terms a "Property Imposed Fee" (PIF) of 25¢ to some PSPs for non-coin calls, but that MCI never made the PIF available to Pacific. According to Pacific, MCI's failure to pay the PIF to Pacific is a violation of PU Code § 453(a) which prohibits public utilities from giving preferential treatment to some customers but not others. MCI denies Pacific's allegation. According to MCI, its PIF was available to all PSPs who satisfied the conditions set forth in its tariff.

Pacific did not cite any evidence of MCI having paid the PIF to any PSP.[66] Since there is no evidence that PSPs received the PIF, we find that Pacific failed to prove its allegation that MCI discriminated against Pacific and violated § 453(a).

G. MCI's Compliance with Pacific's PSSC Tariff

Pacific's PSSC tariff requires MCI to remit the PSSC to Pacific Bell and other PSPs.[67] The Complainants allege that MCI, by failing to remit the PSSC, has violated Pacific's PSSC tariff. MCI responds that Pacific's tariff cannot impose PSSC-related obligations on MCI since MCI is governed by its own PSSC tariff.

In Resolution T-15782, we rejected arguments that Pacific's tariff cannot impose PSSC-related obligations on MCI,[68] and we went on to approve Pacific's

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[66] Pacific's Opening Brief cites 1 TR 153: 25 - 174: 4 and 3 TR 402: 16-25. Neither of these references supports Pacific's allegation that MCI paid the PIF to other PSPs.

[67] Schedule Cal. P.U.C. No. A6.2.1.A.4.

[68] In Resolution T-15782, mimeo., at page 7, we rejected protests to Pacific's advice letter containing its PSSC tariff, including protests (summarized on page 5 of the resolution) that Pacific's PSSC tariff would regulate the behavior of IECs. We note that our use of Pacific's tariff to regulate MCI's remittance of the PSSC is not unusual since IECs, Operator Service Providers (OSPs) and call aggregators are already regulated through Pacific's tariffs. For

Footnote continued on next page

PSSC tariff which contained a clear and explicit requirement for MCI to remit the PSSC to Pacific and other PSPs.[69] But more importantly, in Resolution T-15782 we ordered MCI to file a PSSC tariff to implement Pacific's PSSC tariff.[70] Therefore, even if Pacific's tariff could not in-of-itself require MCI to remit the PSSC -- a notion we rejected in Resolution T-15782 -- our order in Resolution T-15782 for MCI to implement Pacific's PSSC tariff removes any doubt that MCI had an obligation to comply with Pacific's PSSC tariff.

For the forgoing reasons, we conclude that MCI was obligated to comply with the requirement in Pacific's PSSC tariff to remit the PSSC to Pacific and other PSPs. Since MCI never did remit the PSSC, we find that MCI failed to comply with Pacific's tariff.

H. Conclusion

In a complaint case, the burden is on the complainant to prove with a preponderance of evidence that a public utility has failed to comply with a law, tariff, or Commission rule.[71] In the instant proceeding, Complainants have demonstrated that MCI was required by Resolution T-15782 and Pacific's tariff to remit the PSSC to the Complainants by no later than April 12, 1996. It is

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example, any IEC, OSP or call aggregator who provides intraLATA service from Pacific's payphones is regulated by Pacific's tariff Schedule Cal. P.U.C. A5.5.3.C.2j, which caps the rates these entities can charge for intrastate toll calls made from Pacific's payphones.

[69] Resolution T-15782, mimeo., at pp. 1, 5 and 7, and OP 1, indicates that the Commission knowingly authorized Pacific to file a tariff which required MCI to remit the PSSC.

[70] Resolution T-15782, OP 2, orders MCI to "file and make effective tariffs to provide for billing, collecting and remitting the PSSC, as necessary, to implement Pacific Bell Advice Letter No. 17014." (emphasis added)

[71] D.97-09-113, Cal. PUC LEXIS 894 at *25, *26; D.96-09-026, Cal. PUC LEXIS 893 at *7; D.94-05-022, 54 CPUC2d 422, at 425-26; and D.94-05-060, 54 CPUC2d 538, at 541. Preponderance of evidence is defined as: (a) greater weight of evidence; (b) evidence which is more credible and convincing; or (c) that which best accords with reason and probability. (D.97-03-067, Cal PUC LEXIS 626 at *8)

undisputed that MCI never paid the PSSC. Complainants also demonstrated that MCI's PSSC tariff contained so many unreasonable rates, terms, and conditions that MCI would never remit the PSSC. The consequence of MCI's failure to remit the PSSC in compliance with Resolution T-15782 and Pacific's tariff was that MCI earned revenues from non-coin intraLATA calls without compensating the payphone owners whose property made MCI's revenues possible.

For the preceding reasons, we find that the Complainants have met their burden of proof to show that MCI failed to comply with Resolution T-15782 and Pacific's tariff, both of which required MCI to remit the PSSC. We next turn to determining the amount of PSSC that MCI owes to the Complainants pursuant the resolution and Pacific's tariff.

VI. Requested Relief

A. Commission Authority to Award PSSC Payments

MCI asserts that the Commission only has authority to award reparations which MCI defines as a refund or adjustment of the amount paid by a customer to a utility. MCI argues that the monetary awards sought by the Complainants are not reparations since the Complainants never paid for service under MCI's PSSC tariff, and hence there is no amount to refund or adjust. According to MCI, what the Complainants really seek is damages which is beyond the Commission's jurisdiction to award.

Unlike MCI, we do not view the issue in terms of whether the Complainants seek reparations or damages. Rather, we see the issue as whether MCI has complied with our order in Resolution T-15782 to remit the PSSC, and whether we have authority to direct MCI to comply with our prior order.

