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Decision 99-04-030 April 1, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER CLARIFYING DECISION 98-11-063 AND DENYING REHEARING

I. SUMMARY

In this order we deny the application for rehearing of Decision (D.) 98-11-063 (Decision) filed by MCI Telecommunications Corporation (MCI). The Decision is modified to clarify a statement describing the effect of D.96-06-018. The stay of the Decision's Ordering Paragraph eight is also lifted.

II. BACKGROUND

This proceeding involves a charge, known as the "Pay Station Service Charge" (PSSC). The PSSC comes into play when a customer uses a payphone to make a certain type of call, but does not deposit coins. (E.g., the customer uses a credit card.) The calls to which the PSSC applies are "intraLATA toll calls." This phrase indicates that these calls are not long distance, but are nevertheless subject to toll charges because they are outside a particular phone's local calling area.

(E.g., from Berkeley to Palo Alto in the San Francisco Bay Area.) Thus, our decisions describe the PSSC as applying to "non-coin intraLATA toll calls." In some instances these calls are described as "non-sent paid intraLATA calls."

When a customer makes a non-coin intraLATA call, the company that carries the call is to pay PSSC to the owner of the payphone. The owner of a payphone is referred to as a "Pay Station Provider" (PSP). The PSSC is the only compensation a PSP receives for the use of its equipment when a non-coin intraLATA toll call is made. The company carrying the intraLATA toll call is authorized to collect the PSSC from the customer making the call.

Under the regulatory regime established in the "IRD Decision," Re: Alternative Regulatory Frameworks for Local Exchange Carriers (Implementation Rate Design) [D.94-09-065] (1994) 56 Cal.P.U.C.2d. 117, intraLATA calls can be carried by both local exchange carriers (LECs), such as complainant Pacific Bell (Pacific), and by interexchange carriers (IECs), such as MCI. The original version of the PSSC only applied to LECs because only LECs carried intraLATA toll calls in a market closed to competition. (Cf., Re: Coin and Coinless Customer Owned Pay Telephone Service [D.90-06-018] (1990) 36 Cal.P.U.C.2d 446.) When the IRD Decision opened the intraLATA toll market to competition, it made changes to the PSSC to account for the fact that IECs would carry intraLATA calls as well. The IRD Decision determined that any payphone owner was entitled to receive the PSSC as compensation for the use of its equipment when a non-coin intraLATA toll call was placed from one of its payphones. Thus, the Commission made the requirement to pay the PSSC applicable to both LECs and IECs.

MCI, Sprint Communications Company L.P. and the California Association of Long Distance Telephone Companies (CALTEL) challenged this determination, filing a petition to modify the IRD Decision. We denied that petition and reiterated our conclusion that payphone owners should be compensated for the use of their equipment when customers made intraLATA toll calls but did not deposit coins. (Re: Alternative Regulatory Frameworks for Local Exchange Carriers [D.95-06-062] (1995) 60 Cal.P.U.C.2d 435, 436-437.) MCI and CALTEL again challenged our conclusion, this time filing applications for rehearing of the decision denying the petition for modification. We dismissed those applications, noting in our order that the PSSC was a proper part of the regulatory structure that allowed competition in the intraLATA toll market. (Re: Alternative Regulatory Frameworks for Local Exchange Carriers [D.95-09-126] (1995) 61 Cal.P.U.C.2d 618, 619, 625.)

Pursuant to the IRD Decision, Commission staff convened an informal "workshop" on the implementation of the PSSC, which resulted in the "PSSC Workshop Report." Among other things, the PSSC Workshop Report contained recommendations on how the PSSC should be implemented. In Resolution (Res.) T-15782 we adopted all the PSSC Workshop Report's recommendations and approved the mechanism by which the PSSC would be implemented.

Pursuant to Res. T-15782, Pacific was authorized to publish a tariff that required all IECs to pay the PSSC. Res. T-15782 also ordered all IECs carrying more than three percent of non-coin intraLATA calls to file tariffs "to provide for the billing, collecting and remitting the PSSC, as necessary to implement" the terms of Pacific's tariff. The purpose of this requirement was to have each IEC: (i) work out the details of a system that would result in its being able to pay the PSSC to payphone owners in compliance with Pacific's tariff and Res. T-15782, and (ii) to make that system available to PSPs by publishing it in the IEC's tariffs. Once such a system was made available in each IEC's tariff, a PSP could "take service" under the tariff, qualifying itself to receive PSSC payments through the mechanism the IEC had developed. These tariffs were to be filed on or before April 12, 1996, on which date they were to become effective and the obligation to pay the PSSC was to begin.

