

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 7, 2002

Alternate Order to H-16
From 2/21/2002 Agenda

TO: PARTIES OF RECORD IN CASE 98-06-016

Enclosed is the Alternate Order of Commissioner Wood to the Draft Decision of Administrative Law Judge (ALJ) Bushey previously mailed to you. This item is on the Commission's agenda for March 21, 2002.

As set forth in Rule 77.6, parties to the proceeding may file comments on the enclosed alternate at least seven days before the Commission meeting or no later than March 14, 2002. Reply comments should be served by March 18, 2002. An original and four copies of the comments and reply comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. The Commissioners and ALJ shall be served separately by overnight service.

/s/ LYNN T. CAREW by PSW
Lynn T. Carew, Chief
Administrative Law Judge

LTC;jac

Enclosure

Decision **ALTERNATE ORDER OF COMMISSIONER WOOD**
(Mailed 3/7/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network (UCAN),

Complainant,

vs.

MCI Metro Access Transmission Services
(MCI Metro), Inc.,

Defendants.

Case 98-06-016
(Filed June 2, 1998)

O P I N I O N

Summary

In this decision, the Commission finds that that MCI Metro Access Transmission Services (MCI Metro) has resolved the billing errors¹ adjudicated in this proceeding, and that these errors support a fine of \$420,000.

¹ The billing errors resolved in this proceeding are limited to the errors related to local exchange service provided by MCI Metro that are addressed in this decision. This decision does not address any billing or service transfer issues relating to long distance service provided by any MCI Metro affiliate. The problem of customers continuing to be billed after disconnection was expressly excluded from this proceeding per the Assigned ALJ's ruling of January 27, 2000, and therefore is not adjudicated in this decision.

Background

On June 2, 1998, UCAN filed a complaint against MCI Metro Access Transmission Services (MCI Metro). The complaint alleged that MCI Metro had made billing errors and engaged in unlawful practices, including slamming.

A prehearing conference (PHC) was held on September 28, 1998. At the PHC, UCAN stated that MCI Metro had conceded several of the billing errors and was making restitution to customers.

On November 23, 1998, the Assigned Law Judge (ALJ) issued a ruling directing the Commission's Consumer Services Division (CSD) to work with the parties to verify MCI Metro's statements that it had corrected all notice and billing errors, had identified all affected customers, and had refunded or credited affected customers.

A second PHC was held on February 23, 1999. The ALJ directed the parties to continue to work with CSD to resolve all billing problems and to complete the identification of affected customers and the payment of restitution within the next nine months. UCAN withdrew its causes of action related to slamming and privacy violations as moot, in light of MCI Metro's representation that it was no longer offering local telephone service in California.

On April 22, 1999, the Commission issued Decision (D.) 99-04-053,² in which it found that MCI Metro had acknowledged billing errors and had made a commitment to correct the errors and to make restitution to all affected customers. That decision directed MCI Metro and UCAN, with the assistance of

² On July 20, 2000, the Commission issued D.00-07-048 granting UCAN an award of compensation pursuant to Pub. Util. §§ 1801-1812 for its contribution to D.99-04-053.

to work cooperatively to resolve all restitution issues, and to attempt to resolve issues regarding sanctions, as well.

On February 4, 2000, the parties filed a Stipulation of Facts that addressed the status of the restitution efforts. The Stipulation stated that MCI Metro had returned a total of \$9,411,791 to customers for billing errors relating to four different issues.³ The four issues are (1) one-minute overcharge, (2) lack of rate notification, (3) inaccurate coding of accounts, and (4) billing after disconnect.⁴

1. One-Minute Overcharge

The “one-minute overcharge” occurred as a result of MCI Metro passing the call billing data through three different billing systems, to allow all local and long distance charges to be included on one bill. When local calls were processed through the first billing system, the call duration was rounded up to the next minute. This is consistent with MCI Metro’s tariff. After rounding up, however, the system software mistakenly did not delete the seconds from the call duration. For example, a call of 2 minutes 36 seconds would be properly rounded up to 3 minutes, 0 seconds. The software, however, did not delete the seconds, and instead reported a call of 3 minutes, 36 seconds duration to the next billing system. The second billing system then rounded up the 3 minute, 36 second call to 4 minutes, 0 seconds. The second software system did delete the seconds after rounding before passing the data along for final billing. The

³ The sum of the refunds reported for each billing error, however, is \$9,641,353. For purposes of this decision, we will rely on the stipulated total.

⁴ As previously indicated, the billing after disconnect issue was subsequently severed and is outside the scope of this proceeding.

customer was then improperly charged for a 4-minute call, rather than a 3-minute call.