It is undisputed that we had the authority to require MCI to pay the PSSC in Resolution T-15782. What MCI has argued is that we are powerless to award damages, but MCI has shown no reason why we lack authority to now direct

MCI to comply with our prior order to pay the PSSC. Indeed, pursuant to PU Code § 701, we have plenary authority to do all things which are necessary and convenient to supervise and regulate every public utility, including MCI. This broad authority clearly encompasses the power to order MCI to comply with Resolution T-15782. It would be illogical and unreasonable to interpret our governing statutes as allowing us to require MCI to pay the PSSC, but then forbidding us from directing MCI to pay the PSSC after MCI had failed to comply with our previous order to do so. Therefore, to the extent MCI has not complied with our requirement in Resolution T-15782 to pay the PSSC, we clearly possess the authority to now direct MCI to pay the PSSC to the Complainants in conformance with our previous order.

In its comments on the ALJ's proposed decision, MCI contends that it was obligated by Commission orders to remit only the amount of PSSC that MCI billed and collected from its payphone customers. Since MCI never billed and collected the PSSC, MCI claims it cannot be ordered to remit the PSSC.[72] We disagree. As stated previously in this decision, MCI filed a tariff that failed to comply with our order in Resolution T-15782 to bill, collect, and remit the PSSC. By filing its defective tariff, MCI deprived itself of the opportunity with which it could have paid the PSSC to the Complainants.[73] Moreover, we find nothing in our governing statutes which even remotely suggests that MCI's failure to comply with that part of our order requiring MCI to bill and collect the PSSC

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[72] MCI's Comments on Proposed Decision, pp. 2-5.

[73] Resolution T-15782, OP 3, adopted the recommendations in the PSSC Workshop Report. The PSSC Workshop Report, in turn, recommended that IECs which could not bill and collect the PSSC should use the "revenue allocation procedure" under which IECs were to simply pay the PSSC without collecting the PSSC from their customers. (Exhibit 300, Attachment A, pp. 4, 15, 16). Today's decision requires nothing more of MCI than what was already required by Resolution T-15782.

now immunizes MCI from having to comply with the remaining part of our order requiring MCI to remit the PSSC.

B. Applicability of PU Code § 532

MCI contends that because it had a PSSC tariff on file with the Commission,[74] MCI is precluded by PU Code § 532 from now paying the PSSC to the Complainants on terms different from those in its tariff. MCI adds that because the Commission never suspended or rejected the advice letter containing its PSSC tariff, despite protests from CPA and Pacific, it would be unfair for the Commission to now require MCI to remit the PSSC on terms not found in its tariff.

We find nothing in PU Code § 532 that shields MCI from having to comply with our previous order to pay the PSSC. Further, PU Code § 532 provides us with wide latitude to exempt utilities from having to comply with their tariffs:

> "[N]o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time...**The commission may by rule or order establish such exemptions from the operation of this prohibition as it may consider just and reasonable to each public utility.**" (PU Code § 532, emphasis added.)

To avoid the unjust result of MCI using its tariff to avoid compensating PSPs for the use of their property, we conclude that it would be just and reasonable to invoke the exemption provision in PU Code § 532 , if necessary, so that MCI may deviate from its filed tariff and pay the PSSC as previously ordered.

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[74] MCI filed its PSSC tariff in Advice Letter No. 253 submitted on April 12, 1996.

MCI is correct that we never rejected or suspended the advice letter containing its PSSC tariff, even after the advice letter was protested.[75] However, there is no time limit for us to reject an advice letter. For example, in D.94-11-026 we rejected a tariff originally filed by a utility in 1992 because, among other reasons, the advice letter failed to comply with prior Commission decisions.[76] In this same decision, we also ordered the utility to refund the money collected pursuant to its non-compliant advice letter.[77] Thus, there is precedent for the Commission to (1) reject an advice letter years after it was filed if the advice letter failed to comply with a previously issued Commission order, and (2) to place parties in the same position they would have been in had there been timely compliance with the previously issued Commission order.[78]

In its comments on the ALJ's proposed decision, MCI argues that it relied upon its filed PSSC tariff, and that this reliance prohibits the Commission from

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[75] Although the Commission never took action to reject or modify MCI's PSSC tariff, the Commission likewise never issued an order or resolution approving the PSSC tariff. To the contrary, in D.96-10-079 we noted with some dismay that MCI had not yet begun to pay the PSSC. (D.96-10-079, mimeo., p. 6.)

[76] 57 CPUC 2d 317, at 321.

[77] D.97-09-060 upheld the decision in D.94-11-026 to reject the utility's advice letter filed in 1992 and to order the utility to refund the money collected pursuant to the rejected advice letter.

[78] There is nothing impermissibly retroactive about requiring MCI to remit the PSSC starting April 12, 1996. In Resolution T-15782, we required MCI to start remitting the PSSC by no later than April 12, 1996, and our order today requires no payment for periods prior to that date. Nor does our action today conflict with PU Code § 728 which prohibits retroactive ratemaking. Section 728, where it applies, requires the Commission to fix rates that shall thereafter be observed. In Resolution T-15782, issued on March 13, 1996, the Commission ordered MCI to remit the PSSC beginning April 12, 1996. Accordingly, the Commission long ago determined the rates that MCI was thereafter required to observe. Since today's decision simply requires MCI to remit the PSSC in accordance with Resolution T-15782, there is no retroactive ratemaking here, and therefore no violation of PU Code § 728. Nor does today's decision conflict with SoCal Edison v. the PUC. 20 Cal. 3d 813 1978. Indeed, the Court in SoCal Edison ruled that the prohibition against retroactive ratemaking in § 728 is limited to situations where the Commission engages in general ratemaking. There is no general ratemaking in today's decision.

changing MCI's PSSC tariff for any period prior to the date of today's decision. MCI's argument adds nothing to its previous contentions that the Commission is without power to order changes to MCI's tariff. In any event, MCI has not shown how it could have reasonably relied on its PSSC tariff given that (a) the tariff did not comply with Resolution T-15782, (b) the Commission has power under PU Code § 532 to order exceptions to filed tariffs, and (c) the Commission never formally approved MCI's PSSC tariff.

