960846-TP

ORIGINAL

RECEIVED FILE COPY

97 JUL -2 PM 3:49

FLORIDA PUBLIC SERVICE COMM. DIVISION OF APPEALS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware Corporation,	)	Civil Action No. 4:97CV141-RH
Plaintiffs,	)	
v.	)	
BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia Corporation; the FLORIDA PUBLIC SERVICE COMMISSION; and SUSAN F. CLARK, J. TERRY DEASON, JULIA L. JOHNSON, DIANE K. KIESLING, and JOE GARCIA, in their official capacities as Commissioners of the Florida Public Service Commission,	)	
Defendants.	)	

MCI'S FIRST AMENDED COMPLAINT FOR
DECLARATORY AND EQUITABLE RELIEF

Plaintiffs MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI"), by and through their attorneys, pursuant to Federal Rule of Civil Procedure 15(a), for their first amended complaint against BellSouth Telecommunications, Inc. ("BST"), the Florida Public Service

ACK ______
AFA ______
APP ______
CAF ______
CMU ______
CTR ______
EAG ______
LEG ______
LIN ______
OPC ______
RCH ______
SEC 1
WAS ______
OTH ______

DOCUMENT NUMBER-DATE
07135 JUL 16 ~~5~~ 4408
FPSC-RECORDS/REPORTING

Commission ("PSC" or "Commission"), and PSC Commissioners Susan F. Clark, J. Terry Deason, Julia L. Johnson, Diane K. Kiesling and Joe Garcia, in their official capacities, hereby complain and allege as follows:

NATURE OF ACTION

1. This action is asserted to enforce provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act" or "Act"), a landmark statute designed to open local telephone markets to competition. The 1996 Act was passed to end the historical regime in which incumbent local telephone companies (such as defendant BST) monopolized the facilities and services through which consumers place and receive all local and long distance calls. In its place, the 1996 Act mandates a new competitive structure. To that end, the Act preempts state and local barriers to market entry and requires incumbents to provide new entrants into local telecommunications markets (such as plaintiff MCI) with access to the incumbents' telephone networks and services on rates, terms, and conditions that are just, reasonable, and non-discriminatory. These requirements are specifically intended to open monopoly local telephone markets to effective competition as quickly as possible.

2. In addition to obligating incumbents to open their networks to new entrants on procompetitive terms, conditions, and rates, the Act sets forth a procedural mechanism to implement these requirements and hasten the development of competition. Under this scheme, incumbents are required to negotiate in good faith

with new entrants and to develop "interconnection agreements" specifying the terms and conditions upon which the new entrant may interconnect with the incumbent's network.

3. Where the parties cannot arrive at a complete interconnection agreement through voluntary negotiations, the Act gives the state public utility commission the responsibility to conduct expedited administrative proceedings, designated as "arbitration" proceedings, to resolve disputed issues in a manner consistent with the substantive requirements of the Act and the regulations adopted by the Federal Communications Commission ("FCC") pursuant to the Act. The state commission is required to review the resulting interconnection agreement in order to determine whether it complies with the Act. Section 252(e)(6) of the 1996 Act, 47 U.S.C. § 252(e)(6), gives aggrieved parties a right to bring an action in federal district court to challenge terms of an interconnection agreement, as finally approved or rejected by the state commission, on the ground that they are inconsistent with the 1996 Act or the FCC's implementing regulations.

4. The Commission has approved an interconnection agreement ("Agreement") between MCI and BST. As approved, however, several portions of the Agreement violate the Act. MCI brings this claim under Section 252(e)(6) to seek redress from provisions of the Agreement, as adopted by the Commission, that are in violation of the 1996 Act and the FCC regulations.

JURISDICTION

5. These claims arise under the Telecommunications Act of 1996, a law of the United States. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1337 and pursuant to Section 252(e)(6) of the Act, 47 U.S.C. § 252(e)(6).

VENUE

6. Venue in this District is proper under 28 U.S.C. § 1391(b). All defendants reside in Florida, defendant Florida Public Service Commission is located in this District, and the events giving rise to the claims asserted herein occurred in this District. This Court is the "appropriate" district court within the meaning of § 252(e)(6).