MCI Metro undertook an extensive review of the billing process to discover and correct this problem. MCI Metro represents that it corrected the relevant billing systems by the end of May of 1998 (Stipulation of Facts, II.4). MCI Metro also identified each customer that had been overbilled and credited the account for one minute of time. MCI Metro expended 1,400 work hours to accomplish this refund. The total number of customers affected was 30,046. The total refund to customers was \$617,227.

2. Lack of Rate Increase Notification

MCI Metro notified 14,790 customers in their December 1997 invoices that their rates for intraLATA toll calls would be changed from a \$.04 per minute flat rate to a peak/off-peak rate structure of \$.04 per minute for off-peak calls, from 7:00 p.m. to 6:59 a.m., and \$.10 per minute for peak toll calls, from 7:00 a.m. to 6:59 p.m. The notice, however, was not sent to 15,931 additional local service customers due to “human error.” The rate change went into effect on February 1, 1998. Customers were subsequently notified of the increase between April and June, 1998. MCI Metro gave all customers that did not receive the first notice credits that totaled \$179,818.

3. Inaccurate Coding of Accounts

On June 1, 1997, MCI Metro introduced a new intraLATA toll calling plan. This plan featured lower rates. When signing a customer up for this lower-priced plan, however, the customer service representative was required to manually enter a special code into the customers’ records. If the special code was not entered, the customer’s account defaulted to a higher-priced plan. The

inaccurate coding effected intraLATA toll rates billed to some MCI Metro customers between June 1, 1997 and June 26, 1998 (Stipulation of Facts, II.27).

To correct this problem, MCI Metro engaged in several training sessions with its service representatives. MCI Metro also made refunds to customers of \$49,744.

4. Billing After Disconnect

As a result of difficulties with MCI Metro's billing systems and the operations and support systems made available by Pacific Bell, some MCI Metro local customers continued to be billed for local service plans after they had disconnected from MCI Metro's local service. MCI Metro stated that despite having devoted substantial corporate resources and making several computer programming modifications, it has been unable to eliminate this billing problem. MCI Metro has issued \$5,279,273 in credits to customers for all known historic occurrences of this phenomenon. MCI Metro further stated that it is actively seeking and implementing measures designed to eliminate this problem.

On January 27, 2000, the Assigned Administrative Law Judge issued a ruling finding that the billing after disconnect problem remained unresolved, and that MCI Metro and CSD should continue to work towards resolution. Consequently, this issue was severed and is not adjudicated in this proceeding.

5. Other Refunds

In making the refunds discussed above, MCI Metro and UCAN encountered several practical problems. First, MCI Metro could not issue a credit to customers that had left its system. Thus, some credits became "stranded." MCI Metro has implemented a system of sending checks to these customers, which has resulted in refunds to most, but not all, of the customers entitled to refunds.

Second, MCI Metro was not able to credit refunds (at least those due to lack of rate notification and inaccurate coding of accounts) to accounts that were no longer active due to non-payment, fraud, or cancellation.

Third, MCI Metro could not calculate the interest, taxes, and surcharges due each customer for these refunds.

In lieu of making these calculations, MCI Metro decided to credit all outstanding balances for all customers impacted by the one-minute or refund overcharge, lack of rate notification, and inaccurate coding of accounts billing issues discussed above. This refund amounted to \$3,515,291. MCI Metro stated that this amount is and is well in excess of the amount actually due to customers. Having reviewed the Stipulation of Facts filed in this case, we agree with MCI Metro that the \$3,515,291 refund likely exceeds the amount due to customers.

UCAN's Request for Sanctions

On February 25, 2000, UCAN filed brief on the issue of whether the Commission should impose sanctions and penalties on MCI Metro. UCAN requested that the Commission impose a fine of no less than \$250,000 on MCI Metro.⁵ UCAN stated that MCI Metro was properly considered a relatively large and experienced entrant in the local phone market, and that MCI Metro had or should have the resources and experience to adequately and lawfully compete in this market. UCAN contended that should the Commission fail to impose a fine on a company of this size, smaller companies would not be deterred from making similar billing errors.

⁵ UCAN also sought penalties of no less than \$1.75 million for billing after disconnect but, as noted above, today's decision does not resolve that issue.

UCAN observed that the Commission has adopted guidelines for exercise its discretion in setting fines within the statutory range.⁶ A primary factor under these guidelines is the severity of the offense. UCAN quantified the severity of MCI Metro's offenses by looking at the amount of money MCI Metro improperly collected, \$617,227, and the number of customer errors that occurred, 74,815. Some customers may have been affected by more than one error. UCAN pointed out that these errors also have a negative impact on competition. Customers who left their incumbent local exchange carrier and encountered a series of billing errors with MCI Metro will be less likely, in UCAN's view, to seek out other competitive opportunities.