C. Double and Triple Compensation

MCI claims that paying the PSSC would provide the Complainants with double or triple compensation for each non-coin intraLATA call. According to MCI, the FCC's regulations already require MCI to fairly compensate the Complainants for non-coin calls, and requiring MCI to pay the PSSC in addition to FCC-mandated payments would result in double compensation. MCI believes that triple compensation results from MCI's contracts with PSPs under which MCI pays commissions for non-coin calls that are routed to MCI in exchange for the PSPs pre-subscribing their payphones to MCI.

As discussed in more detail elsewhere in this decision, we agree with MCI that requiring it to pay the PSSC in addition to FCC-mandated payments would amount to double compensation. Consequently, we shall not require MCI to pay the PSSC to the Pacific and the Intervenors effective as of the date that MCI commenced FCC-mandated payments to each of these parties.

We find no merit in MCI's argument that it should be relieved of its obligation to remit the PSSC because it pays commissions to some PSPs for non-coin calls routed to MCI. Commissions are voluntary payments made by MCI to PSPs. The PSSC, in contrast, is a mandatory payment that must be made regardless of whether MCI is the pre-subscribed carrier. Moreover, MCI has paid neither commissions nor the PSSC to Pacific[79] and many other PSPs, resulting not in double or triple compensation for these entities, but in zero compensation. Finally, when we established the PSSC, we never indicated that PSPs would have to forgo commission payments in order to receive the PSSC. In fact, quite the opposite occurred. In D.90-06-018, the decision that established the PSSC, we authorized LECs to pay a 10¢ commission per non-coin call in addition to the 25¢ PSSC that LECs were required to remit for every non-coin call.[80]

D. Time Period for Which PSSC Is Owed

The Complainants present three primary reasons why MCI should remit the PSSC from January 1995 to the present. First, they claim D.94-09-065 obligated MCI to pay the PSSC with the start of intraLATA toll competition on January 1, 1995. Second, MCI has enjoyed revenues from non-coin calls since January 1, 1995, and MCI should provide compensation to PSPs for the same period of time. Finally, AT&T, GTE, and Pacific have been paying the PSSC since January 1, 1995, and these carriers should not be competitively disadvantaged by exempting MCI from having to pay the PSSC for the same period of time.

MCI responds that D.94-09-065 did not set any date for it to start remitting the PSSC. According to MCI, its obligation to remit the PSSC began on April 12, 1996, the date that Resolution T-15782 required MCI to file and make effective a PSSC tariff. MCI also believes that any obligation it may have had to remit the PSSC ended when MCI started compensating the Complainants for non-coin calls pursuant to the FCC's regulations.

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[79] Exhibit 2, p. 7.

[80] D.90-06-018, Appendix A, Article IV.3.a.

Pacific used the revenue allocation procedure adopted in Resolution T-15782 to estimate the number of PSSC-eligible calls carried by MCI.[12] Under this approach, Pacific first estimated the total number of PSSC-eligible calls made from its payphones, and then allocated a portion of these calls to MCI based on Pacific's estimate of MCI's market share for PSSC-eligible calls.

To estimate the total number of PSSC-eligible calls, Pacific started by counting the number of non-coin calls made from its 330 "chip" payphones ("chip" phones). Pacific's "chip" phones are the only ones in its inventory of 130,000 payphones that can identify and count non-coin calls. Pacific then deleted from its count of non-coin calls those which were not intraLATA (i.e., not eligible for the PSSC) and those less than one minute in length. The latter procedure was performed since Pacific cannot determine if non-coin calls carried by other carriers are completed (and thus subject to the PSSC), so Pacific assumed that non-coin calls greater than one minute in length were completed calls, while those less than one minute in length were not completed.

Using the previously described process, Pacific determined that each of its "chip" phone generates an average of 10 PSSC-eligible calls per month. To arrive at the total monthly count for PSSC-eligible calls, Pacific multiplied its base of 130,000 payphones times 10 calls/month. The total number of PSSC-eligible calls was then reduced by 30% to reflect that the average Pacific payphone generates fewer calls of all types, including PSSC-eligible calls, compared with Pacific's "chip" payphones.

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[12] The PSSC Workshop Report described the revenue allocation procedure as follows: "The IECs can pay the PSSC based upon estimates until the IECs develop their own billing methods. The estimates can be derived from the gross amount of the PSSC due to the pay telephone provider multiplied by the market share that each IEC has for this type of call." (Exhibit 300, Attachment A, p. 16.)

Pacific next allocated a portion of the total monthly number of PSSC-eligible calls to MCI in accordance with MCI's market share for such calls. To obtain market share data, Pacific used its "chip" phones to count the number of PSSC-eligible calls carried by each IEC. This data showed that MCI had a market share of between 50% and 60%, depending on the month.

To derive the amount of PSSC owed by MCI, Pacific multiplied its estimate of the number PSSC-eligible calls carried by MCI times $0.25. Table 1 below is an example of how Pacific estimated the monthly PSSC owed by MCI:

Table 1 Example of Monthly Calculation Showing Amount of PSSC Owed by MCI	
A. Base of "chip" payphones:	330
B. Number of non-coin calls during month	3,300
C. Average monthly non-coin calls per "chip" payphone (B ÷ A):	10
D. Number of payphones:	130,000
E. Total monthly non-coin calls (C x D):	1,300,000
F. Reduction Factor:	30%
G. Eligible non-coin calls (E x 70%):	910,000
F. MCI Market Share:	50%
G. Non-coin calls attributable to MCI (G x 50%):	455,000
H. PSSC owed by MCI (G x $0.25):	$113,750

For the period of April 15, 1996, through July 15, 1997, Pacific estimated that MCI owes PSSC in the amount of $2,210,957. Pacific also states that MCI should be assessed a late payment charge of 1.5% per month in accordance with Pacific's tariff, with a total late payment charge of $226,550 as of July 15, 1997.