PARTIES

7. Plaintiff MCI Telecommunications Corporation is a corporation organized under the laws of the State of Delaware and with its principal place of business in the District of Columbia. MCI Telecommunications Corporation provides long-distance and other telephone services throughout Florida and the rest of the United States. Through its wholly owned affiliate MCImetro Access Transmission Services, Inc., MCI intends to offer local telephone services throughout Florida in competition with defendant BST. MCImetro Access Transmission Services, Inc., holds a certificate of public convenience and necessity to offer local telephone service in Florida. MCI is a "telecommunications provider" and a "requesting telecommunications carrier" within the meaning of the Act.

8. Defendant BST is a Georgia corporation authorized to do business in Florida, with its principal place of business in Atlanta, Georgia. BST is the monopoly provider of local exchange service throughout a service area covering large portions of Florida. BST is an "incumbent local exchange carrier" within the meaning of Section 252(h)(1) of the Act and a "Bell Operating Company" within the meaning of 47 U.S.C. § 153(4)(A)-(C).

9. Defendant Florida Public Service Commission is a legislative agency of the State of Florida with its principal place of business in the city of Tallahassee. The PSC is a "state commission" within the meaning of 47 U.S.C. § 153(41) and Sections 251 and 252 of the Act.

10. Defendants Susan F. Clark, J. Terry Deason, Julia L. Johnson, Diane K. Kiesling, and Joe Garcia are Commissioners of the Florida Public Service Commission. They are sued in their official capacities only.

BACKGROUND

The Local Telephone Monopoly

11. Since the divestiture of the Bell System in the early 1980s, vigorous competition has characterized the long-distance telephone services market, resulting in much lower long-distance rates and much better service quality. Local telephone service, however, remains the last major bastion of monopoly in the telecommunications industry. Incumbent local telephone companies exercise "bottleneck" control over the local telephone network, including the lines (or "local loops") serving

each telephone subscriber. Despite regulation by state public utility commissions, this monopoly power has produced anticompetitive rates for local services, hampered the development of new services, and deprived customers of the ability to choose their local service provider. Almost all long-distance calls also originate and terminate through that same local network. Incumbents thus have a monopoly over this long distance access function as well. Because monopoly local telephone companies have been permitted to charge long distance carriers inflated "access charges" to originate and terminate long-distance calls, the local telephone monopoly has also artificially inflated long-distance rates over what they would be in a fully competitive telecommunications market.

12. Within its designated service areas, BST has exclusive control of the switches, lines and other telecommunications network equipment (collectively "facilities") necessary to provide local telephone service ("local exchange service") and to originate and terminate long distance calls ("exchange access service"). For a majority of subscribers in Florida, BST is the only available provider of local exchange and exchange access services. BST has a monopoly in local exchange and exchange access services.

The Local Competition Provisions of the 1996 Act

13. The 1996 Act "provide[s] for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all

Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. 113 (1996). The centerpiece of that policy framework is Congress's effort to bring effective competition to the historically monopolized local telephone markets.

14. To help bring the benefits of competition to local telephone customers, Section 253 of the Act overrides any state laws (such as exclusive franchises) that have the "effect" of prohibiting any entity from offering any interstate or intrastate telephone service. The Act also conditions the ability of regional Bell Operating Companies ("Bell Companies"), incumbent local telephone companies that were formerly part of the Bell System, to enter the long distance telephone market within their service areas on their demonstrated compliance with the Act's provisions granting new entrants access to the Bell Companies' facilities and services. See 47 U.S.C. §§ 271(c)(1)(A), (2)(B). BST is a "Bell Operating Company" under Section 3(4) of the Act, 47 U.S.C. § 153(4)(A)-(C), and is therefore required to satisfy this "competitive checklist" for local telephone competition before it can be authorized to provide "in-region" long distance telephone services.

15. Congress recognized that local competition could not develop unless new entrants were afforded access to the bottleneck local exchange facilities that incumbent monopolies had constructed over decades with funds obtained from captive ratepayers. Because no new entrant could realistically compete in all markets through the exclusive use of its own facilities, and because Congress recognized that

shared use of bottleneck facilities was sometimes more efficient than duplication of those facilities, the 1996 Act's scheme for facilitating local competition consists largely of a set of affirmative obligations on incumbent local carriers to make their facilities and services available for purchase or lease by new entrants.