The next factor in the guidelines UCAN addressed is the conduct of the utility. While UCAN views MCI Metro's billing errors caused by human error, as less egregious UCAN sharply criticized MCI Metro for its failure to notify all affected customers of its rate increase. MCI Metro had initially alleged that no law or regulation required such notice. UCAN argued that MCI Metro should have been familiar with the rules and that its disregard of these rules warrants a penalty.

UCAN also pointed out that MCI Metro's restitution efforts have not been exemplary. UCAN concluded that MCI Metro repeatedly under-assessed the number of affected customers and made other errors that resulted in customer refunds being delayed up to two years.

With respect to the financial resources of MCI Metro, another factor to consider in determining the amount of a fine, UCAN pointed out that MCI

⁶ See D.98-12-075, Appendix A.

Metro's parent company, MCI WorldCom had cash revenue of \$5.1 billion for 1999.

Another factor under the guidelines is furtherance of the public interest. UCAN stated that the Commission has the responsibility to prevent further abuses to MCI Metro's customers and to deter similar violations by other carriers.

The final factor is the role of precedent. UCAN cited several Commission decisions that UCAN concluded supported fines ranging between 50% and 100% of the customer harm.

Based on all these factors, UCAN recommended a fine of \$250,000.

MCI Metro's Response

MCI Metro stated that it had forthrightly and cooperatively approached the billing matters at issue in this proceeding, that it had made very generous restitution to all affected customers, and that UCAN was not challenging the overall adequacy of the restitution. MCI Metro also noted that UCAN was not contending that the billing errors resulted from any intentional or negligent conduct on its part. MCI Metro stated that the errors were the result of innocent human mistakes in designing, programming, and using the new ordering and billing systems for MCI Metro's initial entry into the local service market.

MCI Metro stated that the circumstances of this case do not justify the imposition of any penalties. MCI Metro provided detailed affidavits from its employees responsible for customer billings that carefully explained the circumstances that led to each of the billing errors discussed above. MCI Metro also recounted its efforts to provide restitution for all wrongfully billed amounts.

MCI Metro claimed that a fine under these circumstances would serve no deterrent purpose because the errors that occurred were completely accidental, and arose in the unique circumstances of its new local billing system.

Discussion

Pursuant to Section 532,⁷ all utilities must charge for their services in accord with their tariff schedules on file with the Commission. All amounts collected other than in accord with the tariff schedules are unlawful, unreasonable and subject to an order of reparations pursuant to Section 734. Every public utility must “obey and comply with every order, decision, direction, or rule made or prescribed by the Commission.” (Section 702.) The Commission may impose a fine of not less than \$500 nor more than \$20,000 for each violation of the California Constitution, Public Utilities Code or order of the Commission, (Section 2107.) Each day of a continuing violation constitutes a separate violation, (Section 2108.)

The Commission does not exempt new market entrants from compliance with these standards:

We do not condone some sort of “learning period” for new long distance service providers, or any public utility. When we grant a CPCN, we are not necessarily authorizing a research and development effort or a learning opportunity; rather, we are granting authority to the carrier to provide “adequate, efficient, just, and reasonable service . . . as [is] necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.” (Pub. Util. Code § 451.) We expect all certificated public utilities to comply with all applicable requirements at all times.

⁷ All citations are to the Public Utilities Code unless otherwise noted.

Communications TeleSystems International, (1997) 72 CPUC2d 621, 629 (D.97-05-089).

MCI Metro has conceded its billing errors.⁸ Billing errors, intentional or not, have serious negative consequences for a utility's customers. As the record in this proceeding shows, billing errors can be difficult to detect and correct.

Returning all improperly collected amounts to the customers is also a daunting task. The record in this case shows that MCI Metro could not in all instances (1) identify affected customers, (2) precisely calculate the refund owed, and (3) locate the customers. In recognition of these deficiencies, MCI Metro credited all outstanding balances, including those referred to outside collection agencies, as of the customers' January 2000 invoices for all 32,387 customers affected by these billing errors. The total amount credited was \$3,515,291. While this action has the important effect of forcing MCI Metro to disgorge all benefits of the erroneous billings, the amount outstanding on an individual customer's January bill may or may not correlate with the amount which resulted from the erroneous billing. Hence, individual customers may have been under- or over-compensated.

Our goal is accurate refunds. Where perfect accuracy is not feasible, however, our equitable authority allows us to utilize the concept of fluid recovery to distribute the funds. See D.00-04-027, *mimeo.* at pp. 5-10. Thus, we approve the form of credit used by MCI Metro to accomplish these refunds.

⁸ MCI Metro argues that UCAN must show a mental state element to prove a violation of the Public Utilities Code. We have previously rejected such an analysis. Communication TeleSystems International, (1997) 72 CPUC2d 621, 635.