CPA used a somewhat different approach to estimate the amount of PSSC owed by MCI. To develop its estimate, CPA used data from 363 of its members' payphones spread throughout California over the period of January 1995 through July 1997. The 363 payphones in CPA's study were able to count the number of non-coin calls carried by MCI, but were unable to distinguish between interLATA (non-PSSC-eligible calls) and intraLATA calls (PSSC-eligible calls). To estimate the number of intraLATA calls, CPA used a separate study performed by one of its members using data collected from 11,000 payphones over a 17-month period. This study found that 82.17% of the calls from the 11,000 payphones in the study group were intraLATA calls. CPA then applied the figure of 82.17% to the data from the 363 payphones described previously to arrive at the number of non-coin intraLATA calls carried by MCI.

The final step in CPA's methodology was to multiply its estimate of the number of PSSC-eligible calls carried by MCI by the 25¢ PSSC to arrive at the amount of PSSC owed. CPA found the amount of PSSC owed by MCI to be $44.76 for each of its members' payphones in service during 1995; $43.20 per payphone during 1996; and $24.64 per payphone for January 1, 1997, through July 31, 1997. Unlike Pacific, CPA did not state an aggregate amount of PSSC owed by MCI for any period. CPA also recommends that MCI should pay interest on past due amounts of between 8% and 18%. According to CPA, 8% is the current commercial rate, and 18% is Pacific's tariffed rate applicable to late payments.

PSPG did not present an estimate for the amount of PSSC owed to its members. Instead, PSPG supports the study performed by CPA, and asks that PSPG members receive the same amount per payphone as shown in CPA's study.

MCI states that Pacific's and CPA's estimates of the PSSC owed by MCI are based on flawed data. According to MCI, they used sample data from payphones which do not reflect average payphone traffic patterns.[33] MCI also claims that Pacific's study showing MCI's market share for non-coin calls

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[33] MCI claims that Pacific's witness admitted that Pacific's 30% reduction factor was meant to force a result similar to an interim method later abandoned by Pacific. (MCI Opening Brief, 29-30.) The transcript references provided by MCI do not support MCI's argument. R ther, Pacific's witness stated the opposite of what MCI attributed to the witness. (1 TR 68: 8-26.)

exceeding 50% cannot be reconciled with CPA's study showing MCI's market share to be 32%.

2. Discussion

We find that Pacific and CPA have reasonably estimated the amount of PSSC owed by MCI. Pacific used data from the only payphones it owns that are capable of tracking PSSC-eligible calls.[14] We are thus satisfied that Pacific used the best information available. CPA used data from payphones located throughout California, indicating that it obtained data from a representative sample of payphones.

We accord little weight to MCI's argument that Pacific and CPA used flawed data to estimate the amount of PSSC owed by MCI. As stated previously, Pacific used the only data it had available, while CPA used data from a representative sample of payphones. Further, the Complainants demonstrated that MCI can identify and track every non-coin call it carries,[15] yet MCI presented no information on the number of such calls. Thus, if MCI believes we used flawed data to determine the amount of PSSC it owes, then MCI has no one to blame but itself.[16]

We agree with the Complainants that MCI should pay interest on the amount of PSSC it owes. The Complainants should not lose the time value of money associated with the PSSC monies that MCI wrongfully withheld from

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[14] 1 TR 35: 2-11.

[15] Exhibit 1, p. 13; Exhibit 100, pp. 7-11, 14; Exhibit 200, pp. 13-17, 19. Additional evidence of MCI's ability to track non-coin calls comes from the State of Illinois where MCI has been compensating PSPs for completed non-coin interLATA and intraLATA calls since 1995 (Reference Items A, B, and C; and Exhibit 303, p. 11.)

[16] If MCI had provided data on the number of non-coin calls it had carried, we would only have had to determine what proportion of these calls are intraLATA calls in order to arrive at the amount of PSSC owed by MCI.

them. Therefore, as we have often done in circumstances where one party owes another for the time value of money (see, e.g., D.98-02-010 and D.98-01-022), we shall require MCI to pay interest to the Complainants based on the 3-month commercial paper rate as published in Federal Reserve Board Statistical Release G.13. The amount of interest owed by MCI to each of the Complainants shall be based on the period of time that (1) began on April 12, 1996, the date that MCI was required to start remitting the PSSC, and (2) ends on the date that MCI remits the full amount of the PSSC it owes to the Complainant.

We previously determined that MCI owes the PSSC to Pacific for the period of April 12, 1996 through June 9, 1997. Pacific demonstrated that the amount of PSSC owed by MCI for this period is $2,097,432.[47] We also previously determined that MCI should pay the PSSC to the Intervenors for the period of April 12, 1996 through November 6, 1996. The amount of PSSC owed by MCI for this period is $24.63 per payphone (i.e., $43.20 per payphone for all of 1996 prorated over the period of April 12 through November 6, 1996).[48] However, the Intervenors did not state the number of payphones they had in service for the period they are owed the PSSC. Therefore, to determine how much PSSC they are owed by MCI, each Intervenor shall submit a compliance filing within 45 days from the effective date of this decision specifying the average number of payphones its members had in service during the period of April 12, 1996 through November 6, 1996. Before submitting its compliance filings, each Intervenor shall demonstrate to MCI that the number of payphones shown in its

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[47] Pacific calculated the amount of PSSC owed by MCI for the period of April 15, 1996 through June 15, 1997. (Exhibit 1, p. 19.) We find this to be a reasonable approximation of the amount of PSSC owed by MCI for the nearly identical period of April 12, 1996 through June 9, 1997, since the two periods differ in length by only 3 days, or less than 1%.