16. The Act requires incumbents to make their facilities available to new entrants in a variety of ways. Under Section 251(c) of the Act, incumbents must, among other things: allow new entrants to interconnect their facilities with the incumbents' networks at "any technically feasible point" for the purpose of transferring calls to or from the incumbents' network (§ 251(c)(2)); offer the constituent parts or "elements" of their networks (such as local loops and switching facilities) for leasing by new entrants on an element-by-element or "unbundled" basis (§ 251(c)(3)); make any telecommunications service that the incumbent offers its own customers available to new entrants at wholesale so that new entrants may resell those services to their own customers (§ 251(c)(4)); and allow new entrants to construct facilities necessary for interconnection at the incumbents' premises, referred to as "collocation" (§ 251(c)(6)).

17. Congress also understood that incumbent local telephone companies would retain strong incentives to obstruct their prospective competitors' efforts to enter the local market. In particular, Congress recognized that allowing incumbents to dictate the rates, terms, and conditions upon which their prospective competitors may access the incumbents' bottleneck facilities would stifle competition

just as surely as statutory or regulatory restrictions on entry. Therefore, the Act contains a number of provisions specifically designed to prevent incumbents from acting on their built-in incentives to price new entrants out of the market by charging unreasonable rates or imposing unreasonable and discriminatory conditions for interconnection, network elements, resale of incumbent services, and other statutorily mandated forms of competitive access.

18. Section 251(c) provides that incumbents' rates, terms, and conditions for interconnection and unbundled network elements must be "just, reasonable, and nondiscriminatory." Section 252(d)(1) provides that rates for interconnection and network elements must be "based on the cost . . . of providing the interconnection or network element," and specifically provides that cost-based rates may not be predicated upon "rate-of-return or other rate-based proceedings" of the sort that prevailed in the monopoly era. Section 252(d)(3) provides that incumbents must offer telecommunications services purchased by new entrants for resale at wholesale rates determined by subtracting from the incumbent's retail rates all costs the incumbent is able to avoid as a result of not providing the service at retail. And Section 252(d)(2) requires charges for the transport and termination of traffic originating on another carrier's network to "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" and that those costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." That section also

specifically prohibits state commissions from engaging "in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls." The Act similarly constrains incumbents' pricing power as to other forms of competitive access, such as collocation and access to poles, conduits, ducts, and rights-of-way.

19. The Act expressly authorizes the FCC to promulgate regulations implementing the Act's local competition provisions. 47 U.S.C. § 251(d). Pursuant to that authority, the FCC released its First Report and Order containing implementing regulations on August 8, 1996. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 ("FCC Order").

20. On October 15, 1996, the United States Court of Appeals for the Eighth Circuit stayed certain portions of the FCC regulations on jurisdictional grounds pending an expedited appeal. Iowa Utilities Board v. FCC, Nos. 96-3321 and consolidated cases (stay entered Sept. 6, 1996; oral argument on merits held Jan. 17, 1997). The Court of Appeals left the remainder of the regulations intact, fully effective, and binding on telecommunications carriers and state commissions alike.

21. Section 252 of the Act sets forth an expedited procedure for implementing the Act's substantive provisions. Under Section 252(a), incumbents are required to negotiate in good faith with any requesting telecommunications carrier concerning the terms and conditions governing interconnection, access to network

elements, resale and other issues that must be resolved to allow for competitive entry. The Act provides for a fixed period of negotiations during which the parties may voluntarily agree to rates, terms and conditions for interconnection. If the parties do not reach voluntary agreement on all issues within that period, either party may seek "compulsory arbitration," an expedited administrative proceeding to resolve disputed issues of fact and law, conducted by the state regulatory commission. (47 U.S.C. § 252(b)). In performing arbitrations, the state commission must ensure that the arbitrated terms of interconnection comply with the requirements of Sections 251 and 252(d) of the Act and the FCC's implementing regulations. (47 U.S.C. § 252(c)).

22. Proposed interconnection agreements, whether developed through voluntary negotiations alone or through arbitration, must be submitted for review by the state commission pursuant to Section 252(e). State commissions are to review arbitrated agreements for compliance with the requirements of Sections 251, 252(d) and applicable FCC regulations. (47 U.S.C. § 252(e)(2)(B)).