Because it is so difficult to correct billing errors, prevention of billing errors must be a high priority for all utilities. The expense and inconvenience of correcting billing errors should constitute an incentive to prevent such errors. When such errors occur, however, particularly on the scale present here, the public interest requires that the Commission use its powers to provide further incentives in ensure accurate billing.

As a general matter, the Commission's priorities in enforcement proceedings, where violations of law or regulations have been established are to: (1) bring to an end any ongoing violations, (2) provide complete restitution to victims of the wrongdoing, and (3) deter future violations through the use of fines. Here, MCI Metro has corrected the billing errors addressed in this proceeding, so our first priority has been met.

Our second objective, providing restitution to victims, is the issue that the parties have been grappling with throughout this proceeding. We expect any entity that obtains funds in violation of the Public Utilities Code or our regulations to promptly and completely return all such funds to customers. Here, the factual stipulation shows that MCI Metro has made an effort to identify each and every overcharge and to make full restitution. The stipulation also shows that it is not possible for MCI Metro to accomplish this goal fully. To address this inadequacy, MCI Metro credited all outstanding unpaid balances as of January 2000 on all accounts affected by the billing errors. Accordingly, MCI Metro credited customers \$3,515,291 as proxy for the amounts it could not calculate. UCAN did not seek any further restitution by MCI Metro. Thus, the parties to this case have agreed that, as best can be calculated, customers have received a full refund of all overcharges. We, conclude therefore, that our second objective has been met.

We will next consider our third objective -- the possibility of a fine pursuant to our guidelines -- quite apart from the amounts paid for restitution. The purpose of fines is to deter further violations by the current perpetrator or others. Here, as noted, the administrative burden of identifying and correcting billing errors creates a practical incentive to avoid them. Consistent with our guidelines, however, we will impose a fine as a further deterrent.

The Commission may impose fines payable to the State of California pursuant to § 2107. Such fines must be between \$500 and \$20,000 per offense. Each day of a continuing offense constitutes a separate and distinct offense. Because the objective of fines is to deter future violations, fines should be set at a level within the range permitted by §2107 that is sufficient to achieve the objective of deterrence without being excessive.

In this case, the factual stipulation shows that the one-minute overcharge issue occurred from February 1, 1997, to May 14, 1998, or approximately 16 months. The lack of notice of rate increase to customers was corrected approximately 6 months after the rate increase was implemented. The inaccurate coding of accounts occurred over "several months" in 1997 and 1998. Imposing a per day and error fine results in the following:

One-minute overcharge

$$16 \text{ months} \times 30 \text{ days/month} \times \$500 = \$ 240,000$$

Lack of Notice

$$6 \text{ months} \times 30 \text{ days/month} \times \$500 = \$ 90,000$$

Inaccurate Coding

$$6 \text{ months}^9 \times 30 \text{ days/month} \times \$500 = \underline{\$ 90,000}$$

$$\text{TOTAL} \quad \underline{\$ 420,000}$$

In recognition of the MCI Metro's cooperation in correcting the billing errors brought to light by this complaint, we will use the low end of the range of permissible fines.

Comments on Alternate Draft Decision

The draft decision of Administrative Law Judge Bushey in this matter was mailed to parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. CSD filed a motion on December 4, 2000, seeking leave to file comments. The motion is granted. CSD requested two technical corrections that have been incorporated.

Findings of Fact

1. The parties filed a Stipulation of Facts that showed that MCI Metro has made \$9,411,791 in refunds and credits to customers affected by the billing errors discussed in this decision.
2. The Stipulation stated that it was not possible for MCI Metro to credit or refund to each and every customer the exact amount to which the customer was entitled.
3. The Stipulation describes a reasonable means of allocating refunds for customers.
4. The Stipulation provides for MCI Metro to disgorge all improperly collected amounts.

⁹ The factual stipulation does not provide a specific number of months, other than "several." For purposes of this calculation we will use six months as a reasonable proxy.

5. MCI Metro acknowledged and made an effort to identify and correct the billing errors alleged by UCAN in this proceeding.

6. The billing after disconnect issue is not adjudicated in this proceeding.

Conclusions of Law

1. The Commission may impose fines for billing errors.

2. The record supports imposing a fine of \$428,000 pursuant to § 2107 on MCI Metro for the three billing errors adjudicated in this decision.

3. This proceeding should be closed.

4. This decision should be effective immediately.

O R D E R

Therefore, **IT IS ORDERED** that:

1. MCI Metro, shall pay a fine of \$420,000 to the General Fund of the State of California.

2. MCI Metro shall, to the extent it has not done so already, refund or credit all customers consistent with the parties' stipulation and this decision.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.