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November 12, 1996

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Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket 961230-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI") are the original and 15 copies of MCI's Response to Motion to Dismiss.

By copy of this letter, this document has been furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson
Richard D. Melson

ACK _____

AFA _____

APP _____

CAF _____ RDM/cc

CMU _____ Enclosures

cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by MCI)
Telecommunications Corporation for)
arbitration with United Telephone)
Company of Florida and Central)
Telephone Company of Florida)
concerning interconnection rates,)
terms and conditions pursuant to)
the Federal Telecommunications)
Act of 1996.)

Docket No. 961230-TP
Filed: November 12, 1996

MCI'S RESPONSE TO MOTION TO DISMISS

MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. (collectively, MCI) file this response in opposition to the partial Motion to Dismiss filed by United Telephone Company of Florida and Central Telephone Company of Florida (collectively, Sprint) on November 5, 1996. That Motion to Dismiss sought dismissal of the portions of MCI's Petition dealing with (1) the proposed Mediation Plus arbitration procedure, (2) the provision of dim or dark fiber as an unbundled network element, (3) the resale of voice mail, inside wire maintenance and calling cards, (4) any liquidated damages provision, and (5) "any issue which MCI has failed to support with relevant documentation." For the reasons set forth below, Sprint's Motion to Dismiss should be denied in its entirety.

APPLICABLE LEGAL STANDARD

1. Rule 25-22.037(2)(a) authorizes the filing of motions to dismiss. That rule does not specify the basis on which such motions can be granted, nor does Sprint identify the legal basis

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that underlies its motion in this case. Absent standards in its own rules, the Commission should apply, by analogy, the standards set forth in Rule 1.140(b), Florida Rules of Civil Procedure. When Sprint's Motion to Dismiss is read against the standards in that rule, it appears Sprint takes the position that certain portions of MCI's Petition fail to state a cause of action.

MEDIATION PLUS ARBITRATION PROCEDURE

2. Sprint's primary objections to MCI's proposed Mediation Plus arbitration procedure are that the Commission cannot simultaneously serve as mediator and arbitrator (Motion ¶2) and that the procedure is impractical given the time frames in which this proceeding must be concluded (Motion ¶3-4).

3. MCI's proposed Mediation Plus arbitration procedure was offered as a method of facilitating the arbitration of the numerous detailed issues that must be resolved in order to achieve a comprehensive, final agreement. MCI submits that the Commission has the power to establish such a procedure as part of its overall process of resolving MCI's Petition for Arbitration. The fact that this proposed procedure includes elements of both mediation and arbitration does not run afoul of the Act. Even if this procedure were viewed as "pure" mediation, Section 252(a)(2) of the Act permits a request for mediation at any point in the negotiation process:

(2) MEDIATION.-- Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation

and to mediate any differences arising in the course of the negotiation. (emphasis added)

As Sprint states, parties in other cases have continued to negotiate up to and through the actual hearings (Motion ¶4) and, in fact, MCI and Sprint have continued to negotiate since the filing of MCI's Petition. Thus MCI's request for establishment of a Mediation Plus arbitration procedure is in no way inconsistent with the Act.

4. MCI believes that had the Commission established a Mediation Plus arbitration procedure at the outset of this proceeding, the time frames suggested in MCI's Petition would have been workable. MCI recognizes that with the passage of time, the attractiveness of this procedure is diminished. If the Commission determines that the Mediation Plus procedure is not appropriate in this case for any reason, however, the proper remedy is to deny MCI's request, not to "dismiss" it.

DIM OR DARK FIBER

5. Section 251(c)(3) of the Act requires Sprint to provide "nondiscriminatory access to network elements on an unbundled basis." Section 3(45) of the Act defines network element to mean "a facility or equipment used in the provision of a telecommunications service." Sprint argues that "dark fiber" is not "used" in the provision of a telecommunications service, and that MCI's request for arbitration is therefore improper and must be dismissed. Sprint's position is based on an overly narrow reading of the federal law. Dark fiber is a facility used in the

provision of a telephone service just as much as unused space in a central office or unassigned line class codes in an end office switch. MCI notes that the FCC's First Report and Order in CC Docket No. 96-98 (FCC Order) declined to address unbundling of dark fiber on the grounds that additional information was required to determine whether dark fiber qualifies as a network element. (FCC Order ¶450) This arbitration proceeding is an appropriate forum for MCI and Sprint to present such additional information -- in the form of testimony and exhibits -- to support their respective positions regarding the status of such dark fiber under the Act. MCI also notes that resale of dark fiber is being litigated in both the ATT/MCI/BellSouth and ATT/MCI/GTEFL arbitration proceedings, despite testimony by BellSouth and GTEFL that dark fiber should not be classified as a "network element."