[48] Since MCI did not object to PSPG's recommendation that it receive the same amount of PSSC per payphone as CPA, we shall adopt PSPG's recommendation.

compliance filings is fairly stated. If there is a dispute over the number of payphones the Intervenors had in service, MCI and/or the Intervenors may file a petition to modify this decision. If necessary, a hearing will be held and a subsequent decision issued on this matter.

Finally, in determining the amount of PSSC owed by MCI to the Complainants, we have intentionally not reduced the amount owed by MCI to Complainants by a processing fee similar to the 3¢ to 4¢ per call charged by AT&T, GTE, and Pacific. This is because MCI incurred no "processing costs" to bill, collect, and remit the PSSC, thus making it inappropriate to offset the amount of PSSC owed by MCI by a processing fee.

F. Compliance with § 1822(b)

MCI asserts that Pacific used a computer model to determine the amount of PSSC owed by MCI, but that Pacific failed to provide MCI with all the assumptions and equations built into the model as required by PU Code § 1822(b).[39] Absent this information, MCI argues that the results of Pacific's computer model should be accorded no weight. Pacific responds that it provided MCI with everything required by the statute.

We find that Pacific has met its statutory obligation to provide access to its computer model. We have had no trouble in verifying the results of Pacific's computer model by applying simple arithmetic to information available in the record of this proceeding. Moreover, the issue of access to Pacific's computer model was not raised by MCI either before or during the evidentiary hearings. Instead, MCI waited until its opening brief to raise the issue of access to Pacific's computer model. If MCI believed that it had not been given access to Pacific's

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[39] PU Code § 1822(b) states: "Any testimony...that is based, in whole or in part, on a computer model shall include a listing of all the equations and assumptions built into the model."

computer model, MCI could have filed a motion under Rule 74.6 to obtain access. MCI, however, never filed any such motion, which makes its argument about a lack to Pacific's computer model untimely.

G. Revisions to MCI's PSSC Tariff

The Complainants state that MCI should be ordered to file a new PSSC tariff expunged of all the rates, terms, and conditions that the Complainants consider to be unreasonable or illegal. MCI sees little need for a new PSSC tariff since MCI believes the PSSC has been preempted by federal regulations.

Earlier in this decision, we found that MCI failed to comply with our order in Resolution T-15782 to remit the PSSC to the Complainants. To ensure that MCI now complies, we shall require MCI to file an amended PSSC tariff which: (1) states that MCI will remit the 25¢ PSSC to the Complainants and other PSPs beginning April 12, 1996, and ending on the date that individual PSPs began to receive compensation from MCI pursuant to the FCC's payphone regulations; (2) states that the amount of PSSC owed by MCI to the PSPs will be determined in accordance with the revenue allocation procedure described in Staff's PSSC Workshop Report and adopted in Resolution T-15782[30]; (3) states that MCI will pay interest on the PSSC owed to PSPs with interest based on the 3-month commercial paper rate published in Federal Reserve Board Statistical Release G.13; (4) does not include a processing fee since MCI incurred no costs to bill and collect the PSSC; and (5) does not contain any of the rates, terms, and conditions found unreasonable by this decision.

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[30] Due to possible difficulty that MCI and PSPs may have in estimating the number of PSSC-eligible calls carried by MCI, MCI may negotiate with PSPs regarding the amount of PSSC and interest owed by MCI. If no agreement can be reached on the amount of PSSC owed by MCI, then MCI shall utilize the revenue allocation procedure adopted in Resolution T-15782.

So that MCI remits the PSSC to only those PSPs (or their successors) that were operating during the period in which the PSSC was in effect, MCI's amended PSSC tariff may require individual PSPs to provide a sworn declaration regarding the number of payphones the PSP had in service during the period which MCI is required to remit the PSSC. MCI shall promptly remit the PSSC upon the receipt of each sworn declaration.[91] MCI's amended PSSC tariff shall also allow PSPs at least 12 months to submit PSSC claims, after which time MCI may terminate its PSSC tariff.

MCI shall file its amended PSSC tariff no later than 30 days from the effective date of this decision.[92] Once MCI files its amended tariff, the Staff of our Telecommunications Division shall carefully review the tariff for compliance with Resolution T-15782 and this decision. Within 30 days of MCI submitting its revised PSSC tariff, the Director of the Telecommunications Division (TD) shall inform MCI in writing of the results of TD's review of MCI's tariff. The Director of TD may require MCI to revise its PSSC tariff, as necessary, to bring it into compliance with Resolution T-15782 and this decision. If MCI fails to comply with the Director's instructions for revising its PSSC tariff, the Director shall prepare for our consideration a resolution that contains a draft MCI PSSC tariff for adoption by us and a proposed penalty for MCI's failure to comply with Resolution T-15782 and this decision.

Finally, we note that requiring MCI to file an amended PSSC tariff that is effective as of April 12, 1996, is not retroactive ratemaking. On March 13, 1996, the date that Resolution T-15782 was issued, we ordered MCI to start paying the

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[91] If MCI later determines that a PSP's sworn statement contains inaccurate information that caused MCI to remit too much PSSC, MCI may seek the available remedies in the appropriate court of law.

[92] MCI shall submit its amended PSSC tariff by filing a supplement to its Advice Letter No. 253.

25¢ PSSC by no later than April 12, 1996. Thus, our order in Resolution T-15782 was prospective. Now, we are simply requiring MCI to amend its tariff so as to comply with our prior order.[33]

VII. Penalties

Pacific recommends that the Commission penalize MCI for its failure to comply with the Commission's order to pay the PSSC.[34] MCI strongly opposes Pacific's recommendation.

We conclude that a penalty is unnecessary due to our order herein that MCI must pay the PSSC and associated interest to the Complainants without further delay. Should MCI fail to comply with our order herein, we shall impose the strongest monetary penalty allowed by law.

VIII. Attorneys' Fees

PSPG asks that it be awarded an amount of money sufficient to cover its attorneys' fees and other reasonable costs (attorneys' fees). CPA states that if PSPG is awarded attorneys' fees, then CPA should likewise be awarded attorneys' fees. MCI opposes the award of attorneys' fees.