23. The 1996 Act provides for federal district court review of interconnection agreements that have been approved by a state commission. As part of this review, federal courts are required to "determine whether the agreement . . . meets the requirements" of Sections 251 and 252. Because arbitrated terms that are inconsistent with the FCC's implementing regulations also violate the Act, 47 U.S.C. §§ 252(c), 252(e)(2)(B), the federal court's mandate under Section 252(e)(6) includes review of agreements for compliance with FCC regulations.

The MCI-BST Arbitration and Approval Proceedings

24. After a lengthy period of negotiations with BST regarding interconnection, MCI filed a petition for compulsory arbitration of unresolved issues with the Commission pursuant to Section 252(b) on August 15, 1996. This petition was consolidated with an arbitration petition filed with the Commission by AT&T.

25. The Commission held an arbitration hearing from October 9 through 11, 1996.

26. On December 31, 1996, the Commission issued Order No. PSC-96-1579-FOF-TP ("Arbitration Order") resolving a number of the issues submitted for arbitration. (Attached as Exhibit A, together with an amendatory order issued January 9, 1997, to correct scrivenor's errors).

27. On January 15, 1997, BST filed a motion for reconsideration of the Commission's Arbitration Order. MCI and AT&T filed responses to BST's motion for reconsideration on January 27, 1997 and AT&T filed a Cross Motion for Reconsideration that day.

28. On January 30, 1997, pursuant to the Arbitration Order, MCI submitted a proposed interconnection agreement reflecting the conditions set forth in the Arbitration Order and identified the sections of the agreement where the parties still could not agree on the language to incorporate. On February 13, 1997, MCI filed updates to the proposed agreement.

29. The Commission held a Special Agenda Conference on February 21, 1997, and issued Order No. PSC-97-0298-FOF-TP ("Reconsideration Order") on March 19, 1997 addressing BST's and AT&T's motions for reconsideration and amending the Arbitration Order accordingly. (Attached as Exhibit B).

30. On March 21, 1997, the Commission issued Order No. PSC-97-0309-FOF-TP ("Final Order") approving, as modified by the Final Order, the proposed agreement submitted by MCI. (Attached as Exhibit C). The Final Order required the parties to file a signed final agreement incorporating the Commission's determinations within two weeks.

31. On April 4, 1997, MCI signed and submitted to the PSC a revised agreement complying with the Commission's Final Order (the "Agreement"). (Attached as Exhibit D). Although the PSC rejected BST's argument that MCI may not purchase unbundled elements from BST and combine those elements to provide a service that BST provides at retail, BST initially refused to sign any agreement which would allow MCI to purchase and combine unbundled elements if by doing so MCI could undercut the resale price of the service recreated. BST thus signed and submitted on April 4, 1997 their own version of an agreement which would limit MCI's ability to purchase unbundled network elements and combine them to provide a service offered by BST at retail.

32. By Order issued May 27, 1997 (Attached as Exhibit E), the PSC approved the Agreement filed by MCI and ordered the parties to sign and file it

within 14 days, subject to a $25,000 fine for each day thereafter that a party refused to sign.

33. MCI and BellSouth complied with the PSC's Order of May 27, 1997, by executing and filing the Interconnection Agreement on June 4, 1997 (Attached as Exhibit F.) This Interconnection Agreement was approved by the PSC through an administrative order issued June 19, 1997 (Attached as Exhibit G).

COUNT ONE

(Violation of §§ 251 and 252 of the Act)

(Failure to Set Cost-Based Interconnection and Unbundled Network Element Rates)

34. MCI realleges and reaffirms herein the allegations in paragraphs 1 through 33 above.

35. Sections 251(c)(2), 251(c)(3) and 252(d)(1) of the Act require, respectively, that arbitrated rates for interconnection and unbundled network elements be "just, reasonable, and nondiscriminatory" and "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable) . . . and may include a reasonable profit."