RESALE OF VARIOUS SERVICES

6. Section 251(c)(4)(A) of the Act requires Sprint "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Sprint clearly provides voice mail service, inside wire maintenance service, and calling card service at retail to end use customers who are not telecommunications carriers. Sprint challenges MCI's right to arbitrate the resale of these services on the grounds that they are not "telecommunications services" within the meaning of the Act. In this regard, Section 3(51) defines telecommunications

service as "the offering of telecommunications for a fee directly to the public. . ." Section 3(48) in turn defines telecommunications to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

7. Each of the services in question meets the statutory definition. Voice mail service, for example, is simply one step in the transmission of information (voice messages), without change in form or content, from one user to another. The fact that the information is temporarily stored, then retrieved, does not change the underlying nature of the entire service as telecommunications. Similarly, calling card services and inside wire maintenance services are incidental parts of the entire telecommunications service offered to end users.

8. To the extent that Sprint contends that these are not telecommunications services, that is a mixed question of law and fact to be resolved on the merits in this proceeding, not a pure question of law to be resolved on a motion to dismiss.

LIQUIDATED DAMAGES

9. Sprint asserts that the Commission should dismiss MCI's request that the Commission establish a delay credit for situations in which Sprint fails to meet contractual performance standards for provisioning of non-customer specific network elements. (MCI Petition, Ex. 2, Attachment X, ¶3.2) Sprint characterizes this credit mechanism as a liquidated damages

provision, then argues that such a provision "is against Florida public policy and is not an item subject to arbitration." (Motion ¶7) Sprint is wrong on three counts.

10. First, the proposed provision does not require out-of-pocket payment of any form of liquidated damages. It only provides that Sprint must credit MCI for certain specified failures to perform. In this regard, it is no different, except in magnitude, from tariff provisions which require Sprint to credit retail customers for out-of-service conditions.

11. Second, even if it were a liquidated damages provision, it would not be contrary to public policy. Florida law recognizes that parties may stipulate, in advance, the amount payable as compensation for injuries in the event of a breach, provided the amount is reasonable and the damages in their nature are uncertain. Public policy is contravened only when the amount ceases to be liquidated damages and instead becomes a "penalty" that is entirely disproportionate to the actual damages that could be sustained. See, 17 Fla.Jur.2d Damages, §98, et seq. MCI submits that the credit provisions contained in its proposed contract form are not in the nature of a penalty, but instead represent appropriate compensation -- in the form of a credit -- for damages which by their nature are not readily ascertainable.

12. Third, such a contractual provision is an appropriate item for arbitration under the Act. Sections 252(b) and 252(c) of the Act contemplate that the Commission will arbitrate the terms and conditions on which interconnection, unbundled network

elements, and resold services will be provided. The credit mechanism for failure to meet specified performance standards is simply one aspect of the overall contractual terms and conditions governing the provision of such facilities and services, and thus is an appropriate item for resolution by the Commission.

13. Finally, Sprint cites to the Commission's decision in Order No. PSC-96-1321-FOF-TP, in which the Commission stated that it would not be appropriate under state law for the Commission to impose a liquidated damages provision since it would thereby do indirectly what it could not do directly, namely award damages to one party for breach of contract. MCI's proposed credit mechanism is not tantamount to an award of damages for breach of contract, but instead is simply a reduction in the price charged by Sprint to MCI for facilities or services which are not furnished in a timely fashion or do not meet contractual specifications. A Commission decision that such a provision is a reasonable method of enforcing compliance with contractual performance standards is simply a ruling on appropriate contractual terms and conditions, not an award of damages for breach of contract.

OTHER ISSUES

14. Finally, Sprint asks the Commission to dismiss any portion of MCI's Petition which is not supported, either in whole or in part, in the documentation accompanying its filing. The only portion of MCI's Petition which Sprint specifically identifies as falling into this category is MCI's request for

resale of Sprint's voice mail, inside wire maintenance, and calling card services. In fact, MCI's testimony and exhibits support the resale of all telecommunications services (Darnell Prefiled Direct Testimony at page 3, line 13; page 7, line 16; page 8, line 6; Petition Exhibit 2, Attachment II), and specifically include reference to inside wire maintenance service and voice mail service as services that must be available for resale. (Petition Exhibit 2, Attachment II, ¶2.3.8, 2.3.10)


Sprint does not identify any other portions of MCI's Petition which it believes are unsupported by the accompanying exhibits and testimony, and MCI is not aware of any portion of its Petition which lacks such support.

WHEREFORE, for the reasons set forth above, Sprint's Motion to Dismiss portions of MCI's Petition should be denied.

RESPECTFULLY SUBMITTED this 12th day of November, 1996.

HOPPING GREEN SAMS & SMITH, P.A.

By:


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and

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ATTORNEYS FOR MCI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by hand delivery or by UPS Overnight Delivery (*) this 12th day of November, 1996.

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