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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Resolution of Petition(s) to establish	)	
nondiscriminatory rates, terms, and	)	**Docket No. 950984-TP**
conditions for resale involving local	)	
exchange companies and alternative	)	**Filed: April 24, 1996**
local exchange companies pursuant	)	
to Section 364.161, Florida Statutes	)	

OPPOSITION OF
METROPOLITAN FIBER SYSTEMS OF FLORIDA, INC.
TO BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION

Pursuant to Rule 25-22.060(b), Florida Administrative Code and Order No. PSC-95-0888-PCO-TP ("Order"), Metropolitan Fiber Systems of Florida, Inc. ("MFS"), by its undersigned attorneys, hereby files this Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Reconsideration of Order No. PSC-96-0444-FOF-TP ("Order"), issued on March 29, 1996.

I. SUMMARY OF POSITION

In order to prevail, BellSouth must show that the Commission either ignored, misinterpreted or misapplied the law applicable to the evidence in this proceeding, or overlooked and failed to consider the significance of certain evidence in this docket. *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). As in the interconnection proceeding (Docket No. 950985-TP), BellSouth has taken this opportunity to attempt to relitigate the issues that the Commission has already decided, without making any new legal arguments, or pointing to any additional or overlooked facts. BellSouth claims that the Commission's order will not permit it to recover costs, yet the Commission explicitly relied upon cost data supplied by BellSouth which demonstrates that it will cover its costs. BellSouth claims that it must be permitted to recover shared and common costs in its unbundled element prices, yet can point to no Commission order or other precedent requiring such recovery. BellSouth also introduces for the first time the fact that it intends to charge MFS and other ALECs the Carrier Common Line charge ("CCL") and the End User Common Line charge ("EUCL"), in addition to the loop charge which is set so as to recover all of its incremental costs. Motion at 5. These rates were imposed by the FCC as an accounting mechanism; such recovery is decidedly not necessary here, where cost recovery is already guaranteed by the Commission's cost-based rate. The Commission has already decided the issue of collocation of digital loop carriers: it is necessary to permit such collocation in order to foster competition, and the federal Act, relied on by BellSouth, if anything, expands the Commission's authority to permit collocation. Finally, the Commission will not violate the Contracts Clause by this decision, given the Commission's broad authority to regulate public utilities in the public interest.

II. BELLSOUTH WILL RECOVER ITS COSTS UNDER THE ORDER

A. The Commission Had Ample Evidence to Set Interim Cost-Based Rates

While BellSouth claims that the Commission's rates do not cover cost as required by Section 364.161(1), Florida Statutes, the Commission acted on the cost information provided by BellSouth to set interim rates. As determined by the Commission, BellSouth submitted loop costs of $15.53 and $15.97 from studies performed in 1994. Order at 15. The Commission set rates on an interim basis to fulfill its obligation to foster competition, and required the filing of cost studies in order to set permanent rates. *Id.* As the Commission noted, BellSouth's competitors should not suffer by delayed entry into the market while waiting for Bell to file cost studies. *Id.* The Commission considered a lower rate of $16.00, but in fact gave BellSouth an additional dollar of contribution to ensure that its costs were covered. Bell claims that the Commission was obligated to rely upon the highest cost study available to ensure that Bell covers its costs. Bell, however, fails to distinguish this cost study, or provide any valid substantive reason for relying upon it. Given the information available to the Commission as provided by BellSouth,[1] the Commission fulfilled its statutory duty under Section 364 to set cost-based unbundled loop rates in response to the MFS and MCI petitions. Contrary to BellSouth's claim, the evidence was also "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1st DCA 1957).