MCI filed an application for rehearing of Res.T-12782, which we denied. We again reiterated our determination that the PSSC be paid to payphone owners. (Re: Alternative Regulatory Frameworks for Local Exchange Carriers [D.96-10-079] (1996) __ Cal.P.U.C. __. MCI filed its PSSC tariff on April 12, 1996. Because April 12, 1996 was the deadline for the effectiveness of IECs' PSSC tariffs, MCI's tariff became effective that day. No PSP took service under MCI's tariff, and MCI did not collect or pay any PSSC. California Pay Telephone Association (CPA) and Pacific protested the Advice Letter after MCI's tariff became effective. Pacific subsequently filed this complaint case in which CPA and other parties, referred to as the "Intervenor PSPs,"[1] intervened. Following administrative proceedings, we issued the Decision. (Pacific Bell v. MCI Telecommunications Corporation [D.98-11-063] (1998) __ Cal.P.U.C.2d __.) Among other things, the Decision concludes that MCI was required by prior Commission orders to pay the PSSC and directs MCI to do so.

MCI filed an application for rehearing of the Decision on December 23, 1998. MCI also requested a stay of the Decision. The application and the stay request were opposed by Pacific and the Intervenor PSPs. On December 21, 1998, MCI filed a supplemental advice letter in compliance with the Decision and subsequently made a payment to Pacific. In D.99-01-032 and D.99-02-047, the Commission partially stayed the Decision, determining that it would resolve the applications for rehearing before requiring MCI to pay the Intervenor PSPs. On February 19, 1999 and March 23, 1999, the Executive Director extended the time for the Intervenor PSPs' to make a compliance filing relating to the calculation of MCI's PSSC payment.

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[1] The Intervenor PSPs are two separate parties: CPA, and Payphone Service Providers Group and San Diego Payphone Owners Association, filing jointly.

III. DISCUSSION

The Decision considers two questions: "whether MCI has complied with our order in Res. T-15782 to remit the PSSC, and whether we have authority to direct MCI to comply with our prior order." (Pacific Bell v. MCI Telecommunications Corporation, supra, __ Cal.P.U.C.2d at p. __, D.98-11-063 at p. 33 (mimeo).) The Decision finds that MCI did not pay the PSSC as ordered, and that its tariff was non-compliant. The Decision states: "MCI's PSSC tariff contained so many unreasonable rates, terms, and conditions that MCI would never remit the PSSC." (Ibid.) For example, the Decision notes that the terms of MCI's tariff employ a technical requirement relating to "screening digits" that effectively disqualified Pacific—California's largest PSP—from ever taking service. Other terms provide that payment of the PSSC would only begin 18 months after a PSP requested service, and that a $10,000 "account set-up fee" was required to initiate service. MCI's tariff also provided that MCI would retain 82% of the PSSC as a "processing fee."

After it concludes that MCI did not comply with prior orders, the Decision considers the Commission's response. The Decision determines that Commission requirements with respect to the PSSC should be enforced by directing MCI to comply with Res. T-15782. Thus, the Decision directs MCI to pay specific amounts of PSSC to Pacific and the Intervenor PSPs,[2] and to file a corrected PSSC tariff. The Decision explains why this response is proper. It notes that the Commission had authority to establish the PSSC and to require utilities to pay the PSSC when we issued Res. T-15782. We were then faced with the question of how to proceed when a utility filed a tariff that had the result of preventing compliance with Res. T-15782. The Decision concludes it is logical

[2] The Decision specified a total dollar amount of PSSC to be paid to Pacific, and specified the amount of PSSC per payphone to be paid to the Intervenor PSPs, with the amount of phones to be determined in a compliance filing.

and proper to enforce our prior orders by directing MCI to take action placing it in compliance with those orders.

As we specifically explain in the Decision, our authority to supervise regulated utilities includes the ability to devise solutions to regulatory problems that ensure the effectiveness of our regulatory programs. In Public Utilities Code section 701[3] the Legislature granted us plenary power to "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in" the supervision and regulation of public utilities. Thus, we have the ability to make orders that are not otherwise specifically provided for in our governing statutes, so long as we do not contravene any specific directive of the Legislature. Although no specific statute exists that explicitly permits us to direct MCI to pay the PSSC, we believe section 701 grants us the authority to require a utility to comply with prior orders in situations such as this. No reason has been shown why we lack such authority or why any rule or law would prevent us from achieving that result, as we explain in detail below. We also explain why the Decision is properly supported by record evidence.

A. The Decision Properly Concludes That MCI's PSSC Tariff Creates No Bar to Directing Compliance With the Commission's Prior Orders.

Utility tariffs include rates, charges and classifications together with rules which in any manner affect or relate to rates or service. (Pub. Util. Code, § 489, subd. (a).) Thus, utility tariffs may be used to implement the specific details of regulatory programs. Several sections of the Public Utilities Code describe utilities' rights and responsibilities under the tariff system of regulation. General Order (G.O.) 96-A also includes a number of rules relating to tariffs. The code sections spell out the broad outlines of our authority. Relevant here, for example, section 455 gives the Commission authority to alter tariff provisions "upon complaint or upon its own motion." Similarly, section 532 prevents utilities from deviating from their tariffs, but allows the Commission to make exceptions in its discretion.