36. A long-run forward-looking cost methodology based on the use of the most efficient technology currently available and the lowest-cost network configuration given the incumbent carrier's existing wire centers is necessary to

satisfy the Act's requirement that rates must be based on cost "without reference to" a rate-base, rate-of-return proceeding because use of "embedded" or historical costs and existing technology or physical architecture employed by the incumbent carrier in pricing would compensate incumbents with a rate of return on their past investments. Forward-looking costs are appropriate because they approximate the results that would be obtained in a competitive market, and therefore prevent incumbent local telephone companies from using interconnection pricing as a means of obstructing competitive entry into the local telecommunications market.

37. The cost methodology adopted by the Commission violates Section 251(c)(3) and 252(d)(1) because it is based on the existing technology and physical architecture deployed by the incumbent carrier in its existing network.

38. MCI submitted a long-run forward-looking cost study in the arbitration providing rates for interconnection and unbundled elements that meet the requirements of the Act. Although BST also submitted a cost study in this proceeding, its cost study did not meet the Act's requirements that rates be based on cost because, among other defects, BST's cost study was in large part based on historical data, embedded technology, and existing network architecture; relied on numerous inflated, unjustified cost factors; and was not capable of being verified by regulators or interconnecting carriers. The only study before the Commission that meets the requirements of the Act was MCI's cost study. The Commission, however, declined to apply the MCI cost model, instead adopting rates, some which are interim

rates, that are not based on the long run forward looking cost standard required by the Act.

39. With respect to those rates set on an interim basis, the Agreement makes no provision for an adjustment (or "true up") if permanent rates are set lower than the interim rates adopted by the Commission. For this reason, MCI will be irrevocably damaged by the Commission's adoption of interim rates that do not comply with the Act's requirements.

40. The Agreement as adopted by the Commission over MCI's objection violates Sections 251 and 252 of the Act because it sets rates for interconnection and unbundled network elements that are not based on cost.

41. The rates contained in the Agreement, the cost methodology adopted by the Commission, and the Commission's refusal to use MCI's cost model are arbitrary and capricious, not the product of reasoned decisionmaking, an abuse of discretion, and unsupported by substantial evidence.

42. MCI has been aggrieved by the Commission's determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

COUNT TWO

(Violation of §§ 251 and 252 of the Act)

(Failure to Deaverage Unbundled Network Element Rates)

43. MCI realleges and reaffirms herein the allegations in paragraphs 1 through 42 above.

44. Sections 251(c)(3) and 252(d)(1) of the Act require, respectively, that rates for unbundled network elements be "just, reasonable, and nondiscriminatory" and "based on the cost . . . of providing the . . . network element."

45. The State of Florida is large and diverse, containing geographic regions with vastly different degrees of population density. The costs of providing network elements vary with the degree of population density in the geographic area served.

46. The Agreement contains rates for unbundled elements that are based on the statewide average of these varying costs. These averaged rates fail to reflect the geographic cost differences of providing network elements.

47. Rates that are not "geographically deaveraged" (i.e., computed separately for different density-related zones) are neither cost-based nor just, reasonable, and nondiscriminatory and therefore do not comply with Sections 251 and 252 of the Act.

48. The Commission's refusal to geographically deaverage network element rates was arbitrary and capricious, not the product of reasoned decisionmaking, an abuse of discretion, and unsupported by substantial evidence.

49. MCI has been aggrieved by the Commission's determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

COUNT THREE

(Violation of §§ 251 and 252 of the Act)

(Adoption of Non-Cost-Based Rates for Non-Recurring Charges)

50. MCI realleges and reaffirms herein the allegations in paragraphs 1 through 49 above.

51. The Agreement adopts BST's proposed non-recurring charges (charges for service ordering, for example).

52. The extremely high non-recurring charges violate the requirements of Sections 251(c)(3) and 252(d)(1) that rates for unbundled elements be "just, reasonable, and nondiscriminatory" and "based on the cost" of providing the network element because the charges are not based on the long-run forward-looking costs associated with the provision of unbundled network elements.

53. The non-recurring charges included in the Agreement are the result of arbitrary and capricious Commission action, are not the product of reasoned

decisionmaking, are an abuse of discretion, and are unsupported by substantial evidence.

54. MCI has been aggrieved by the Commission's determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

COUNT FOUR

(Violation of Section 251 of the Act and the FCC Order)

(Failure to Require BST to Provide Unbundled Dark Fiber)

55. MCI realleges and reaffirms herein the allegations in paragraphs 1 through 54 above.

56. A network element is defined in Section 3(45), 47 U.S.C. § 153(45) as "a facility or equipment used in the provision of a telecommunications service."