Bell also attempts to relitigate its claim that special access pricing is appropriate. Motion at 4-5. The Commission correctly concluded that "special access lines are not an appropriate substitute for an unbundled loop." Order at 7. This is based on the substantial evidence offered by MFS and others, as cited in the Commission's Order (*id.*), that special access requires special engineering, provides for additional performance parameters, and that special access pricing could lead to a price squeeze. This issue was briefed at length (*see, e.g.*, MFS Brief at 27-33) and the distinction between

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[1] Bell points to the fact that the Commission stated that it could not "properly evaluate" BellSouth's cost data. Motion at 7. Had BellSouth offered substantial cost data at an earlier stage in this proceeding, the Commission could have fully analyzed the data. BellSouth cannot hide behind its own failure to provide sufficient cost information to attack what are, after all, only interim rates.

special access and unbundled loops was properly recognized by the Commission based upon the substantial record evidence on this issue.[2]

B. BellSouth Claims For the First Time That It Will Impose End User Common Line Charges and Carrier Common Line Charges On Top of the Commission Ordered Cost-Based Loop Rates

Bell, for the first time in its motion for reconsideration claims that it will impose on ALECs end user common line charges and carrier common line charges, in addition to the rate imposed by the Commission for unbundled loops. Motion at 5. Such an effort is totally unjustified, has not been addressed in this proceeding, would clearly be anticompetitive, and would undermine the Commission's Order in this proceeding.

BellSouth in taking this position ignores the basis for the rates set by this Commission. This proceeding was established in part to determine the cost to BellSouth of providing unbundled loops. Now after these costs have been obtained, and cost-based rates have been set, is not the time for BellSouth to argue that it has the right to collect additional charges associated with the federal EUCL and CCL. The EUCL and the CCL represent mere accounting formalities, growing out of rates of return rate based regulations and have nothing to do with BellSouth's costs.[3] While BellSouth references the *Rochester* waiver at the FCC, it fails to note that it has not received such a waiver and absent such a waiver may not impose these charges. BellSouth's purpose in raising this issue at this time appears to be nothing more than an attempt by BellSouth to double charge MFS.

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[2] As to the appropriate pricing of the port charge (Motion at 9-10), MFS submits that, unlike loops, which are bottleneck elements, ports are available on a competitive basis. Accordingly, the market should establish the appropriate rate for ports.

[3] It should be noted that the Act specifically states that network elements shall be based on costs *without reference to a rate of return or rate based proceeding*. § 252(d)(1)(A).

In Michigan, the competitive carrier City Signal took the position that if Ameritech Michigan chose to recover any portion of its costs in the form of the EUCL, "any EUCL recovery should offset the $8 and $11 unbundled loop rates. City Signal argued that this is appropriate to ensure that Ameritech Michigan does not over recover its costs."[4] The Commission agreed: "if Ameritech Michigan assesses a federal EUCL charge for the unbundled loop, that charge should offset the $8 and $11 rates. Not allowing for an offset of any interstate recovery through the EUCL charge would result in a double recovery of interstate costs." *Id.* Similarly, any EUCL or CCL charge by BellSouth should be an offset to the (significantly higher) $17.00 loop rate established by the Commission. Bell is simply trying to gain through the CCL and the EUCL what it could not gain in the hearing room, as it readily admits: "The resulting charge to the carrier will be substantially similar to the original rate proposed by BellSouth." Motion at 6 & n.2.

C. Universal Service Recovery in Unbundled Loop Rates is Entirely Inappropriate

BellSouth claims that it was not allowed to recover contribution towards joint and common costs "in connection with the price for an unbundled loop." Motion at 8. Yet, it is clear that the Commission allowed more than a dollar of contribution in these rates. The Commission also appropriately concluded that loop rates including substantial contribution were not the appropriate and could lead to a price squeeze. There is substantial record evidence to support this conclusion. More than one witness testified that the price squeeze created by special access pricing would make the use of unbundled loops completely impractical. Devine, Tr. at 61; Cornell, Tr. at 158.

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[4] *In the matter of the application of CITY SIGNAL, INC., for an order establishing and approving interconnection arrangements with AMERITECH MICHIGAN*, Case No. U-10647, Opinion and Order at 35 (Feb. 27, 1995).