The appropriate time for PSPG to seek an award for its attorneys' fees is after the issuance of a final decision.[35] Consequently, we shall not decide now on PSPG's request for attorneys' fees.[36]

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[33] Elsewhere in this decision, we conclude that (1) we have the authority to reject a tariff that has been on file for years if the tariff failed to comply with a previously issued Commission order, and (2) that our rejection may be effective as of the date the tariff was originally filed. We exercise that authority here.

[34] The Commission's authority to penalize MCI is found in PU Code § 2107 which states as follows: "Any public utility which violates or fails to comply with any provision of any order, decision...or requirement of the Commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense."

IX. Section 311 Comments

The proposed decision of the Administrative Law Judge (ALJ) was served on the parties pursuant to Rule 77.1 which allows the Commission to apply the procedures set forth in Article 19 of the Commission's Rules of Practice and Procedure (Rules) to proceedings initiated by customer or subscriber complaint when the Commission finds it is in the public interest to do so. Article 19 implements PU Code § 311. Comments and reply comments to the ALJ's proposed decision were timely received from all the parties.

Rule 77.3 requires comments to address factual, legal, and technical errors in the ALJ's proposed decision. Comments which merely reargue positions taken in briefs are accorded no weight. We have carefully reviewed the comments that complied with Rule 77.3. To the extent that such comments required changes to the ALJ's proposed decision, such changes have been incorporated into this decision. Comments that did not comply with Rule 77.3 were not considered.

Findings of Fact

1. In D.94-09-065, the Commission adopted a policy that IECs should bill and collect from their customers a 25¢ PSSC for each non-coin intraLATA call and remit the PSSC to PSPs. The PSSC serves to compensate PSPs for the use of their payphones to originate non-coin intraLATA calls carried by the IECs.

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[85] PU Code § 1804(c) states that a request for intervenor compensation pursuant to §§ 1801 et seq should be filed after the issuance of a final order or decision by the Commission. In D.97-08-052 and D.94-09-082, the Commission stated that all pleadings associated with a request for compensation from the Advocates' Trust Fund (ATF) should be submitted after the relevant proceeding has concluded.

[86] On October 29, 1997, the ALJ ruled that: (1) PSPG filed its notice of intent to claim compensation after the deadline specified in PU Code § 1804(a)(1); (2) PSPG could submit a request for compensation from the ATF after a final decision in this proceeding; and (3) any award to PSPG from the ATF would occur only if PSPG were found ineligible for compensation pursuant to PU Code §§ 1801 et seq.

2. In D.94-09-065, Commission Staff were instructed to hold workshops and report back to the Commission on how IECs should comply with the Commission's requirement to bill, collect, and remit the 25¢ PSSC.

3. Staff's PSSC Workshop Report recommended that: (a) MCI should implement the PSSC within 30 days of a Commission order to do so; and (b) until MCI could deploy a system to bill, collect, and remit the PSSC, MCI should remit the PSSC using one of three methods identified in the PSSC Workshop Report.

4. Resolution T-15782 took the following actions: (a) adopted all of the recommendations contained in the PSSC Workshop Report; (b) adopted Pacific's PSSC tariff which required MCI to remit the PSSC to Pacific and other PSPs; and (c) ordered MCI to file a tariff to implement the PSSC and Pacific Bell's Advice Letter No. 17014 which contained Pacific's PSSC tariff.

5. MCI is required by Pacific's tariff and Resolution T-15782 to remit the PSSC to PSPs beginning April 12, 1996.

6. MCI never paid the PSSC to the Complainants.

7. On April 12, 1996, MCI filed Advice Letter No. 253 which contained MCI's PSSC tariff. MCI's PSSC tariff contained so many unreasonable rates, terms, and conditions, which are identified in the body of this decision, that the tariff failed to comply with the requirement in Resolution T-15782 for MCI to bill, collect, and remit the PSSC.

8. As required by the Telecom Act of 1996, the FCC has prescribed rules that require IECs to fairly compensate PSPs for every completed non-coin call originated from their payphones, including non-coin calls subject to the PSSC.

9. Effective November 7, 1996, MCI is required by FCC rules to fairly compensate the Intervenors for non-coin calls.

10. Pacific sent a letter to MCI dated June 10, 1997, in which Pacific certified that it had satisfied all of the FCC's conditions for receiving compensation for non-coin calls from MCI in accordance with the FCC's rules.

11. Requiring MCI to pay the state-mandated PSSC of 25¢ in addition to the FCC-mandated compensation of 28.4¢ for the same non-coin intraLATA call would result in MCI paying the Complainants twice for the same call.

12. MCI's voluntary payment of commissions to some PSPs for non-coin intraLATA calls routed to MCI in addition to the mandatory the 25¢ PSSC that MCI must remit to PSPs for such calls does not result in MCI paying double compensation for PSSC-eligible calls.

13. In the case of Pacific and many other PSPs, there is no possibility of double compensation associated with MCI paying these entities both commissions and the PSSC because MCI did not pay these entities any commissions for PSSC-eligible calls.

14. The Complainants cannot identify and track every PSSC-eligible call originated from their payphones.

15. Pacific and CPA each used a reasonable method to estimate the total number of PSSC-eligible calls originated from their payphones and MCI's share of those calls.

16. Pacific reasonably estimated that the amount of PSSC owed to it by MCI for the period of April 15, 1996 through June 15, 1997, is $2,097,432.

17. CPA reasonably estimated that the amount of PSSC owed to its members by MCI is $43.20 per payphone in service for all of 1996.

18. A reasonable method for determining the amount of PSSC owed by MCI to CPA's members is to prorate the $43.20 per payphone that CPA estimates MCI owes for all of 1996 over the period of April 12 through November 6, 1996. Using

this method, the amount of PSSC owed by MCI to CPA's members is $24.63 per payphone.