57. Section 251(c)(3) of the Act requires BST to provide nondiscriminatory access to its network elements "on an unbundled basis at any technically feasible point" on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The FCC's binding regulations require BST to provide access on an unbundled basis to all network elements for which it is technically feasible to do so. (47 C.F.R. § 51.317; FCC Order ¶ 278).

58. The Commission failed to require BST to provide MCI with unbundled access to "dark fiber," (Arbitration Order at 22), finding that dark fiber is

not a network element as defined by the Act. Dark fiber is a fiber optic telecommunications facility without the associated electronic equipment needed to actually transmit telecommunications. Much like an unbundled local loop, when dark fiber is "activated" by combining it with other telecommunications equipment at both ends, dark fiber is used to transmit telecommunications. Thus, dark fiber meets the Act's definition of a network element because it is "a facility or equipment used in the provision of a telecommunications service." The Commission's determination that dark fiber is not a network element was therefore error.

59. Where an incumbent local telephone company has network elements available that are used in the provision of telecommunications services, it does not matter for purposes of the Act whether they are currently in use or will be used where demand justifies their activation. Dark fiber is no different from any other network element; all network elements must be combined with other elements in order to provide a telecommunications service. Because the Agreement fails to require BST to provide unbundled dark fiber, the Agreement violates Section 251(c)(3) of the Act and the FCC Order.

60. The FCC Order places on BST the burden of proving that it is not technically feasible to provide access to a particular network element. (FCC Order ¶ 278). BST presented no evidence that access to unbundled dark fiber is technically infeasible. BST has failed to meet its burden of proving that it is technically infeasible to provide dark fiber on an unbundled basis.

61. The unavailability of dark fiber to new local telephone entrants will diminish competition and increase prices to consumers. Fiber optic facilities offer the highest transmission speeds, greatest capacity and largest bandwidth of telecommunication network equipment. Permitting incumbent local telephone companies to withhold available state of the art telecommunications facilities from their competitors, where unbundled access is clearly technically feasible, will advantage monopoly providers and undermine competition for the most technologically advanced local telecommunications services, in contradiction of the purposes of the Act's network unbundling requirements.

62. The Commission's failure to require BST to provide dark fiber as an unbundled network element violates Section 251(c)(3) of the Act and the FCC Order.

63. MCI has been aggrieved by the Commission's determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

COUNT FIVE

(Violation of Section 251 of the Act and the FCC Order)

(Failure to Include a Noncompliance Compensation Mechanism)

64. MCI realleges and reaffirms herein the allegations in paragraphs 1 through 63 above.

65. Section 251(c) of the Act requires incumbents to make available interconnection, unbundled elements, and services on terms and conditions that are just, reasonable, and nondiscriminatory. The Act and the FCC's regulations require incumbents to provide access, elements, and services on terms and conditions equal to the terms and conditions under which the incumbent provides those elements and services to itself. (47 U.S.C. § 251(c)(2)(C); 47 C.F.R. §§ 51.313, 51.603). And the FCC Order makes clear that state commissions may adopt performance standards, reporting requirements, and other mechanisms necessary to ensure compliance with the Act and to provide new entrants with a meaningful opportunity to compete. (FCC Order ¶¶ 310-11). As adopted by the Commission over MCI's objections, the Agreement does not contain a noncompliance compensation mechanism such as delay and performance failure credits.

66. To compete with BST, MCI must be able to ensure that BST will comply with the Act and the terms of the Agreement by providing, among other things, interconnection, unbundled elements, and services in a timely manner, at the same level of quality as BST provides to itself, and in accordance with the technical and performance standards contained in the Agreement. But, as Congress recognized, incumbent telephone companies such as BST have no incentive to cooperate with competitors seeking entry into their heretofore monopolistic markets. Unless there is a prompt, effective mechanism in place to penalize BST should it fail to comply with the terms of the Agreement, such as a system of credits for noncompliance, BST can

effectively block MCI from entering the local market in an efficient and timely manner. An agreement that does not have easily enforceable compliance incentives, such as credits, will allow BST to more easily violate its obligations under the Act and the Agreement because other legal remedies will not have a sufficiently immediate effect to ensure that BST will cooperate with its competitors and fulfill its obligations.