Nor is contribution required by the Commission's universal service order, as claimed by Bell. Motion at 8. In fact, the universal service order actually concluded that "SBT and GTEFL have not demonstrated any need for US/COLR funding at this time," and recommended that Bell "should continue to fund their US/COLR obligations as they currently do; that is, through markups on the services they offer." Order No. PSC-95-1592-FOF-TP, Docket No. 950696, at 28. While the Commission noted that this could in theory extend to services "such as local interconnection and number portability," it made no mention of unbundled loops. *Id.* Moreover, the Commission clearly intended to leave the decision as to whether contribution is appropriate for particular services to future dockets. *Id.* In this docket, based upon evidence that excessive contribution could lead to an anticompetitive price squeeze, the Commission determined that substantial contribution is not appropriate in connection with unbundled loops. Order at 14.

III. COLLOCATION OF DIGITAL LOOP CARRIERS IS SUPPORTED BY THE RECORD AND CONSISTENT WITH THE EXPANSION OF COLLOCATION IN THE TELECOMMUNICATIONS ACT OF 1996

It is unclear from its Motion whether BellSouth is requesting reconsideration of the collocation of digital loop carriers ("DLCs") based upon its misguided assertion that DLCs are switches or on some other grounds. Motion at 10. If it is asking for reconsideration based on its "switch" claim, there is no legitimate basis for this request.

The record clearly established, as the Commission found (Order at 11), that loop concentration is a multiplexing function utilized by ALECs in several states on a collocated basis that permits a carrier to concentrate the traffic from a number of loops onto a single channel. Cornell, Tr. at 155. The Commission properly determined that unbundling of the DLC systems is necessary in order to ensure that the efficiency of links MFS leases from the BellSouth is equal to the efficiency of links that BellSouth uses. Devine, Tr. at 31. The Commission also correctly read its prior decisions to permit the collocation of such multiplexing equipment. Order at 11. As with many BellSouth arguments, Bell has not added any new legal theories nor factual information that has not already been fully considered and rejected by the Commission.

BellSouth does claim that the federal Act grants it a new opportunity in which to negotiate collocation arrangements. MFS filed its request under Section 364 for unbundled elements, including the appropriate collocation arrangements, in July 1995. In three months, the MFS request will be over a year old. BellSouth had ample opportunity to negotiate under Florida Statute Section 364 but squandered that opportunity. In fact, the Commission's authority to require unbundled loops based on BellSouth's failed negotiations is fully supported by the Act:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

Act § 261(b). The Commission is merely enforcing its statutory mandate to order unbundled elements in a situation in which the parties have not reached agreement.[5/] To interpret the federal Act to undermine the introduction of competition in this manner would be contrary to not only the letter but also the spirit of the Act.

[5/] There is no question that such unbundling at cost-based rates is consistent with the federal Act. *See* Act §§ 251(c)(3), 252(d)(1).

IV. THE COMMISSION'S ORDER DOES NOT VIOLATE THE CONTRACTS CLAUSE

To facilitate unbundling and the development of competition, the Commission ordered BellSouth to permit any customer to convert its unbundled service with BellSouth to an unbundled service with an ALEC, with no penalties, rollover, termination, or conversion charges either to the ALEC or the customer. *Order* at 16-18. This "fresh look" policy permits customers rapidly to avail themselves of competition for LEC service. The Commission is well within its regulatory prerogative to permit BellSouth's customers to reevaluate, without penalty, their long-term contracts within the new competitive environment.

Both the Federal Communications Commission ("FCC") and the California Public Utilities Commission have instituted similar "fresh look" requirements. For example, the FCC has instituted "fresh look" for many telecommunications services reasoning that a changed regulatory climate renders certain utility contracts unreasonable. *See Expanded Interconnection with Local Telephone Company Facilities, 9* FCC Rcd 5154, 5207-10 (1994) ("fresh look" available to LEC customers who wish to sign with competitive access providers); *Competition in the Interstate Interexchange Marketplace,* 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands,* 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" imposed as condition of grant of licenses under Title III of Communications Act). The California Public Utilities Commission explicitly requires language in certain customer service contracts stating:

> This Agreement shall at all times be subject to such changes or modifications by the Commission as the Commission may from time to time direct in the exercise of its lawful jurisdiction.

See, e.g., Alternative Regulatory Frameworks for Local Exchange Carriers, 1993 WL 565428 at *92, *rescinded*, 1993 WL 495331 (Cal. P.U.C. 1993). When new competitive opportunities exist, the California commission then announces the length of the "fresh look" period during which renegotiation or termination of contracts may occur without penalty. *See id.*

BellSouth asserts that a "fresh look" policy violates the Contracts Clause of the federal and Florida constitutions by permitting its customers to abrogate termination charges in its service contracts. The argument is without merit. Like the FCC and the California Commission, this Commission has the authority to implement such a policy:

> [It is a] well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts.

H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913, 914 (Fla. 1979) (*citing Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937)); *see Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (application of proper regulatory authority may not be defeated by private contractual obligations). While BellSouth's customers were able to balance the benefits of service with contract termination provisions in the prior LEC regulatory climate, circumstances have changed.

The Commission has a statutory mandate under Section 364.163(2) to effect unbundling in response to a petition. The Commission has found that the petition is in the public interest and that interest is served by permitting unbundling without delay. In the absence of a "fresh look" policy, the Commission's public interest finding would be thwarted by termination provisions which BellSouth concedes in its motion would pressure its customers to remain. BellSouth's citation to

Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n, 261 U.S. 379 (1923), is not to the contrary.

> [A] state may exercise its legislative power to regulate public utilities . . . notwithstanding the effect may be to modify or abrogate private contracts. . . . It is the intervention of the public interest which justifies and, at the same time conditions its exercise.

Id. at 382.[6] Accordingly, the Commission is clearly within its rights in waiving certain termination and rollover charges in the public interest in order to foster the development of competition in Florida. This action will ensure that BellSouth is not permitted to lock up large numbers of key customer accounts through long term contracts and therefore delay the advent of local competition in Florida.

V. CONCLUSION

BellSouth has presented no new legal theory, nor any new or overlooked fact in its Motion. Based on BellSouth's own evidence, the Commission had sound support in the record for its cost-based rate of $17.00. Moreover, the Commission set this rate on an interim basis with the stated intention of developing a further record on the issue of cost. The record was, however, replete with evidence that BellSouth's proposed rate, special access, is an improper basis for unbundled loop pricing. The Commission was therefore fully supported in rejecting this inappropriate surrogate. Bell has likewise provided no additional reason that the Commission should not permit the

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[6] BellSouth's reliance on *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So.2d 557 (Fla. 1975) and *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979) is inapposite. Neither case involves the modification of private contractual relations resulting from the state's regulation of a public utility.

collocation of DLC multiplexing equipment. Its effort to use the Act to argue a right to delay the initiation of competition is perverse. BellSouth's argument that the Commission has violated the Contracts Clause lacks any sound legal foundation in a regulated environment and should be rejected by the Commission. The Commission's unbundling order is fully supported by the record, and represents a significant contribution to the development of competition in Florida in that it will provide customers with an opportunity to choose between multiple local service providers for the first time. BellSouth's Motion should accordingly be rejected in its entirety.

Respectfully submitted,

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Dated: April 23, 1996

CERTIFICATE OF SERVICE

I, James C. Falvey, hereby certify that on this 23rd day of April, 1996 a copy of the foregoing **Opposition of Metropolitan Fiber Systems of Florida, Inc., to BellSouth Telecommunications, Inc.'s Motion for Reconsideration,** Docket No. 950984-TP, was served, via First Class Mail, postage prepaid, to each of the following parties:

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