19. The Complainants lost the time value of money associated with the PSSC that MCI failed to remit to them in accordance with Resolution T-15782 and Pacific's tariff.

20. To account for the time value of money, the Commission has often used the 3-month commercial paper rate as published in Federal Reserve Board Statistical Release G.13.

21. PSPG asked that its members receive the same amount of PSSC that is awarded to CPA's members.

22. The Intervenors did not provide the number of payphones their members had in service for any period of time, and thus did not provide sufficient information to determine the total amount of PSSC owed to them by MCI.

23. MCI incurred no costs to bill, collect, and remit the PSSC to the Complainants.

24. MCI asserts that PU Code § 532 precludes MCI from remitting the PSSC to Complainants on terms and conditions different from those in MCI's PSSC tariff.

25. PU Code § 532 provides the Commission with authority to exempt MCI from complying with its filed PSSC tariff.

26. Pacific presented no evidence to support its allegation that MCI violated PU Code § 453(a).

Conclusions of Law

1. The complainants have the burden of proving each of their allegations by a preponderance of evidence.

2. MCI is required by Resolution T-15782 and Pacific's tariff to remit the PSSC to the Complainants and other PSPs starting no later than April 12, 1996.

3. The Complainants have proven by a preponderance of evidence that MCI did not comply with the requirement in Resolution T-15782 and Pacific's tariff to remit the PSSC to the Complainants.

4. The Commission has authority to order MCI to comply with Resolution T-15782 which required MCI to remit the PSSC to the Complainants.

5. To avoid the unjust result of MCI using its PSSC tariff to avoid compensating PSPs for the use of their property to originate non-coin intraLATA calls carried by MCI, the Commission should use its authority under PU Code § 532 to exempt MCI from having to comply with its filed PSSC tariff.

6. When an advice letter (a) does not comply with a previously issued Commission order and (b) was not previously approved by a Commission decision or resolution, the Commission has authority to reject the advice letter years after the advice letter was filed, with the rejection being effective as of the date the advice letter was originally filed.

7. MCI's Advice Letter No. 253 meets the conditions for rejection stated in Conclusion of Law No. 6.

8. MCI should be ordered to comply with the requirement in Pacific's tariff and Resolution T-15782 to pay the PSSC to PSPs beginning April 12, 1996.

9. MCI's obligation to pay the PSSC to each PSP for non-coin intraLATA calls should end as of the date that MCI began to compensate each PSP for such calls pursuant to the FCC's rules.

10. If MCI began compensating Pacific for non-coin intraLATA calls under the FCC's rules on a date other than June 10, 1997, then Pacific and MCI should confer with one another for the purpose of reaching a joint stipulation on the date that MCI effectively started compensating Pacific for non-coin calls under the FCC's rules. Any such stipulation should be filed at the Commission's Docket Office. MCI's obligation to pay the PSSC should continue up to the date shown

in the aforementioned stipulation. If no stipulation can be reached, Pacific and/or MCI should file a petition to modify this decision regarding the date that MCI effectively began compensating Pacific under the FCC's rules. If necessary, the assigned ALJ should hold an evidentiary hearing and prepare a decision on the issue of when MCI began compensating Pacific for non-coin calls under the FCC's rules.

11. The members of CPA, PSPG, and SDPOA should receive the same amount of PSSC for each of their payphones in service during the period for which MCI owes them the PSSC.

12. MCI should pay to Pacific the PSSC in the amount of $2,097,432 for the period of April 12, 1996, through June 9, 1997.

13. MCI should pay to each Intervenor's members the PSSC in the amount of $24.63 times the average number of payphones the Intervenor's member had in service for the period of April 12, 1996 through November 6, 1996.

14. MCI should pay interest on the amount of PSSC it owes to each Complainant for the period of time that begins on April 12, 1996, and continuing until MCI pays the full amount of PSSC owed to the Complainant. The amount of interest should be determined in accordance with the 3-month commercial paper rate published in Federal Reserve Board Statistical Release G.13.

15. Each Intervenor should submit a compliance filing that shows the average number of payphones that each of the Intervenor's members had in service during the period of April 12, 1996, through November 6, 1996. Each compliance filing should also specify the amount of interest owed by MCI to each of the Intervenor's members.

16. Each Intervenor, before submitting its compliance filing, should demonstrate to MCI that the number of payphones shown in its compliance filing is fairly stated. If there is a dispute over the number of payphones the

Intervenors had in service, MCI and/or the Intervenors should be allowed to file a petition to modify this decision. If necessary, a hearing should be held and a subsequent decision issued on this matter.

17. In paying the PSSC to Complainants, MCI should receive no processing fee since MCI incurred no costs to bill, collect, and remit the PSSC.

18. This decision does not engage in impermissible retroactive ratemaking since this decision simply requires MCI to comply with the Commission's prior order in Resolution T-15782 to remit the PSSC to the Complainants beginning on April 12, 1996.

19. Pacific did not meet its burden to prove its allegation that MCI violated PU Code § 453(a).

20. PU Code § 2107 provides the Commission with authority to impose penalties on MCI for its failure to comply with Resolution T-15782.

21. No penalty should be imposed upon MCI at this time for its failure to comply with Resolution T-15782.

22. MCI should supplement its Advice Letter No. 253 by submitting an amended PSSC tariff that complies with Resolution T-15782 and the following order.

23. MCI's amended PSSC tariff should be carefully reviewed and formally approved by the Commission's Telecommunications Division.

24. The Commission may take official notice of FCC orders when considering the matters at issue in this proceeding.

25. PU Code § 1702 provides the Commission with authority to decide this complaint case.

ORDER

IT IS ORDERED that:

1. MCI Telecommunications Corporation (MCI) shall comply with the requirement in Resolution T-15782 to remit the Pay Station Service Charge (PSSC) to payphone service providers (PSPs) beginning April 12, 1996.

