

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration  
concerning complaint of MCImetro  
Access Transmission Services LLC  
for enforcement of  
interconnection agreement with  
BellSouth Telecommunications,  
Inc.

DOCKET NO. 981121-TP  
ORDER NO. PSC-99-1089-FOF-TP  
ISSUED: May 27, 1999

The following Commissioners participated in the disposition of  
this matter:

JOE GARCIA, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JULIA L. JOHNSON  
E. LEON JACOBS, JR.

APPEARANCES:

RICHARD MELSON, ESQUIRE, Hopping Green Sams & Smith,  
P.A., P.O. Box 6526, Tallahassee, Florida 32314.  
On behalf of MCImetro Access Transmission Services LLC.

J. PHILLIP CARVER, ESQUIRE, 675 West Peachtree Street,  
#4300, Atlanta, Georgia 30375.  
On behalf of BellSouth Telecommunications, Inc.

MARTHA CARTER BROWN, ESQUIRE AND JOHN MILLER, ESQUIRE,  
Florida Public Service Commission, 2540 Shumard Oak  
Boulevard, Tallahassee, Florida 32399-0850.  
On behalf of the Commission Staff.

ORDER RESOLVING COMPLAINT

BY THE COMMISSION:

BACKGROUND

On September 14, 1998, MCImetro Access Transmission Services  
LLC (MCIm) filed a complaint for enforcement of its Interconnection  
Agreement with BellSouth Telecommunications, Inc. (BellSouth).  
BellSouth filed its Answer and Response to MCI's Petition on

October 5, 1998. We conducted an evidentiary hearing on the complaint on February 3, 1999. The issues we addressed at the hearing concern the appropriate provisioning and pricing of a 4-wire DS1 loop and DS1 dedicated transport network element combination under the agreement. Our decision on those issues is explained in detail below.

#### DECISION

MCIm complains that BellSouth has refused to provide the combination of a DS1 loop and a DS1 Transport at the sum of the individual unbundled network element (UNE) prices, as their interconnection agreement requires. MCIm asserts that it has been forced to purchase higher priced T-1 circuits from BellSouth's access tariffs to provide high-speed, full-service telecommunications to its business customers. MCIm asks that we order BellSouth to provide the network element combination to MCIm at the simple sum of UNE prices and require BellSouth to reimburse MCIm for the difference between the DS-1 combination price and the T-1 price MCIm has been paying.

BellSouth responds that the DS1 loop and transport combination MCIm demands recreates a BellSouth retail service called "MegaLink". According to BellSouth, the parties' interconnection agreement and this Commission's policies regarding combinations of unbundled network elements (UNEs) do not require it to provide this combination at the sum of the UNE prices. BellSouth relies on our Order No. PSC-98-0810-FOF-TP, issued June 12, 1998, in Docket No. 971140-TP, which addressed a number of issues concerning the treatment of UNE combinations in AT&T Communications of the Southern States, Inc.'s (AT&T) and MCIm's interconnection agreements with BellSouth. In Order No. PSC-98-0810-FOF-TP, page 25, we said:

MCIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIm's order.

Because the parties did not agree that the combination MCIm requested recreated BellSouth's MegaLink service, they never negotiated a price. BellSouth contends that the parties are required to negotiate the price for the combination, and BellSouth

asserts that the price should be set at the wholesale price of MegaLink service.

Thus, to resolve this dispute we must answer this question: Does the combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreate an existing BellSouth retail service known as MegaLink? If it does not, then the parties' interconnection agreement, and our Order No. PSC-98-0810-FOF-TP interpreting the relevant portions of the agreement, clearly indicate that BellSouth must provide the combination to MCIm at the sum of the UNE prices. If it does, then we must direct the parties to negotiate a price.

#### The DS1 combination and MegaLink

MCIm witness Martinez described a DS1 loop as a four-wire facility and associated electronics that connect a customer's premises to the customer's serving wire center. A DS1 loop provides 1.5 million bits per second (MBPS) of bandwidth, which is equivalent to 24 voice grade channels. Witness Martinez described DS1 dedicated transport as a four-wire interoffice facility and associated electronics that provide a 1.5 MBPS connection between the customer's serving wire center and a point of interconnection at MCIm's local switch location. Witness Martinez testified that MCIm intends to use the DS1 loop/ DS1 transport combination to connect a business customer's premises to a MCIm Class 5 local switch, which MCIm uses to provide local service to the customer, including dial-tone, local calling, vertical features, access to operator services, access to 911 service, and switched access to the customer's preferred long distance carrier.

BellSouth witness Milner described MegaLink as a service by which digital signals are transmitted over digital facilities at a rate of 1.544 MBPS to and from a customer's premises. He explained that BellSouth offers MegaLink through its Private Line Services Tariff, but functionally MegaLink is the same as a DS1 loop and dedicated transport combination. He argued that the functional equivalence of the element combination is what determines the recreation of a retail service, and the proposed combination of UNEs and MegaLink service provide identical functionality regardless of whether MCIm connects either to MCIm's switch.

MCIm's witnesses Martinez and Gillan acknowledged that the DS1 loop/DS1 dedicated transport combination is functionally the same as MegaLink, but also pointed out that there are four possible ways

to obtain this functionality: (1) by purchasing a DS1 loop UNE and DS1 transport UNE out of the Interconnection Agreement, and MCIIm combining these themselves in a collocation space; (2) by purchasing BellSouth's MegaLink service; (3) by purchasing T-1 circuits from BellSouth's access tariff; and (4) by purchasing the combination of a DS1 loop and DS1 dedicated transport. With the exception of the pricing on option (4), BellSouth witness Hendrix agreed that BellSouth has the capability of providing this functionality in four different ways.

Witness Martinez disagreed, however, that a MegaLink circuit provided to an end use customer by BellSouth and a DS1 loop/DS1 dedicated transport combination used by MCIIm as part of an MCIIm switch-based local service offering are in any way equivalent in the eyes of the customer. According to MCIIm, one must compare the service to be offered using the UNE combination to the BellSouth retail service in order to determine if the former "recreates" the latter. In MCIIm's view, the combination in question here does not recreate any existing BellSouth retail service within the meaning of Order No. PSC-98-0810-FOF-TP.

We cannot accept the position that identical functionality alone determines whether a competing carrier's use of an unbundled network element combination "recreates" an incumbent carrier's retail service. If that were so, almost any element combination could be said to "recreate" some retail service. Such a standard would severely restrict competitive carriers' use of UNEs to enter local telephone markets, contrary to the intent of the Telecommunications Act of 1996 and the FCC's rules implementing that Act.<sup>1</sup> We believe we must evaluate a claim that a UNE combination recreates a retail service much more comprehensively. Section 364.02(11), Florida Statutes, states that "[s]ervice is to be construed in its broadest and most inclusive sense," and we need to consider other aspects of the services in question beyond just the functionality of the facilities involved. We need to consider

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<sup>1</sup> Witness Gillan argued that if the Commission adopts BellSouth's view, then BellSouth, in its own discretion, has the ability to avoid its unbundling and network element combining obligations simply by always having services that equal the network elements. While we do not believe that BellSouth will attempt to avoid its obligations in this fashion, we do agree that as the number of BellSouth's service offerings increases, the potential for this type of conflict could increase.

both the nature of the incumbent's tariffed retail service as well as the competitor's intended use of the requested UNE combination to determine whether the one recreates the other.

In this case, one of the major differences between MCI's intended use of the DS1 combination and BellSouth's MegaLink service is that MCI will use it with its own Class 5 local switch to provide a full range of local telecommunications to its customers. Witness Gillan testified that BellSouth has continuously objected to a particular network configuration, the so-called network element "platform," where the entrant provides its service entirely using network elements obtained from BellSouth. Witness Gillan pointed to the direct testimony of BellSouth witness Robert Scheye in the AT&T/MCI Arbitration proceeding, which stated:

ALECs should be able to combine BellSouth provided elements with their own capabilities to create a unique service. However, they should not be able to use only BellSouth's unbundled elements to create the same functionality as a BellSouth existing service.

Here, MCI intends to use the BellSouth UNEs in concert with its own facilities, its Class 5 switch. As MCI witness Gillan stated:

To determine whether MCI "recreates" a BellSouth service requires a comparison that considers the service MCI offers. The service offered by MCI uses network elements in exactly the way BellSouth has (until now) argued that it should -- in combination with MCI's own facilities-- and BellSouth's instant claim that even this arrangement "recreates" a BellSouth service should be rejected.

The inconsistency of BellSouth's position is not the important thing here. It is the fact that MCI will connect BellSouth's DS1 loop and DS1 dedicated transport to its own facilities to provide telecommunications service. It cannot be said from the evidence in the record that MCI will provide telecommunications service to its customers entirely from a combination of BellSouth's network elements that recreate a retail service.

The evidence in the record also indicates that the total service BellSouth offers through its MegaLink tariff is not consistent with MCI's intended use of the UNE combination. BellSouth offers MegaLink service only to private line customers. Although BellSouth's witness Milner stated that the tariff clearly contemplates that the transport functionality may be used in conjunction with switches, the evidence does not support this assertion. Witness Milner admitted that the terms "local switch" or "toll switch" do not appear in any provisions of the MegaLink tariff, but he argued that Section B7.1.2.D of the tariff, regarding the connections that may be made to the MegaLink service, uses the term "Customer-Provided Communications Systems" which he believes includes switches. The tariff defines "Communications Systems," however, as follows:

The term "Communications Systems" when used in connection with communications systems, provided by an Other Carrier (OC) denotes channels and other facilities furnished by the OC for private line services as such OC is authorized by Federal Communications Commission or Public Service Commission to provide.

Witness Milner agrees that MCI would be considered an Other Carrier. Thus the tariff would require an "Other Carrier" such as MCI to connect MegaLink to facilities used to provide private line services. As MCI argues in its brief, it "is offering a switched-based local exchange service that can be used to call any telephone in the world. It is the antithesis of a private line service."

BellSouth witness Milner also testified that MegaLink can be used to connect an end user customer to a BellSouth central office, or to another end user customer, or to connect two of BellSouth's central offices. Again, the evidence does not support this statement. As MCI pointed out at the hearing, Section B2.1.1 of BellSouth's Private Line Services Tariff states:

Private line service is the provision of Company facilities for communication between specified locations of customers or authorized users.

The tariff further defines "authorized users" as:

a person, firm or corporation (other than the customer) who may communicate over a private line or channel according to the terms of the tariff and (1) on whose premises a station of the private line service is located or (2) who receives from or sends to the customer such private line or channel communications relating solely to the business of the customer. An authorized user must be specified in the service contract.

The evidence shows that BellSouth's private line MegaLink service is intended to connect locations of the same customer, or a customer and an affiliated authorized user. MCIIm intends to connect unrelated business customers to the public switched network to provide local service not to provide private line service. Therefore, the language in BellSouth's Private Line Services tariff would prohibit MCIIm from providing the service it intends to provide.

#### Conclusion

Based on the evidence in the record, we find that the combination of UNEs consisting of a 4-wire DS1 loop and DS1 dedicated transport does not recreate BellSouth's MegaLink service. MCIIm's intended use of the elements is inconsistent with the conditions of the MegaLink service tariff. Since Section 251(c)(3) of the Telecommunications Act of 1996, states that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," and since BellSouth is required to provide UNE combinations under the terms of the parties' agreement, we direct BellSouth to provide this combination at the sum of the individual network elements.

#### Refund

MCIIm requests that we order BellSouth to refund the difference between the access tariff prices for the T-1 circuits that MCIIm has been ordering and the price for the UNE combination of a DS1 loop and DS1 transport. MCIIm witness Martinez stated that as of the date direct testimony was filed, the accumulated difference in price was over \$3 million, and was continuing to increase at a rate of over \$300,000 per month.

BellSouth argues in its brief that:

Clearly, this case is not a situation in which a refund is appropriate under the normal criteria (i.e., because the customer did not receive service, was not charged for service at the tariffed rate, or had some legitimate complaint regarding the quality of service).

BellSouth witness Hendrix also argued that MCIm ordered T-1 circuits from the access tariff and has used them accordingly. He stated that MCIm's argument that it ordered these circuits via the access tariff because it could not purchase UNEs is not true. He contended that MCIm could have purchased UNEs and combined them in their collocation space, or they could have purchased MegaLink service at the tariffed rate less the applicable resale discount. While this may be correct, it is irrelevant. The parties' interconnection agreement entitles MCIm to order the UNE combination from BellSouth at the price defined in the contract. BellSouth is contractually required to provide it, regardless of other options available to MCIm.

BellSouth is also contractually required to provide a refund where it has failed to comply with the terms of its agreement. BellSouth acknowledged that MCIm attempted to order the DS1 loop/DS1 dedicated transport combination in late 1997. Since BellSouth did not provide it, it now must provide the refund pursuant to the interconnection agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. shall provide the DS1 loop and DS1 dedicated transport combination to MCImetro Access Transmission Services LLC, pursuant to the terms of its interconnection agreement at the sum of the unbundled network element prices. It is further

ORDERED that BellSouth Telecommunications, Inc. shall provide a refund to MCImetro Access Transmission Services LLC of the difference between the price of the combination and the access tariff price of a T1 circuit that MCImetro Access Transmission Services LLC has purchased since November of 1997. It is further

ORDERED that this docket shall be closed.



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By ORDER of the Florida Public Service Commission this 27th  
day of May, 1999.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).

M E M O R A N D U M

May 27, 1999

RECORDS AND  
REPORTING

99 MAY 27 PM 2:51

RECEIVED-FPSC

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BEDELL) *NCB CB*

RE: DOCKET NO. 981121-TP - In re: Request for arbitration concerning complaint of MCImetro Access Transmission Services LLC for enforcement of interconnection agreement with BellSouth Telecommunications, Inc.

99-1089-PDF

Attached is an ORDER RESOLVING COMPLAINT to be issued in the above-referenced docket. (Number of pages in order - 9)

PLEASE ISSUE TODAY

CB/slh  
Attachment  
cc: Division of Communications  
I:981121or.cb

*See 1.8*

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