G.O. 96-A, among other things, describes a review process that is often undertaken when tariffs are filed. Under that process, during a 40 or 30 day period protests may be filed, and the Commission staff has the opportunity to review tariffs and protests. Often, staff prepare a draft resolution for our consideration so that we formally approve or reject a tariff. If no action is taken, a tariff becomes "effective" at the end of the 40 or 30 day period. However, Section XV of G.O. 96-A provides that we may order exceptions to its provisions, and we often do order different procedures to occur. In this case, for example, we ordered that PSSC tariffs would become effective on April 12, 1996 regardless of when they were filed. In the case of MCI's tariff, this meant that no review period occurred, and those protests that were filed were received after the tariff became effective.

In these circumstances, it was proper to require the payment of the PSSC despite the terms of MCI's tariff. We had never approved MCI's tariff and upon review it became clear that the tariff was not only non-compliant but also an impediment to compliance with prior orders, and thus required correction. The application asserts that this approach was improper, arguing that MCI's PSSC tariff was "effective" and "adopted" and therefore not subject to further Commission review and action. These claims do not accurately describe the status of MCI's tariff and the effect of our review in these proceedings. MCI's PSSC tariff was never reviewed or "adopted" by the Commission. When the Commission examines a tariff's terms and determines that they are acceptable, it may make a formal order approving that tariff. Res. T-15782 is an example of such an order,

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[3] Code sections references indicate the Public Utilities Code unless otherwise stated.

approving Pacific's PSSC tariff. A tariff can be effective even though not approved by the Commission in cases (such as this) where effectiveness occurs automatically without an opportunity for Commission review or approval.

MCI's tariff did not comply with the requirements of our prior orders, a condition we will refer to here as "non-compliant." The mere fact that MCI's PSSC tariff was "effective" does not prevent us from reviewing its terms or taking regulatory action when such a review indicates defects. For example, under section 455, tariffs become "effective . . . subject to the power of the commission, after a hearing had . . . upon complaint, to alter or modify them." The application asserts that ordering changes to effective tariffs ignores G.O. 96-A's requirements, without reference to a specific provision of G.O. 96-A. Many of G.O. 96-A's requirements are not relevant here because MCI's PSSC tariff did not undergo review through the G.O. 96-A process. In addition, the application does not cite any provision of G.O. 96-A that states a limitation on our ability to reject non-complaint tariffs. Our review of G.O. 96-A also does not indicate any such rule.[4]

The application also indicates that it finds the "retroactive" nature of our order troubling. However, the application cites no authority for the proposition that we may not, when appropriate, issue orders with nunc pro tunc effect.[5] It is clearly not the case that a Commission order is illegal simply because it has such effect. The California Supreme court has specifically disclaimed a requirement "that each and every act of the Commission operate solely in futuro ...." (Southern Cal. Edison v. Public Utilities Com. (1978) 25 Cal.3d 813, 816.) The claim that

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[4] An application for rehearing must set forth its grounds of error with specificity and "vague assertions . . . without citation" do not demonstrate error. (Cf., Pub. Util. Code, § 1732, Rules of Practice and Procedure, Rule 86.1.) The purpose of an application for rehearing is to identify error so that we may correct it. We should not be forced to guess as to the source of error in our decisions. This provides an independent basis for us to deny rehearing.

[5] This phase, literally meaning "now for then," refers to those acts which are allowed to be done at a later time "with the same effect as if regularly done." (Blacks Law Dict. (4th Revised ed. (1968), p. 1218.)

section 532 only authorizes the Commission to grant exceptions to tariff rules with prospective effect is similarly unsubstantiated and we find no such requirement in that section's language.[6]

In cases such as this, the fact that we have authority to reject a tariff as of the day it was filed makes sense in light of our regulatory mandate. When a tariff becomes effective when filed, retroactive rejection is the only method by which we can ensure compliance with our orders. Without this ability, we would be unable to prevent utilities from avoiding regulatory requirements through the expedient of filing tariffs that stated other terms. If we could not make orders with retroactive effect in these circumstances, utilities that filed non-compliant tariffs would be authorized to contravene Commission orders during the period between a tariff's filing/effectiveness date and the date their tariffs were rejected with prospective effect. The Commission has the authority to reject unapproved, non-compliant tariffs as of their effective date to avoid just such a result.

The application states that MCI was entitled to rely on the fact that its tariff had not yet been rejected as a guarantee that it would not ultimately be rejected. The application claims so much time had elapsed since the tariff's effectiveness date that rejection should not have been permitted. Yet the application cites no rule allowing older non-compliant tariffs to escape review. Moreover, there was only a ten month period when MCI was not actively litigating this complaint challenging the validity of its tariff. Even during that time, protests against the tariff were outstanding. The fact that those protests remained unresolved does not demonstrate the legitimacy of MCI's tariff. Rather, it is inconclusive. There is no more basis for the conclusion that the Commission's failure to formally deny the protests confirmed that the protests were correct than

[6] Again, the application's failure to substantiate its claims makes it difficult to tell on what basis error is in fact alleged. We should not be forced to guess where error occurs and this provides an independent basis to deny rehearing.

for the conclusion that the lack of a response to the protests amounted to a confirmation of the tariff's validity. No party other than MCI relied on the effectiveness of the tariff as a guarantee of its validity, since no party took service under the tariff and many PSPs actively disputed the validity of the tariff throughout its period of effectiveness.