2. The complaint of Pacific Bell (Pacific) is granted to the extent that Pacific seeks to have MCI: (a) remit the PSSC to Pacific for the period of April 12, 1996, through June 9, 1997; (b) remit interest on the PSSC owed by MCI to Pacific; and (c) file a PSSC tariff that complies with Resolution T-15782 and this order. In all other respects, Pacific's complaint is denied.

3. Within 45 days from the effective date of this order, MCI shall pay to Pacific the following amounts: (a) PSSC in the amount of $2,097,432 for the period of April 12, 1996, through June 9, 1997; and (b) interest on the aforementioned amount of PSSC, with the amount of interest determined in accordance with the 3-month commercial paper rate published in Federal Reserve Board Statistical Release G.13 for the period commencing on April 12, 1996, and ending on the day that MCI remits the PSSC to Pacific in accordance with this order.

4. If the actual date that MCI began to compensate Pacific for PSSC-eligible calls under the rules of the Federal Communications Commission (FCC) is other than June 10, 1997, then Pacific and MCI shall confer with one another and file at the Commission's Docket Office a joint stipulation on the date that MCI effectively started compensating Pacific for PSSC-eligible calls under the FCC's rules. MCI shall continue to remit the PSSC up to the date shown in the aforementioned stipulation. If no stipulation can be reached, Pacific and/or MCI may file a petition to modify this decision regarding the date that MCI effectively began compensating Pacific under the FCC's rules. If necessary, the assigned

ALJ shall hold an evidentiary hearing and prepare a decision on the issue of when MCI began compensating Pacific for non-coin calls under the FCC's rules.

5. The requests by the California Payphone Association, the Payphone Service Providers Group, and the San Diego Payphone Owners Association (the Intervenors) are granted to the extent they seek to have MCI: (a) remit the PSSC to the Intervenors' members for the period of April 12, 1996, through November 6, 1996; (b) remit interest on the PSSC owed by MCI to the Intervenors' members; and (c) file a PSSC tariff that complies with Resolution T-15782 and this order. In all other respects, the Intervenors' requests are denied.

6. MCI shall pay to each Intervenor's members: (a) the PSSC in the amount of $24.63 per payphone times the average number of payphones the Intervenor's member had in service for the period of April 12, 1996 through November 6, 1996; and (b) interest on the aforementioned amount of PSSC, with the amount of interest determined in accordance with the 3-month commercial paper rate published in Federal Reserve Board Statistical Release G.13 for the period commencing on April 12, 1996, and ending on the day that MCI remits the PSSC to the Intervenor's member in accordance with this order.

7. Each Intervenor shall file and serve within 45 days from the effective date of this order a compliance filing specifying the average number of payphones each of the Intervenor's members had in service during the period for which MCI owes the PSSC. The compliance filing shall also specify the amount of interest owed by MCI to each of the Intervenor's members. Before submitting its compliance filing, each Intervenor shall demonstrate to MCI that the average number of payphones in service as shown in the Intervenor's compliance filing is fairly stated. If there is a dispute over the number of payphones the Intervenor's members had in service, MCI and/or the Intervenor may file a petition to modify

this decision. If necessary, a hearing will be held and a subsequent decision issued on this matter.

8. MCI shall remit to each Intervenor's members the amount of PSSC and interest shown in the Intervenor's compliance filing described in Ordering Paragraph No. 7 no later than 30 days following the service of the Intervenor's compliance filing. If MCI disputes the amount it is obligated to remit to one or more of the Intervenor's members, MCI shall nonetheless remit the amount shown in the Intervenor's compliance filing pending the outcome of any petition to modify this order filed pursuant to Ordering Paragraph No. 7.

9. Within 30 days from the effective date of this order, MCI shall supplement its Advice Letter No. 253 by filing an amended PSSC tariff that complies with Resolution T-15782 and implements the requirements of this order. MCI's amended PSSC tariff shall: (a) contain none of the rates, terms, and conditions found unreasonable in the body of this decision; (b) state that MCI shall pay the 25¢ PSSC to PSPs beginning April 12, 1996, and ending on the day that each individual PSP began to receive compensation for non-coin intraLATA calls from MCI pursuant to the FCC's rules; (c) determine the amount of PSSC owed by MCI to each PSP in accordance with the revenue allocation procedure set forth in the PSSC Workshop Report and adopted in Resolution T-15782; (d) provide for the payment of interest based on the 3-month commercial paper rate published in Federal Reserve Board Statistical Release G.13; (e) contain no processing fee or other deduction from the 25¢ PSSC; and (f) allow payphone owners at least 12 months from the date of this decision to submit a PSSC claim to MCI.

10. The Staff of the Telecommunications Division shall review MCI's amended PSSC tariff for compliance with Resolution T-15782 and this order. Within 30 days of MCI's submittal of its amended tariff, the Director of the Telecommunications Division (Director) shall inform MCI in writing of the

results of the Division's review of MCI's amended PSSC tariff. The Director shall have authority to require MCI to revise its amended PSSC tariff, as necessary, to bring the tariff into compliance with Resolution T-15782 and this order. If MCI fails to comply with the Director's instructions to revise its PSSC tariff, the Director shall prepare for the Commission's consideration a resolution that contains a draft MCI PSSC tariff for adoption by the Commission and a proposed penalty for MCI's failure to comply with Resolution T-15782 and this order.

11. MCI may negotiate with PSPs for the purpose of reaching a mutual agreement on the amount of PSSC and interest owed by MCI. If no agreement can be reached, then MCI shall pay the PSSC and interest as provided for in the amended PSSC tariffed that MCI is ordered to file in Ordering Paragraph No. 9.

12. This proceeding is closed.

This order is effective today.

Dated November 19, 1998 at San Francisco, California

RICHARD A. BILAS
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

I dissent.

/s/ P. GREGORY CONLON
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner