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

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File Nos. E-89-232

CENTRAL TELEPHONE COMPANY OF FLORIDA, CENTRAL TELEPHONE COMPANY OF ILLINOIS, CENTRAL TELEPHONE COMPANY - MINNESOTA, CENTRAL TELEPHONE COMPANY - NEVADA, CENTRAL TELEPHONE COMPANY - NORTH CAROLINA, CENTRAL TELEPHONE COMPANY OF OHIO, CENTRAL TELEPHONE COMPANY OF TEXAS, and CENTRAL TELEPHONE COMPANY OF VIRGINIA,

CAROLINA TELEPHONE AND TELEGRAPH COMPANY, UNITED TELEPHONE COMPANY OF THE CAROLINAS, UNITED TELEPHONE COMPANY OF FLORIDA, UNITED TELEPHONE COMPANY OF INDIANA, INC., UNITED TELEPHONE COMPANY OF IOWA, UNITED TELEPHONE COMPANY OF KANSAS, UNITED TELEPHONE COMPANY OF MINNESOTA, UNITED TELEPHONE COMPANY OF MISSOURI, UNITED TELEPHONE COMPANY OF JERSEY, INC., UNITED TELEPHONE COMPANY OF THE NORTHWEST, UNITED TELEPHONE COMPANY OF OHIO, THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA, UNITED INTER-MOUNTAIN TELEPHONE COMPANY, and UNITED TELEPHONE COMPANY OF TEXAS, INC., E-89-233

CONTEL OF ARKANSAS, INC., CONTEL OF CALIFORNIA, INC., CONTEL OF ILLINOIS, INC., CONTEL OF INDIANA, INC., CONTEL OF IOWA, INC., CONTEL OF KANSAS, INC., CONTEL OF KENTUCKY, INC., CONTEL OF MAINE, INC., CONTEL OF MINNESOTA, INC., CONTEL OF MISSOURI, INC., CONTEL OF NEW HAMPSHIRE, INC., CONTEL OF NEW YORK, INC., CONTEL OF NORTH DAKOTA, INC., CONTEL OF NORTH CAROLINA, INC., CONTEL OF PENNSYLVANIA, INC., CONTEL OF THE SOUTH, INC., CONTEL OF SOUTH CAROLINA, INC., CONTEL OF TEXAS, INC., CONTEL OF VERMONT, INC., CONTEL OF VIRGINIA, INC., and CONTEL OF WEST VIRGINIA, INC., E-89-234

CINCINNATI BELL TELEPHONE COMPANY, E-89-235

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, and E-89-236

GTE NORTH INCORPORATED, GTE ALASKA INCORPORATED, GTE CALIFORNIA INCORPORATED, GTE FLORIDA INCORPORATED, GTE NORTHWEST INCORPORATED, GTE SOUTH INCORPORATED, GTE WEST COAST INCORPORATED, GTE SOUTHWEST INCORPORATED, and GTE HAWAIIAN TELEPHONE COMPANY, INCORPORATED, E-89-237
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted June 13, 1990; Released: July 3, 1990

By the Commission:

1. On June 1, 1989, MCI Telecommunications Corporation (MCI) filed a series of related complaints against the above-named carriers (hereinafter referred to collectively as the carriers). MCI requests that the Commission declare unlawful charges levied by each carrier for interstate access services from January 1, 1987, through December 31, 1987, to the extent those charges resulted in earnings in excess of the carrier's authorized rate of return for that period. The carriers filed responsive pleadings, including motions to dismiss, and MCI replied.[1] For the reasons discussed below, we grant the motions to the extent indicated herein and dismiss the complaints without prejudice.

2. One of the arguments advanced in three of the motions to dismiss is that Commission policy requires a two-year review period.[2] Therefore, the carriers conclude, MCI's allegations that the rates were unreasonable because they exceeded the prescribed target for a one-year period fail to state a cause of action. In this regard, MCI argues that the two-year prescription period established by the Commission relates only to the Commission's own decision regarding rates, but does not affect claims for damages filed pursuant to Section 208 of the Act. 47 U.S.C. § 208. It maintains that the carriers' rates were unlawful from their inception and thus the claim is ripe for decision.