In this respect, it is useful to note that the rules describing the force of effective tariffs also do not create a requirement that the Commission be bound by the terms of those tariffs. While Public Utilities Code section 532 makes it unlawful for utilities to deviate from the provisions contained in their tariffs it makes an one important exception. "The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility." Thus, section 532 is best understood as a directive that utilities not make their own decisions on how to act, but instead adhere to stated requirements or seek Commission authorization.

The application claims that the statue has a different effect, citing cases requiring utilities to adhere to their tariffs. However, cases describing the effect of the rule do not describe the effect of the exception. Even the language MCI quotes indicates that the holdings the application relies upon discuss the situation where a utility acts "without any authority from the Commission." (Cf., Application for Rehearing, p. 15, quoting Fairchild Camera & Instrument Corp. v. Great Oaks Water Co., [D.83-02-004], (1983) 10 Cal.P.U.C.2d 712 (emphasis added).)

The claim that section 532's exemption provisions can only be invoked "where requested by the utility and only in exceptional circumstances" is not supported by the language of the statute. No legal principle requires section 532 to be construed in a way that limits the Commission's discretion in order to avoid "emasculat[ing]" the statute. Moreover, the purpose apparent on the face of this statute is to ensure that utilities adhere to appropriate rules and obtain

Commission approval for any deviations. Interpreting section 532 to impose restrictions on the Commission that would insulate utilities from having to comply with Commission orders would run counter to that purpose. We also note that we do not rely on the exception to section 532 as sole authority for the proposition that we may reject MCI's tariff. Rather, we rely on it to refute MCI's claim that the terms of its tariff prevent us from exercising our authority by requiring MCI to pay the PSSC.

Likewise, we note that we relied on prior authority when we rejected MCI's tariff, citing AT&T v. Ortega [D.94-11-026] (1994) 57 Cal.P.U.C.2d 317, rehearing denied on other grounds AT&T v. Ortega [D.97-09-060] (1997) __ Cal.P.U.C.2d __. In that 1994 decision, the Commission retroactively rejected a tariff filed in 1992 on the grounds that it failed to comply with Commission orders. We believe the salient features of AT&T v. Ortega are parallel to the main features of this case. In AT&T v. Ortega, the Commission found that a utility had filed a tariff that failed to comply with prior orders. The Commission then rejected the non-compliant tariff roughly two years after it was filed.

The fact that no party protested AT&T's tariff does not distinguish AT&T v. Ortega. We explained above that our lack of action on the protests here is inconclusive, and does not insulate MCI's tariff from further Commission action in a way that distinguishes the AT&T v. Ortega case. Moreover, the specifics of the actual order that AT&T failed to comply with do not distinguish this case. The key fact is that the utilities in each case disregarded Commission orders. Finally, AT&T v. Ortega's reliance on an additional theory to provide independent grounds for rejecting AT&T's tariff does not diminish the relevance of the determination that AT&T's tariff would be rejected because it did not comply with prior orders.

We are also not persuaded by the claim that the Decision contravenes procedural rules in a way that deprives MCI of due process rights. As discussed above, the rules the application alleges exist are not to be found in G.O. 96-A or elsewhere. Indeed, the Decision's approach seems to be proper under rules set out in section 455, section 532 and prior decisions.[2] Thus, cases such as Amluxen v. Regents of Univ. of Cal. (1975) 53 Cal.App.3d 27 do not apply here where the application does not indicate procedural rules that we failed to follow. Similarly the claim that MCI's reliance on these so-called "procedural rules" deprived it of notice of the possible effect of the Decision does not demonstrate error. Pacific's complaint specifically requested that the Commission order MCI to pay the PSSC and file a corrected tariff. MCI cannot claim that it was unaware that the Commission might grant that relief.

Finally, we believe that the policy we have established in this case is appropriate. This order provides a logical remedy to a utility's non-compliance with our orders. Contrary to the application's claims, it increases, rather than diminishes certainty. We think it would be more "administratively troubling" if the Commission sanctioned a utility's utilizing non-compliant tariffs to avoid meeting its obligations under Commission orders. (Cf., Application for Rehearing, p. 17.)

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[2] The application asserts Commission decisions set a precedent that tariff changes can only be adopted with prospective effect, citing Re: Southern California Edison Company [D.96-01-011] (1996) 64 Cal.P.U.C.2d 241, and Re: Line Extension Rules, etc. [D.96-12-030] (1996) __ Cal.P.U.C.2d __. These cases deny requests for retroactive application of tariff changes. However, they do so in cursory terms that do not indicate the basis for denial. It could be inferred that retroactive tariff changes were denied in these cases simply as a matter of discretion, and that the Commission might approve such requests in other circumstances. If reasons can be inferred for these cases' determination not to approve retroactive tariff changes, they are not the reasons the application claims. In the first decision, the Commission stated that it was making tariff changes effective as of the date of the decision to comply with a prior ruling limiting the matters to be decided with retroactive effect in that case. (Re: Southern California Edison Company (SONGS Settlement), supra, 64 Cal.P.U.C.2d at p. 441, fn. 83.) Similarly, the discussion in Re: Line Extension Rules, etc. [D.96-12-030] (1996) __ Cal.P.U.C.2d __ indicates that particular proceeding was limited to examining policy on a going-forward basis because other fora were available for reviewing currently filed tariffs.

The Decision does not make all filed tariffs subject to attack and retroactive rejection via the complaint process. Rather, it determines a tariff that fails to comply with Commission decisions can be rejected. Based on the facts of this case the Decision holds that we should take such action with respect to MCI's PSSC tariff.

B. The Decision Properly Determines MCI's PSSC Obligation By Looking to the Number of PSSC-Eligible Calls Made, Not the Amount Customers Paid or the Fact That Commissions Were Paid.

The Decision determines MCI's PSSC obligation by looking to the number of PSSC-eligible calls MCI carried. In response to assertions made by MCI, the Decision disagrees with the claim that MCI could only be required to pay an amount of PSSC equal to the amount it collected from its customers. The Decision points out that MCI's tariff contained strong disincentives to any PSP to take service, and it effectively prevented Pacific from taking service. Thus, MCI's failure to collect the PSSC from its customers was the result of its having filed an unreasonable and non-compliant tariff. The Decision finds that this action does not prevent the Commission from ordering MCI to comply with prior orders by paying the PSSC.

In addition, the Decision explains that MCI's obligation was not limited to passing already collected PSSC on to PSPs. MCI's obligation was to develop a system that ensured payphone owners received the PSSC. Until MCI developed such a system, it was still obligated to pay the PSSC without collecting it from customers. These obligations were clearly set out in the PSSC Workshop Report's recommendations adopted by the Commission in Res. T-15782. Thus, the collection of the PSSC from customers was not a necessary antecedent to fulfilling the requirement that PSSC payments reach payphone owners. Based on the fact that the Commission's requirement was indifferent to the collection of PSSC from customers, the Decision concluded that MCI's failure to implement a system that collected the PSSC from its customers did not create a bar to MCI's remitting the PSSC to payphone owners now. The Decision reached a similar conclusion by analyzing past decisions, noting that there were three elements to the Commission's PSSC scheme: billing, collection and payment. The Decision found that MCI's failure to comply with the first two directives did not prevent the Commission from requiring compliance with the third element.

Thus, the application's claim that MCI was only required to handle PSSC in a role as "billing agent" and not to pay the PSSC itself mischaracterizes the obligation MCI was under. (Cf., Application for Rehearing at p. 21.) The application's discussion of the history of the PSSC relies on decisions implementing the original PSSC that do not form the basis of MCI's obligation.[8] The decision's descriptions of the PSSC obligation that MCI is under—one that applies to IECs—indicate the PSSC requirement is primarily designed to compensate PSPs for the use of their equipment, with the allocation of these costs being a secondary issue.

Pacific's PSSC tariff also does not establish that the PSSC was a charge on end-users only. Pacific's tariff indicates that the PSSC applies to each non-coin intraLATA toll call. It does not allocate cost responsibility for paying the PSSC to end users, stating only that IECs are "required to collect and remit" the PSSC. The Decision's conclusion that these are two independent requirements is supported by this language.

The application's remaining claims—that MCI must be allowed a choice and that the Decision is unfair—do not withstand analysis. The fact that MCI was offered options in 1996 does not form the basis for a requirement that

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[8] We note in this respect that the Decision does not clearly indicate that the types of intraLATA calls the PSSC now applies to are different from those it originally applied to. We will modify the Decision to clarify this statement.

MCI be offered the same options in 1998, when the passage of time and MCI's own actions make some of those options infeasible. MCI had the option to design a system in 1996 that would have collected the PSSC from customers and remitted it to PSPs, but it failed to exercise that option. It is neither unfair nor legal error to ensure that the one feasible method of paying the PSSC is now implemented.

Similarly, the Decision correctly concludes that the payment of a commission to a PSP does not relieve MCI of its obligation to pay the PSSC to that PSP. In some cases MCI pays commissions to PSPs that route non-coin calls to MCI because the PSP has agreed with MCI that it is to be the PSP's "primary" or "pre-subscribed carrier." In contrast, the PSSC is a regulatory charge that is imposed to achieve the Commission's goals. The Commission ordered the PSSC to be paid because it determined that PSPs were entitled to receive that amount as compensation simply for the use of their equipment. The fact that PSPs may be compensated in other ways for providing other services does not remove the necessity for the MCI to pay the PSSC.

The Decision also properly distinguishes commissions from federally-mandated "dial-around compensation." In that case another agency requires IECs to pay PSPs an amount to compensate them for the use of their equipment. The distinction between such a required charge based on a regulator's decision on how a market should be structured and negotiated consideration designed to compensate a company for services provided is clear, and there is no error in treating the two differently.

C. The Decision Properly Directs MCI to Comply With Prior Orders and Does Not Touch on Matters of Compensation.

The application asserts that we cannot order MCI to pay the PSSC because "an award of damages is beyond the Commission's jurisdiction." (Application for Rehearing, p. 4.) This claim misunderstands the basis on which the Decision directs MCI to pay the PSSC. We ordered MCI to pay the PSSC to ensure compliance with our prior orders. The assertion that we require MCI to pay the PSSC in order to "compensate" complainants finds no support in the Decision's actual holdings. (Cf., Application for Rehearing, p. 6.) The Decision does not contain discussion indicating that MCI should pay the PSSC for the purpose of offsetting or mitigating any loss complainants may have suffered. For example, Conclusion of Law 8, referred to in the application, states, "MCI should be ordered to comply with the requirement . . . to pay the PSSC."

Similarly, the Decision's use of complainants' evidence to determine the amount of PSSC MCI owes does not prove that the Decision intends to award impermissible "compensation" as the application alleges. Complainants' submitted estimates of the number of PSSC-eligible calls made from their payphones. Relying on the number of PSSC-eligible calls to determine the extent of MCI's PSSC obligation does not show an intent to compensate complainants for injury suffered by them. Rather, we were attempting to quantify the extent of MCI's PSSC obligation under prior Commission orders. The claim that the use of this evidence makes the Decision's action fit within a definition of damages makes too much of this issue. (Cf., Civ. Code, § 3281.) Similarities between the results of the Decision's calculation and the results of a hypothetical calculation of damages do not establish the basis on which the Commission relied when it made its orders.

Thus, Pacific Bell v. AT&T [D.92-04-077] (1992) 44 Cal.P.U.C.2d 180, Public Utilities Code section 734, and cases cited on the topic of damages and reparations are inapposite because the Decision does not award damages. Authority cited on the effect of section 701 is also not on point because we do not rely on section 701 as authority to contravene rules relating to the award of damages. (Cf., Assembly of State of Cal. v. Public Utilities Com. (1995) 12 Cal.4th 87.) As discussed above, the Decision relies on section 701's grant of authority to devise an appropriate solution in a case where there is no statutory provision that specifically authorizes us to direct MCI to pay the PSSC. This is the paradigm example of the action section 701 authorizes. We note also that this action is in the "public interest," which includes broad questions of competition and industry structure. The assertion that the "public interest" is limited to the direct financial interests of ratepayers in the rates they pay defines the term too narrowly.

D. The Decision Properly Relied on Pacific's PSSC Tariff As a Basis for Determining That MCI Must Pay the PSSC.

The Decision concluded that MCI failed to comply with legitimate requirements imposed on it both in Res. T-15782 and Pacific's PSSC tariff. There is no legal error in this approach. As the Decision makes clear, MCI's obligation to comply with Pacific's PSSC tariff stems from the Commission's own orders as well as the language of Pacific's tariff. "[E]ven if Pacific's tariff could not in-of-itself require MCI to remit the PSSC . . . our order in Resolution T-17582 for MCI to implement Pacific's PSSC tariff removes any doubt that MCI had an obligation to comply with Pacific's tariff." (Pacific Bell v. MCI Telecommunications Corporation, supra, __Cal.P.U.C.2d at p. ____, D.98-11-063 at p. 32 (mimeo.).)

In addition, no legal rule prevents us from ordering MCI to undertake certain activities by cross-referencing Pacific's tariff. If we could have ordered MCI to pay the PSSC by repeating the contents of Pacific's tariff in the resolution, there is no reason why we could not have simply ordered MCI to comply with that tariff, as we did. We have traditionally regulated certain types of PSPs through the tariffs filed by LECs. In fact, the application's allegation turns out to be a claim that Res. T-15782 is in error rather than the Decision. The Decision found that MCI failed to comply with a requirement previously placed upon it. The application now claims that requirement was invalid. The proper time for alleging error with respect to this requirement was when Res. T-15782 issued. MCI has no grounds for alleging legal error in the resolution at this point. (Pub. Util. Code § 1731, subd. (b).) Significantly, MCI did challenge this aspect of Res. T-15782 in its application for rehearing of Res. T-15782. The Commission rejected MCI's claim when it denied the application for rehearing, and Res. T-15782 is now a final order.

Finally, MCI restates its argument that its tariff is controlling under section 532. As discussed above, this claim does not withstand analysis. MCI was under an obligation to file a tariff that complied with Pacific's. It did not do so. This failure to comply cannot be the source of a legal requirement preventing the Commission from enforcing its order. Such a reading of section 532 would clearly be absurd, and contravene principles of statutory interpretation.

E. The Decision Properly Found That MCI's 20.5¢ Processing Fee Was Unreasonable Based on Record Evidence.

The Decision found, in Finding of Fact seven:

> 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 filed failed to comply with the requirement of Resolution T-15782 for MCI to bill, collect and remit the PSSC.

(Pacific Bell v. MCI Telecommunications Corporation, __Cal.P.U.C.2d at p. __ supra, D.98-11-063 at p. 51 (mimeo.).)

The body of the Decision analyzed four main elements and four miscellaneous elements of MCI's tariff.[9] MCI's application alleges the Decision's

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[9] The Decision analyzed: the 18-month "development period" during which MCI would not collect the PSSC; the 20.5¢ "processing fee" MCI would retain from PSSC recipients; the $10,000 "account set-up fee" MCI would charge to recipients of the PSSC; the requirement that recipients of the PSSC demonstrate that MCI carried 3% of their non-coin intraLATA traffic; the failure to provide for payment of the PSSC with respect to calls dialed via "950" access codes; "screening digit"

conclusion with respect to only one of these elements, the 20.5¢ "processing fee" is not supported by the evidence. This fee was made up of three components: 10¢ for billing and collection, 6¢ for "database dips," and 4.5¢ for uncollectibles.

The Decision contains a lengthy analysis of the 20.5¢ processing fee. With respect to the 10¢ billing and collection element, the Decision determined that MCI's evidence was not material. MCI had argued that inclusion of 10¢ for billing and collection in its processing fee was proper because MCI was required to pay that amount to a payphone customer's LEC if it carried a non-coin intraLATA toll call placed by a "casual" customer.[10] However, the Decision found that many calls subject to the PSSC would not be casual calls. Thus the Decision concluded "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." (Pacific Bell v. MCI Telecommunications Corporation, supra __Cal.P.U.C. at p. ___, D.98-11-063 at p. 22 (mimeo).) In addition, the Decision held that even when a casual call was made, MCI would receive a substantial benefit in exchange for the 10¢ fee it paid to the LEC. On this basis, the Decision concluded the fee should not be passed on to the payphone owner by deducting it from the PSSC.

With respect to the remainder of the processing fee, the Decision held that MCI's evidence did not show MCI would incur actual costs of 6¢ for data dipping and 4.5¢ for uncollectibles. MCI justified the 6¢ and 4.5¢ fees by asserting that LECs charged these amounts in situations unrelated to the PSSC. The retail amounts charged by LECs for these services outside the context of the PSSC do

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restriction that effectively prevented Pacific from qualifying to receive PSSC; the requirement that payphone owners provide a list of their automatic number identification (ANIs) to MCI; and the requirement that payphone owners provide MCI with free access to line information databases and 411 databases as a prerequisite to PSSC compensation.

[10] A "casual" customer is payphone user who is not a customer of an IEC such as MCI, but who nevertheless uses the IEC to place a call. Since a casual customer is not the IEC's customer, the IEC may need to pay the LEC to bill and collect the

not establish the amounts of MCI's actual costs for these services in the context of the PSSC. The Decision noted that MCI would not be required to pay other companies for these services but would in fact perform these services on its own behalf. In addition, the Decision based its finding on evidence that other telephone companies were levying total fees in the order of three and four cents for processing the PSSC. The decision relied on that evidence to conclude that MCI's fees were unreasonably high.

The application alleges that these conclusions are in error because the Decision failed to give "sufficient weight" to MCI's evidence. As discussed above, the Decision's holdings are backed up by record evidence and the claim that the Commission did not give sufficient weight to contradictory evidence does not demonstrate error. Moreover, the application only alleges that one aspect of the Decision's conclusion of unreasonableness was in error.[11] The Decision finds that MCI's tariff was unreasonable by relying on an analysis of eight different terms and conditions contained in that tariff. Even if some evidence favored MCI with respect to one of those terms and conditions, the problems with the remaining seven terms would provides sufficient evidence that MCI's PSSC tariff was unreasonable. The Decision explains why the 25¢ PSSC should not now be reduced for "processing," since no "processing" will occur. (Pacific Bell v. MCI Telecommunications Corporation, supra, __ Cal.P.U.C.2d at p. __, D.98-11-063 at p. 46 (mimeo.).)

F. The Decision Properly Determined the Amount of PSSC MCI Should Pay Based on Record Evidence.

The Decision determined the amount of PSSC the Commission should direct MCI to pay based on evidence submitted by Pacific and the Intervenor PSPs.

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cost of the casual call.

[11] A discussion in a footnote refers to another aspect of evidence MCI introduced, but we cannot determine the point this statement is making.

This evidence consisted of estimates of the number of PSP-eligible calls placed from these parties' payphones as indicated in the Decision on pages 39-44 (mimeo.). Pacific and the Intervenor PSPs used estimates because they could not identify PSSC-eligible calls on a call-by-call basis. MCI did not submit any evidence in this respect, although it tracked its non-coin payphone traffic on a call-by-call basis. However, MCI challenged the evidence submitted by the other parties.

The application for rehearing claims that we should not have relied on the estimates because MCI introduced other evidence setting out a number of criticisms of the methods used to estimate the amount of PSSC MCI owed. However, as the application itself admits, MCI challenges only the weight we accorded this evidence, arguing that greater weight should be given to MCI's evidence. The record contains Pacific's and the Intervenor PSPs' justifications of their evidence, and rebuttals to MCI's criticisms. Thus, the application asserts only that a conflict between contradictory evidence should have been resolved differently. An application for rehearing is not the proper vehicle to dispute the relative weight of competing evidence. It is not error for us to resolve conflicts between contradictory evidence one way or another and we will not grant rehearing to reconsider this evidentiary dispute.

The application also challenges the evidence underlying the Decision's finding that MCI was able to track and identify each non-coin call that it carried. The Decision found that MCI had the ability to track every non-coin call it carried. The Decision noted that MCI might not be able to break out this data into int<u>er</u>LATA calls (to which the PPSC does not apply) and int<u>ra</u>LATA calls (to which the PSSC does apply). However, it stated that even data on the total number of non-coin calls would have been of assistance to the Commission because then "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." (<u>Pacific</u>

Bell v. MCI Telecommunications Corporation, supra, __ Cal.P.U.C.2d at p. __, fn. 86, D.98-11-063 at p. 44 (mimeo.).) MCI is incorrect to claim that evidence indicating it can track non-coin calls is "contradicted" by evidence that MCI cannot break out the intraLATA calls. The Decision specifically refers to total non-coin calls, not a break-out of intraLATA calls.

G. The Stay Previously Ordered Should Be Lifted in a Manner Not Conflicting With the Executive Director's Letter of February 19, 1999 and March 23, 1999.

In D.99-01-032 and D.99-02-047, we partially stayed the Decision, finding that we preferred to resolve the application for rehearing before requiring MCI to pay the Intervenor PSPs. Pursuant to the Decision's Ordering Paragraph eight, MCI was obliged to pay the PSSC to the Intervenor PSPs no later than 30 days after the compliance filings described in Ordering Paragraph seven were submitted. The Executive Director has extended the time for the compliance with D.98-11-063's Ordering Paragraph seven and the deadline for making those filings is now April 30, 1999. We will lift the stay of Ordering Paragraph eight with the understanding that a new deadline for compliance filings has been established.

THEREFORE, IT IS ORDERED that:

1. The last three lines of text in the body of the opinion on page two of D.98-11-063 beginning, "the purpose… and ending "…following methods:" are restated to read:

> 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 when customers made certain types of intraLATA calls without depositing coins. The exact non-coin calls to which the PSSC applies were described by the Commission in Resolution T-15782, page one.

2. The first nine lines of text in the body of the opinion on page three of

D.98-11-063, comprising the three bullet points set off with diamonds and the sentence stating, "Pre-paid calling card … not subject to the PSSC." are deleted.

3. Rehearing of Decision 98-11-063 is denied.

4. The partial stay of D.98-11-063 granted in D.99-01-032 and D.99-02-047 is lifted.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

I will file a written concurrence.

/s/ JOSIAH L. NEEPER
Commissioner

C.97-02-027
D.99-04-030

Commissioner Josiah L. Neeper, Concurring:

I concur with the order to the extent that this decision finds no legal error in those allegations and only those made by MCI that the majority's decision erred. In other respects, my view of the majority's order remains the same, as it was when the original order was adopted.

As I said then, 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. In this case, Complainants (Pacific and Intervenors) did not, in my view, demonstrate that MCI failed to comply with or violated Resolution T-15782, the IRD decision or Pacific's tariff.

It is undisputed that MCI never remitted the PSSC. But that is not because MCI violated a Commission order or its own tariffs. MCI, through its tariffs and in compliance with Resolution T-15782, offered a billing service to telephone owners to bill, collect and remit PSSC charges. None of the Complainants sought service from MCI based on this tariff, and consequently none of them received PSSC remittances. We can not hold MCI responsible for Complainants' failure to act. The duty imposed on MCI to make payment to Complainants was conditioned on MCI's billing and collection actions. Thus the order was devoid of either an actionable duty or the specificity of time with respect to payment.

While I continue to hold this view about the majority's decision, I find the order before us sound in its analysis of MCI's allegations of legal error.

/s/ JOSIAH L. NEEPER
JOSIAH L. NEEPER
Commissioner

San Francisco, California
April 1, 1999

C.97-02-027
D.99-04-030

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Josiah L. Neeper
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Commissioner

San Francisco, California
April 1, 1999