67. The failure of the Commission to include a noncompliance compensation mechanism in the Agreement is an unreasonable, unjust, and discriminatory term and condition on MCI's access to interconnection, unbundled elements, and services in violation of Section 251 of the Act and the FCC Order.

68. MCI has been aggrieved by the Commission's determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

COUNT SIX

(Violation of FCC Regulations Implementing the Act)

69. MCI realleges and reaffirms herein the allegations in paragraphs 1 through 68 above.

70. Section 251(d) gives the FCC the authority to implement the Act's interconnection, resale and unbundling provisions by promulgation of regulations. State commissions are required to apply these regulations in their arbitration proceedings and arbitration decisions under Section 252.

71. The Commission's Order approving the Agreement is inconsistent with numerous FCC regulations, including, inter alia, 47 C.F.R. §§ 51.501-51.515, 51.601-51.611, 51.701-51.715, adopted in the First Report and Order. These regulations, among other things, require use of an incremental, forward-looking cost standard based on the use of the most efficient technology currently available and the lowest cost network configuration given the incumbent carrier's existing wire centers for determination of unbundled network element rates and direct the application of "proxy" rates, including both wholesale rates and network element rates, in situations in which state public utility commissions cannot conduct complete cost study analyses in the limited time periods provided for arbitration decisions under the Act.

72. Some of these FCC regulations are currently subject to a stay issued by the United States Court of Appeals for the Eight Circuit pending appellate review. Because a decision by the Court of Appeals is anticipated shortly, this Court may be required to decide in this case whether the Commission's arbitration decisions and the Agreement satisfy the FCC's implementing regulations.

73. To the extent that the Commission's determinations are inconsistent with the FCC's regulations, MCI has been aggrieved by the Commission's determinations as set forth above and is entitled to declaratory and other equitable relief pursuant to 28 U.S.C. §§ 2201, 2202 and 47 U.S.C. § 252(e)(6).

PRAYER FOR RELIEF

WHEREFORE, MCI requests that this Court grant it the following relief:

(a) That the Court declare that the provisions of the Agreement and the Commission's decisions:

- (i) failing to set cost-based interconnection and unbundled network element rates,
- (ii) failing to deaverage unbundled network element rates,
- (iii) adopting non-cost-based rates for non-recurring charges,
- (iv) failing to require BST to provide unbundled dark fiber,
- (v) failing to include a noncompliance compensation mechanism,

violate the 1996 Act and the FCC's implementing regulations; and

- (vi) otherwise failing to comply with FCC regulations implementing the Act

(b) That the Court reform the Agreement or direct the reformation of the Agreement and the inclusion of provisions consistent with the Act, the FCC's implementing regulations and the decision of this Court; and

(c) That the Court award MCI such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: ________________________

Carolyn S. Raepple (FB No. 329142)
Ralph A. DeMeo (FB No. 471463)
Richard D. Melson (FB No. 201243)
Hopping Green Sams & Smith, P.A.
123 South Calhoun Street
P. O. Box 6526
Tallahassee, FL 32314
Telephone: (904) 222-7500
Telecopier: (904) 224-8551

Thomas F. O'Neil III
William Single, IV
MCI TELECOMMUNICATIONS CORP.
1133 19th Street, N.W.
Washington, D.C. 20036
Telephone: (202) 736-6096
Telecopier: (202) 736-6482

Donald B. Verrilli, Jr.
Maureen F. Del Duca
Michelle B. Goodman
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 639-6000
Telecopier: (202) 639-6066

Attorneys for Plaintiffs MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties on this the 30th day of June, 1997:

By Hand Delivery:

David Smith, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Nancy White
c/o Nancy Sims
BellSouth Telecommunicatons
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301

By Facsimile and U.S. Mail:

William Deem, Esquire
Christine R. Milton, Esquire
Mahoney Adams & Criser, P.A.
3300 Barnett Center
50 North Laura Street
Post Office Box 4099
Jacksonville, FL 32201-4099

Carolyn S. Raepple
Attorney