3. The Commission recently reiterated that, in the case of a Section 208 complaint, a carrier's rate of return should be examined over the relevant monitoring period

established in CC Docket No. 84-800 [3] (in this instance 1987-1988). It dismissed two complaints which limited to one year the period in which to determine a carrier's earned rate of return. The Commission noted that the complainant, MCI, had failed to provide sufficient justification to support deviation from the existing Commission policy of examining rates in relation to the two-year monitoring period. *MCI Telecommunications Corporation v. Southern Bell Telephone and Telegraph Company*, 4 FCC Rcd 8135 (1989) (*MCI v. Southern Bell), recon. den.*, _____ FCC Rcd _____ (released March _____, 1990). Likewise, MCI has here limited the period in which to determine the carrier's earned rate of return to one year and has provided no persuasive reason why, in the particular circumstances presented by these complaints, we should deviate from examining rates in relation to the entire monitoring period.[4] Accordingly, we are dismissing the complaints without prejudice.[5]

4. As previously stated, n. 1 *supra*, the Centel defendants filed a cross complaint against MCI. On October 28, 1987, these defendants had issued a check to MCI in compliance with the refund requirements of Part 65 of the Rules then in effect (47 C.F.R. Part 65) for earnings exceeding their authorized rates of return for the period October 1, 1985, through December 31, 1986, subject to the outcome of the court proceedings challenging the lawfulness of the Commission's automatic refund rules. Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800 (*Phase I Order)*, FCC 85-527, 50 Fed. Reg. 41350 (Oct. 10, 1985). *recon.*, FCC 86-114 (released Mar. 24, 1986), *summarized in* 51 Fed. Reg. 11033 (Apr. 1, 1986), *further recon.*, 2 FCC Rcd 190 (1987), *vacated in part and remanded*, American Telephone and Telegraph Co. v. FCC, 836 F.2d 1386 (D.C. Cir. 1988). The Centel defendants previously requested MCI to repay the difference between what they refunded and what they would have refunded if they had calculated overearnings on an overall basis rather than on the basis of the three access categories. MCI refused the request, alleging that it was not required to return previously paid overearnings absent a Commission ruling. In the cross complaint the Centel defendants seek to recover the amount of these alleged overpayments to MCI, plus interest, as well as an amount attributable to a calculation error made by Centel.

5. The complaint provisions of the Communications Act make a carrier liable to its customers for damages that result from the carrier's unlawful actions or omissions. 47 U.S.C. §§ 206-209. These sections of the Act do not provide a basis for a carrier to file a complaint against its customers. *See* Illinois Bell Telephone Company, *et al.* v. American Telephone and Telegraph Co., 4 FCC Rcd 5268 (1989); American Telephone & Telegraph Company v. Northwestern Bell Telephone Company, 5 FCC Rcd 143 (1990). In the instant case Centel's claim arises out of a refund the carrier made to its customer, MCI. Therefore, we dismiss Centel's cross complaint. However, since MCI's complaint is being dismissed without prejudice, should MCI refile a complaint based on information obtained from the entire monitoring period, our action would not preclude Centel from raising as an equitable argument the amounts it claims MCI should refund as an offset against any damages claimed by MCI.

6. Accordingly, IT IS ORDERED that the above-listed complaints (File Nos. E-89-232 through E-89-237) filed by MCI Telecommunications Corporation on June 1, 1989, ARE DISMISSED WITHOUT PREJUDICE.

7. IT IS FURTHER ORDERED that the motions to dismiss the above-listed complaints ARE GRANTED to the extent indicated above.

8. IT IS FURTHER ORDERED that the cross complaint filed by the Central Telephone Company defendants IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Central Telephone Companies listed above (File No. E-89-232) (Centel defendants) did not file a motion to dismiss. Instead, they filed a cross complaint against MCI. *See* paras. 4 & 5, *infra*.

[2] It is unnecessary to summarize all of the arguments advanced in these pleadings or to resolve the other issues raised by the parties, given our disposition of MCI's complaints. We note that issues raised by defendants in these complaints, such as whether the Commission may award damages when it is the carrier's earned return for an individual service category rather than its overall return which exceeds the allowed rate of return, have been raised in a number of other complaints filed by MCI. Many of those arguments have been addressed in our decisions resolving those other complaints. *See, e.g.*, MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216 (1990), *pet. for recon. pending.*

[3] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, 50 Fed. Reg. 41350 (Oct. 10, 1985) (*Phase I Order), recon.*, FCC 86-114 (released Mar. 24, 1986), *summarized in* 51 Fed. Reg. 11033 (Apr.1, 1986), *further recon.*, 2 FCC Rcd 190 (1987), *vacated in part and remanded*, American Telephone and Telegraph Co. v. FCC, 836 F.2d 1386 (D.C. Cir. 1988).

[4] As in *MCI v. Southern Bell, supra* para. 3, MCI offers only general arguments why the Commission might have chosen to adopt a one year review period in CC Docket No. 84-800, instead of the two year period selected.

[5] MCI is not prejudiced by this result. The statute of limitations will not bar full recovery of any damages MCI might have sustained as a result of the carriers' charges. *MCI v. Southern Bell, supra*. For purposes of Section 415 of the Communications Act, 47 U.S.C. § 415, discovery of the "right or wrong" or of the facts on which such knowledge is chargeable in law occurs in this instance when defendant files its rate of return monitoring report for the two-year monitoring period. The carriers have only recently filed their final monitoring reports for the 1987-1988 period, and the information contained therein may be the subject of future complaints by MCI.